



## Governing Body

325th Session, Geneva, 29 October–12 November 2015

GB.325/INS/12

Institutional Section

INS

### TWELFTH ITEM ON THE AGENDA

## Reports of the Committee on Freedom of Association

### 376th Report of the Committee on Freedom of Association

#### *Contents*

	<i>Paragraphs</i>
Introduction .....	1–154
<i>Case No. 2743 (Argentina): Report in which the Committee requests to be kept informed of developments</i>	
Complaint against the Government of Argentina presented by the Confederation of Argentine Workers (CTA) .....	155–167
The Committee's conclusions .....	163–166
The Committee's recommendations.....	167
<i>Case No. 3046 (Argentina): Report in which the Committee requests to be kept informed of developments</i>	
Complaint against the Government of Argentina presented by the Confederation of Municipal Workers of Argentina (CTM) .....	168–175
The Committee's conclusions .....	173–174
The Committee's recommendation .....	175
<i>Case No. 3075 (Argentina): Report in which the Committee requests to be kept informed of developments</i>	
Complaint against the Government of Argentina presented by the Single Trade Union of Port Administration Workers (SUTAP) .....	176–189
The Committee's conclusions .....	185–188
The Committee's recommendations.....	189

*Case No. 3083 (Argentina): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Argentina presented by the Association of Staff of Supervisory Bodies (APOC) .....	190–203
The Committee’s conclusions .....	200–202
The Committee’s recommendations .....	203

*Case No. 2318 (Cambodia): Interim report*

Complaint against the Government of Cambodia presented by the International Trade Union Confederation (ITUC) .....	204–224
The Committee’s conclusions .....	214–223
The Committee’s recommendations .....	224

*Case No. 2655 (Cambodia): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Cambodia presented by Building Wood Workers’ International (BWI) .....	225–244
The Committee’s conclusions .....	237–243
The Committee’s recommendations .....	244

*Case No. 3102 (Chile): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Chile presented by the National Confederation of Workers of the Bread and Food Industry (CONAPAN), the National Federation of Unions of Bus and Truck Drivers, and Related Activities of Chile (FENASICOCH), the Inter-Company-Union of Workers of Líder Supermarkets, the Federation of United Workers Trade Unions (AGROSUPER), the Inter-Company Union of Contractor Company Workers (SITEC), the Inter-Company Union of Actors of Chile (SIDARTE), the Inter-Company National Union of Professionals and Technicians of the Film and Audio-visual Sector (SINTECI), the Federation of ENAP Contractor Workers of Concón, the Inter-Company Union of Professional Footballers, the Federation of Trade Unions of Workers of ISS Holding Companies and Subsidiaries, and General Services (FETRASSIS) and the Inter-Company Union of Domestic Workers .....	245–275
The Committee’s conclusions .....	271–274
The Committee’s recommendation .....	275

*Case No. 3027 (Colombia): Interim report*

Complaint against the Government of Colombia presented by the General Confederation of Labour (CGT) and the Pricol Alimentos SA Workers’ Union (SINTRAPRICOL) .....	276–300
The Committee’s conclusions .....	289–299
The Committee’s recommendations .....	300

*Case No. 3087 (Colombia): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Colombia presented by the Confederation of Workers of Colombia (CTC) and the Union of Workers of Financial Entities (SINTRAENFI) .....	301–320
The Committee’s conclusions .....	314–319
The Committee’s recommendations.....	320

*Case No. 3088 (Colombia): Definitive report*

Complaint against the Government of Colombia presented by the Union of Cali Municipal Enterprises Workers (SINTRAEMCALI) .....	321–337
The Committee’s conclusions .....	332–336
The Committee’s recommendation .....	337

*Case No. 2786 (Dominican Republic): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of the Dominican Republic presented by the National Trade Union Confederation (CNUS).....	338–351
The Committee’s conclusions .....	346–350
The Committee’s recommendations.....	351

*Case No. 3068 (Dominican Republic): Interim report*

Complaint against the Government of the Dominican Republic presented by the Union of Freight Handling Workers of the firm Terminal Granelera del Caribe SA (TEGRA) and the Jarabacoa Poultry and Livestock Corporation (Pollo Cibao) .....	352–364
The Committee’s conclusions .....	361–363
The Committee’s recommendations.....	364

*Case No. 3079 (Dominican Republic): Definitive report*

Complaint against the Government of the Dominican Republic presented by the National Confederation of Dominican Workers (CNTD) and the Dominican Association of Air Traffic Controllers Inc. (ADCA).....	365–424
The Committee’s conclusions .....	417–423
The Committee’s recommendation .....	424

*Case No. 2957 (El Salvador): Interim report*

Complaint against the Government of El Salvador presented by the Union of Workers of the Ministry of Finance (SITRAMHA) .....	425–435
The Committee’s conclusions .....	432–434
The Committee’s recommendations.....	435

*Case No. 3099 (El Salvador): Definitive report*

Complaint against the Government of El Salvador presented by the Salvadorian Social and Trade Union Front (FSS).....	436–448
The Committee’s conclusions .....	443–447
The Committee’s recommendation .....	448

*Case No. 2970 (Ecuador): Definitive report*

Complaints against the Government of Ecuador presented by Public Services International (PSI)–Ecuador, the National Federation of Education Workers (UNE), the Standing Inter-union and the Ecuadorian Medical Federation (FME), supported by the International Trade Union Confederation (ITUC).....	449–471
The Committee’s conclusions .....	459–470
The Committee’s recommendation .....	471

*Case No. 3040 (Guatemala): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Guatemala presented by the National Federation of Workers (FENATRA).....	472–487
The Committee’s conclusions .....	480–486
The Committee’s recommendations.....	487

*Case No. 3042 (Guatemala): Interim report*

Complaint against the Government of Guatemala presented by the Trade Union, Indigenous and Campesino Movement of Guatemala (MSICG) .....	488–568
The Committee’s conclusions .....	526–567
The Committee’s recommendations.....	568

*Case No. 3062 (Guatemala): Interim report*

Complaint against the Government of Guatemala presented by the General Confederation of Rural and Urban Workers (CTC) and the Workers’ Union of the Guatemalan Olympic Committee (SITRACOGUA) .....	569–585
The Committee’s conclusions .....	578–584
The Committee’s recommendations.....	585

*Case No. 3051 (Japan): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Japan presented by the National Confederation of Trade Unions (ZENROREN), the Japan Federation of National Service Employees (KOKKOROREN) and the All Health and Welfare Ministry Workers’ Union (ZENKOSEI) .....	586–704
The Committee’s conclusions .....	683–703
The Committee’s recommendations.....	704

*Case No. 3081 (Liberia): Interim report*

Complaint against the Government of Liberia presented by the Petroleum Oil Chemical Energy and General Services Union of Liberia.....	705–728
The Committee’s conclusions .....	717–727
The Committee’s recommendations.....	728

*Case No. 3076 (Republic of Maldives): Interim report*

Complaint against the Government of the Republic of Maldives presented by the Tourism Employees Association of Maldives (TEAM).....	729–750
The Committee’s conclusions .....	738–749
The Committee’s recommendations.....	750

*Case No. 3086 (Mauritius): Definitive report*

Complaint against the Government of Mauritius presented by the Fédération des Travailleurs Unis (FTU) .....	751–786
The Committee’s conclusions .....	773–785
The Committee’s recommendation .....	786

*Case No. 3060 (Mexico): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Mexico presented by the “Don Napoleón Gómez Sada” National Mining and Metalworking Union (SNMM) .....	787–804
The Committee’s conclusions .....	799–803
The Committee’s recommendations.....	804

*Case No. 3055 (Panama): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Panama presented by the Confederation of Workers of the Republic of Panama (CTRP).....	805–824
The Committee’s conclusions .....	820–823
The Committee’s recommendations.....	824

*Case No. 3019 (Paraguay): Interim report*

Complaint against the Government of Paraguay presented by the National Confederation of Workers (CNT), the Single Authentic Confederation of Workers (CUT–A) and the Trade Union Confederation of Workers of the Americas (CSA).....	825–847
The Committee’s conclusions .....	840–846
The Committee’s recommendations.....	847

*Case No. 3101 (Paraguay): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Paraguay presented by the National Union of Teachers – National Trade Union (UNE–SN) and the Central Confederation of Workers Authentic (CUT–A), supported by Education International (EI).....	848–860
The Committee’s conclusions .....	855–859
The Committee’s recommendations.....	860

*Case No. 3096 (Peru): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Peru presented by the National Union of State Health Service Nurses (SINESSS).....	861–896
The Committee’s conclusions .....	886–895
The Committee’s recommendations.....	896

*Case No. 3072 (Portugal): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Portugal presented by the General Confederation of Portuguese Workers – National Inter-Union Body (CGTP-IN).....	897–927
The Committee’s conclusions .....	914–926
The Committee’s recommendations.....	927

*Case No. 3067 (Democratic Republic of the Congo): Interim report*

Complaint against the Government of the Democratic Republic of the Congo presented by the Congolese Labour Confederation (CCT), Union Espoir (ESPOIR), the National Union of Teachers in Registered Schools (SYNECAT), the Union of State Agents and Civil Servants (SYAPE), the National Trade Union for the Mobilization of Agents and Civil Servants of the Congolese State (SYNAMAFEC), the Union of Workers – State Agents and Civil Servants (UTAFE), the National Union of Agents and Civil Servants in the Public Sector (SYNAFAR), the General Trade Union of the State and Para-State Finance Administration, and Banks (SYGEMIFIN), the Trade Union of Congo Workers (SYNTRACO), the State Civil Servants and Public Agents Trade Union (SYFAP) and the National Board of State Agents and Civil Servants (DINAFET) .....	928–956
The Committee’s conclusions .....	943–955
The Committee’s recommendations.....	956

*Case No. 3113 (Somalia): Interim report*

Complaint against the Government of Somalia presented by the Federation of Somali Trade Unions (FESTU) and the National Union of Somali Journalists (NUSOJ), supported by the International Trade Union Confederation (ITUC).....	957–991
The Committee’s conclusions .....	984–990
The Committee’s recommendations.....	991

*Case No. 2994 (Tunisia): Interim report*

Complaint against the Government of Tunisia presented by the Tunisian General Confederation of Labour (CGTT).....	992–1008
The Committee’s conclusions .....	1000–1007
The Committee’s recommendations.....	1008

*Case No. 3016 (Bolivarian Republic of Venezuela): Interim report*

Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Union of Workers of the Ministry of Science and Technology (SITRAMCT), the National Alliance of Cement Workers (ANTRACEM) and the National Union of Workers of Venezuela (UNETE) .....	1009–1038
The Committee’s conclusions .....	1028–1037
The Committee’s recommendations.....	1038

## 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 29, 30, 31 October and 6 November 2015, under the chairmanship of Professor Paul van der Heijden.
2. The following members participated in the meeting: Mr Albuquerque (Dominican Republic), Mr Cano (Spain), Ms Onuko (Kenya), Mr Teramoto (Japan), Mr Titiro (Argentina), Mr Tudorie (Romania); Employers' group spokesperson, Mr Syder, and members, Mr Echavarría, Mr Frimpong, Ms Horvatić and Mr Matsui; Workers' group spokesperson, Mr Veyrier (substituting for Mr Cortebecq), and members, Mr Asamoah, Mr Martínez, Mr Ohrt and Mr Ross. The members of Argentinian, Colombian, Dominican Republic and Japanese nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2743, 3046 and 3075), Colombia (Cases Nos 3027, 3087 and 3088), the Dominican Republic (Cases Nos 2786, 3068 and 3079) and Japan (Case No. 3051).

\* \* \*

3. Currently, there are 159 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 33 cases on the merits, reaching definitive conclusions in 20 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 Case No. 2318 (Cambodia) because of the extreme seriousness and urgency of the matters dealt with therein.

### **Paragraph 69 of the Committee's procedures**

5. In light of the seriousness of the matters raised in Case No. 3113 (Somalia), the Committee invites the Government, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, to come before the Committee at its next session in March 2016 so that it may obtain detailed information on the steps taken by the Government in relation to the pending matters.

### **Cases examined by the Committee in the absence of a government reply**

6. The Committee deeply regrets that it was obliged to examine the following cases without a response from the government: 3067 (Democratic Republic of the Congo), 3076 (Maldives), 3081 (Liberia) and 3101 (Paraguay).

## Urgent appeals

7. As regards Cases Nos 2723 (Fiji), 3095 (Tunisia) and 3104 (Algeria), 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

8. The Committee adjourned until its next meeting the examination of the following cases: 3119 (Philippines), 3120 (Argentina), 3121 (Cambodia), 3122 (Costa Rica), 3123 (Paraguay), 3124 (Indonesia), 3125 (India), 3126 (Malaysia), 3127 (Paraguay), 3130 (Croatia), 3131 (Colombia), 3133 (Colombia), 3137 (Colombia), 3138 (Republic of Korea), 3139 (Guatemala), 3141 (Argentina), 3142 (Cameroon), 3143 (Canada), 3144 (Colombia), 3145 (Russian Federation), 3146 (Paraguay), 3147 (Norway), 3148 (Ecuador), 3149 (Colombia), 3150 (Colombia), 3151 (Canada), 3152 (Honduras), 3154 (El Salvador), 3155 (Bosnia and Herzegovina), 3156 (Mexico), 3157 (Colombia), 3158 (Paraguay), 3159 (Philippines), 3160 (Peru), 3161 (El Salvador), 3162 (Costa Rica), 3163 (Mexico), 3164 (Thailand), 3165 (Argentina), 3166 (Panama), 3167 (El Salvador), 3168 (Peru), 3169 (Guinea) and 3170 (Peru), since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

## Observations requested from governments

9. The Committee is still awaiting observations or information from the governments concerned in the following cases: 2177 and 2183 (Japan), 2508 (Islamic Republic of Iran), 3059 (Bolivarian Republic of Venezuela), 3018 (Pakistan), 3108 (Chile), 3109 (Switzerland), 3110 (Paraguay), 3114 (Colombia) and 3117 (El Salvador).

## Partial information received from governments

10. In Cases Nos 2203 (Guatemala), 2265 (Switzerland), 2445 (Guatemala), 2609 (Guatemala), 2811 (Guatemala), 2817 (Argentina), 2824 (Colombia), 2830 (Colombia), 2869 (Guatemala), 2882 (Bahrain), 2897 (El Salvador), 2902 (Pakistan), 2927 (Guatemala), 2948 (Guatemala), 2967 (Guatemala), 2978 (Guatemala), 3003 (Canada), 3007 (El Salvador), 3023 (Switzerland), 3032 (Honduras), 3047 (Republic of Korea), 3078 (Argentina), 3089 (Guatemala), 3090 (Colombia), 3091 (Colombia), 3092 (Colombia), 3103 (Colombia), 3106 (Panama), 3115 (Argentina), 3134 (Cameroon) and 3153 (Mauritius), 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

11. As regards Cases Nos 2254 (Bolivarian Republic of Venezuela), 2620 (Republic of Korea), 2673 (Guatemala), 2753 (Djibouti), 2761 (Colombia), 2889 (Pakistan), 2923 (El Salvador), 2949 (Swaziland), 2958 (Colombia), 2982 (Peru), 2987 (Argentina), 2989 (Guatemala), 2997 (Argentina), 3017 (Chile), 3035 (Guatemala), 3048 (Panama), 3053 (Chile), 3061 (Colombia), 3064 (Cambodia), 3069 (Peru), 3074 (Colombia), 3082 (Bolivarian Republic of Venezuela), 3093 (Spain), 3094 (Guatemala), 3097 (Colombia), 3098 (Turkey), 3100 (India), 3107 (Canada), 3111 (Poland), 3112 (Colombia), 3116 (Chile), 3118 (Australia), 3128 (Zimbabwe), 3129 (Romania), 3132 (Peru), 3135 (Honduras), 3136 (El Salvador) and 3140 (Montenegro), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

## Article 26 complaint

12. The Committee requests the Government of Belarus to provide any additional information it wishes to draw to the Committee's attention in respect of the measures taken to implement the recommendations of the Commission of Inquiry.

## Transmission of cases to the Committee of Experts

13. The Committee draws the legislative aspects of the following cases, as a result of the ratification of Conventions Nos 87 and 98, to the attention of the Committee of Experts on the Application of Conventions and Recommendations: 2786 (Dominican Republic), 2970 (Ecuador) and 3113 (Somalia).

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

### Case No. 2837 (Argentina)

14. The Committee last examined this case at its June 2013 meeting, when it made the following recommendation [see 368th Report, para. 15]:

The Committee requests the Government to send its response concerning the additional information provided by the Association of State Workers (ATE) and, in particular, to keep it informed about the result of the appeals relating to the lifting of the trade union immunity of two ATE trade union officials (Mr Máximo Parpagnoli and Mr Pastor Mora). Furthermore, the Committee requests the Government to keep it informed about the status of the five other trade union delegates who had also allegedly been the object of legal action to lift their trade union immunity.

15. Furthermore, in its report of March 2012, the Committee requested the Government to take the necessary steps to ensure that the ATE is not excluded from bargaining on the conditions of employment of workers of the Teatro Colón autonomous body [see 363rd Report, para. 312].
16. In its communications of October 2013 and May 2014, the Government sends the replies transmitted by the Office of the Undersecretary of Labour of the Autonomous City of Buenos Aires and by the Directorate-General for Labour Relations of the Ministry of Modernization of the Autonomous City of Buenos Aires, indicating that: (1) as regards

union official Mr Máximo Parpagnoli, in a decision dated 22 August 2013, Chamber I of the Labour Court of Appeals overturned a ruling of the court of first instance, dismissing the application for the lifting of his trade union immunity; and (2) as regards the union official Mr Jorge Mora Pastor, in a decision dated 22 March 2013, Chamber X of the Labour Court of Appeals ratified the ruling of the court of first instance which upheld the application for the lifting of his trade union immunity; the Government adds that a ruling issued by that same court on 12 August 2013, dismissed the extraordinary federal appeal filed by Mr Jorge Mora Pastor against the aforementioned ruling. In response, the defendant filed an appeal before the Supreme Court of Justice, which is still pending.

**17.** As regards the status of the other five union officials, who had been the subject of legal action to lift their trade union immunity, the Government indicates the following:

- as regards the official Ms Susana Inés Benítez, the Government of the Autonomous City of Buenos Aires (GCBA) filed an application to lift her trade union immunity, which is being heard by Labour Court of First Instance No. 22 of the Federal Capital, and is currently at the evidence stage;
- as regards the official Mr Carlos Saúl de Jesús Flores, who is the subject of an application for the lifting of his trade union immunity that is being heard by Labour Court No. 68 of the ordinary courts of the Federal Capital, on 20 March 2014 a ruling was handed down that has not to date been notified;
- as regards the official Mr Oscar Ricardo Ochoa, who is the subject of an application for the lifting of his trade union immunity that is being heard by Labour Court of First Instance No. 14 of the ordinary courts of the Federal Capital, on 28 March 2013 a ruling was handed down dismissing the application to lift his trade union immunity; as a result, the GCBA filed an appeal against this ruling, but this was dismissed. An extraordinary appeal was filed and rejected. A complaint filed before the Supreme Court of Justice is still pending;
- as regards the official Dr Silvia Patricia Pérez, who is the subject of an application for the lifting of her trade union immunity that is being heard by Labour Court of First Instance No. 49 of the ordinary courts of the Federal Capital, on 14 February 2012, the request was declared not applicable given that the defendant was deceased;
- as regards the official Mr José Esteban Piazza, who is the subject of an application for the lifting of his trade union immunity that is being heard by Labour Court of First Instance No. 76 of the ordinary courts of the Federal Capital, on 27 September 2012 a ruling was handed down dismissing the application to lift his trade union immunity; an appeal was brought against the ruling, which upheld the ruling handed down at first instance. On 12 November 2013 a complaint was filed before the Supreme Court of Justice, which was dismissed on 20 February 2014. An appeal has been filed and is currently still pending resolution.

**18.** *The Committee notes this information and requests the Government to keep it informed of the final rulings handed down in relation to the cases concerning the lifting of the trade union immunity of ATE members Mr Jorge Mora Pastor, Ms Susana Inés Benítez, Mr Carlos Saúl de Jesús Flores, Mr Oscar Ricardo Ochoa and Mr José Esteban Piazza.*

**19.** *As regards the allegations of the ATE concerning its exclusion from the collective bargaining process in the Teatro Colón autonomous body, the Committee notes that the Government highlights that the workers of said theatre are covered under the collective labour agreement signed by the GCBA and the ATE in 2010, and by the succeeding wage agreements signed by these same parties.*

20. *Taking into consideration that the collective agreement referred to by the Government was signed in 2010 and that, in its previous communications, the ATE had referred to non-compliance with court rulings handed down in 2012, which provided that the Government of the City of Buenos Aires should continue to bargain collectively in the Teatro Colón and that the ATE should be involved, the Committee encourages the Government to take increased measures, with ATE involvement, to promote collective bargaining in the Teatro Colón and to keep it informed of any new collective agreements concluded.*

### **Case No. 2765 (Bangladesh)**

21. The Committee last examined this case at its June 2014 meeting [see 372nd Report, paras 46–58]. On that occasion, the Committee noted that the Bangladesh Cha-Sramik Union (BCSU) office had been vacant since 21 May 2013. It trusted that all remaining issues would be resolved in the near future and requested the Government and the complainant organization to keep it informed in this regard.
22. In a communication dated 10 October 2014, the Government indicates that the election of the executive committee of the BCSU was held on 12 August 2014. The Government further specifies that both conflicting groups participated in the election process and that the panel headed by Makhon Lal Karmokar-Ramvajan Koiry, the complainant in this case, won the election. According to the Government, the winning panel is now running the activities of the BCSU.
23. *The Committee takes due note of the information provided in the Government's report and observes that the election of the executive committee of the BCSU was held and that both conflicting parties participated in the election process. The Committee notes with satisfaction that a panel was elected and is now running the activities of the BCSU, thus resolving this issue.*

### **Case No. 2512 (India)**

24. The Committee last examined this case, which concerns alleged acts of anti-union discrimination and interference in trade union affairs through the creation of a puppet union, dismissals, suspensions and transfers of trade union members, arbitrary reduction of wages, physical violence and lodging of false criminal charges against trade union members, at its March 2014 meeting [see 371st Report, paras 72–78]. On that occasion the Committee deeply regretted that two anti-union dismissal cases, the cases of M. Subramani and P. Ravinder, were still pending before the Madras High Court almost ten years after termination of the employment of the claimants. The Committee firmly expected that those cases be concluded without any further delay and urged the Government to provide copies of the rulings as soon as they were handed down.
25. The Committee also requested the Government to provide updated information on the outcome of other remaining anti-union dismissal cases, and to provide detailed observations on the status of the cases of allegedly false criminal charges against members and officers of the Madras Rubber Factory United Workers' Union (MRFUWU) and their alleged transfers because of trade union membership or activities. With regard to the enactment of legislation providing for recognition of trade unions, the Committee requested the Government to provide detailed information on the deliberations of the State Labour Advisory Board on 30 January 2013 and on the examination by the state Government of Tamil Nadu of the related issues. The Committee firmly expected that the Government, in full and frank consultations with the social partners, actively consider establishing objective rules for the designation of the most representative union for collective bargaining purposes. Finally, the Committee reiterated its request that the

Government give due consideration to the adoption of legislative provisions that further the goal of preventing anti-union discrimination including by providing sufficiently dissuasive sanctions; and once again recalled that the relevant provisions of the Industrial Dispute Act must be amended in order to ensure that the suspended workers and trade unions using the Grievance Redress Machinery may approach the court directly, without referral by the state Government.

- 26.** In a communication dated 19 April 2014, the MRFUWU provides additional follow-up information in support of its original complaint. Concerning the cases of dismissal of M. Subramani and P. Ravinder, the complainant submits that the appeal lodged by the management against first instance awards directing their reinstatement with continuity of service and payment of 50 per cent back wages is still pending before the Madras High Court. Likewise, the cases relating to the dismissal of 22 of MRFUWU members remain pending before the Madras High Court, following appeals lodged by the management against the awards of Labour Court, Vellore, directing their reinstatement with continuity of service and payment of 25 per cent back wages. The complainant finally states that, on 18 September 2013, the Industrial Tribunal, Chennai, dismissed the management's Approval Petitions Nos 57, 58, 69, 70, 118 and 124 of 1995, seeking the approval of the dismissal of six worker members of the MRFUWU, one of whom, V. Divijendran, is the Vice-President of the union. The management has appealed against this award, and the case is now pending before the Madras High Court. The complainant alleges that these workers were unjustly dismissed and criminal charges were also pressed against them on false grounds, but the criminal cases had earlier ended in acquittal.
- 27.** The complainant refers to a number of allegedly groundless criminal cases that remain pending against its members. These include cases pressed against 42 members who participated in a peaceful procession in Chennai on 30 July 2009, seeking to hand over petitions to government and management, requesting the implementation of the recommendations of the Committee on Freedom of Association. The police intervened, allegedly at the instance of the management, lathi-charged the participants, and caused serious injuries to six workers and one child. In this context, a criminal case was registered against 42 members of the MRFUWU that remains pending before the Court of Chief Metropolitan Magistrate, Egmore, Chennai, as CC No. 1223 of 2010. The complainant also mentions three criminal cases pending before the Court of Judicial Magistrate II Arakkonam against its office bearers, allegedly on the basis of false complaints. One criminal case that was before the Court of the Assistant Sessions Judge, Ranipet, Vellore, ended in acquittal, against which judgment the management has filed an appeal, which is now pending before the Madras High Court.
- 28.** With regard to the recognition of the MRFUWU for collective bargaining purposes, the complainant states that the management insists on its refusal to recognize the union. The management and Arakkonam MRF Workers' Welfare Union (AMRFFWU) filed a Special Leave Petition (SLP) against the 2009 judgment of the Madras High Court that directed the application of the procedure prescribed under the Code of Discipline for determination of the most representative union. The SLP remains pending before the Supreme Court of India since 2010. The complainant states that, at the early stage of the proceedings, the Government of Tamil Nadu has stated before the Madras High Court that it has no legal obligation to ensure that recognition is accorded to the MRFUWU.
- 29.** The complainant holds that, on 20 June 2013, the management entered into a settlement on terms and conditions of employment with the AMRFFWU, which the complainant claims is a puppet union. The binding force of this settlement was limited to the signatory union. The management also immediately granted recognition to the Anna Thozhilalargal Sangam Peravai (ATP) union, which was formed in 2011 and has a membership of barely 70 workers. Subsequently on 3 July 2013, before the Conciliation Officer, the 20 June

2013 settlement was converted into a settlement under section 12(3) of the Industrial Disputes Act, which is binding on all workers in the factory, including on the MRFUWU members, who were not represented in the settlement. The complainant recalls in this regard, that prior to the settlement of 20 June 2013, 800 of the 1,232 workers belonging to the MRFUWU had sent letters by registered post in May–June 2013 affirming that they are only members of the complainant union and therefore no settlement should be entered into with any other union. The MRFUWU states that those letters were ignored.

30. The MRFUWU reports that on 30 October 2013, in the proceedings related to ID No. 14 of 2008, the Industrial Tribunal, Chennai, rejected a Miscellaneous Application (MA No. 29 of 2010) of the management of the company seeking an award in terms of the settlements it had entered into with its puppet unions in 2004 and 2009. The Tribunal grounded this rejection in the fact that the management had failed to establish that a vast majority of the workers were parties to the said settlements.
31. In its communication dated 4 December 2014, the Government provides details about 31 dismissal cases including the cases of M. Subramani and P. Ravinder. According to this information, the following cases have been settled by the Labour Court, Vellore: P. Baskar, B. Meshak, A. Ravi, S. Prakasam, V. Baskaran, A. Paranthaman, E. Narashimalu, R. Dhinakaran, D. Babu, E. Raja, S. Hari Govindan, Sekarkumar, T.S. Arumugam, S. Babu, Arul Gandhi, Muthan, Thulasiraman, K. Ravikumar and S. Vinayagam. In the following cases, the awards of the Labour Court are still pending appeal before the High Court, Chennai: N. Ramathilagam, M. Subramani, P.N. Ravidaran and M. Sudarsanam. Two cases were dismissed for default by the petitioner: S. Srinivasan and K. Periyasamy. The case of E. Vajravelu was settled outside the Court and R.S. Sathyamurthy and R. Senthilnathan were reinstated. Three dismissed employees did not lodge a complaint: R. Chandran, Sridhar and M. Krishnamurthy. In this regard, the Government of Tamil Nadu acknowledges the information provided by the complainant, according to which as a result of the appeal petition presented by the employer, dismissal cases of P. Ravinder and M. Subramanian and 22 other worker members of the MRFUWU are now pending before the Madras High Court. The state Government also refers to “the earlier case involving dismissal of probationers” and states that the dispute is before the Labour Court and it is “expected to be disposed of shortly”.
32. The Government reiterates that nine other dismissal cases remain pending before the Industrial Tribunal, Chennai [same as mentioned in 371st Report, para. 73]. The Government indicates that the management has framed charges for certain misconduct committed by individuals as per the Standing Orders and has held independent inquiry and, since the charges have been proved beyond reasonable doubt, termination orders have been issued. The Government affirms that the judiciary acts in independence and the Government cannot have a say in disposing of cases before the courts.
33. With regard to recognition of trade unions, the Government refers to input it has received from the Government of Tamil Nadu which reiterates that the state follows the Code of Discipline procedure adopted as per the recommendations of the Indian Labour Conference and the union had to seek recognition through the State Evaluation Committee only, which it chose not to do. In this regard, the state Government reiterates that a State Evaluation and Implementation Committee was constituted that conducted a fact-finding mission to the unit and on 28 May 2008 submitted a report to the Government in which it observed that most workers at the unit had dual membership in both the MRFUWU and the AMRFFWU and that they were free to choose their union. The state Government considers that thereby it has complied with the ILO recommendations. With regard to legislative measures and the recommendation to consider laying down objective rules for the designation of the most representative union, the Government indicates that an

amendment to the Trade Union Act, 1926, in conferring recognition to trade unions is under examination.

- 34.** With regard to the settlements between the management and the AMRFFWU, the state Government indicates that these are long-term wage settlements with recognized unions having the support of the majority of workers. The 20 June 2014 settlement was a bipartite settlement with the AMRFFWU which enjoys the support of the majority of workers within the unit. It came about as a result of the expiration of the erstwhile settlement dated 9 May 2009. The state Government indicates that, although most workers subscribed to the 20 June settlement, some disgruntled workers belonging to a new union, namely MRF Anna Thozhilalargal Sangam, objected to it and raised a dispute before the Joint Commissioner of Labour. Therefore the settlement was taken to the conciliation table and, after a due process of conciliation, it was converted to the settlement dated 3 July 2013, which was a tripartite settlement with the AMRFFWU and the MRF Anna Thozhilalargal Sangam, signed before the Joint Commissioner of Labour under section 12(3) of Industrial Disputes Act. Settlements signed under section 12(3) extend to all workers on the unit by operation of law. It is stated that, prior to the signing of this last settlement, the Conciliation Officer gave ample opportunities to the complainant union to participate in wage negotiations. The MRFUWU initially took part in the conciliation proceedings, but later withdrew from the process and so spurned the opportunity to be a signatory to the settlement. The Government concludes from the above that claims of non-recognition of the complainant union are incorrect. In the same line of thought, the state Government indicates that since in the State of Tamil Nadu there is no law for trade union recognition in such situations, the management of the company cannot accord recognition to any trade union. Hence it is incorrect to state that they have accorded such recognition to the MRF Anna Thozhilalargal Sangam. The Government states that the company had engaged with all the registered unions including the complainant union either at bilateral level or before the conciliation machinery, irrespective of their affiliation and representative capacity, with a view to a long-term wage settlement.
- 35.** With regard to Miscellaneous Application (MA) No. 29 of 2010 in the ID No. 14 of 2008 proceedings before the Industrial Tribunal, Chennai, the state Government contends that the MA resulted from a mutual agreement between the union and the management as to request a decision on whether an award can be passed in terms of 2004 and 2009 settlements as a preliminary issue. The Government states that, despite its refusal to pass an award in terms of settlement, the Tribunal admitted that the letters of workers accepting both settlements are genuine.
- 36.** With regard to Approval Petitions Nos 57, 58, 69, 70, 118 and 124 of 1995, the Government of Tamil Nadu states that the case pertains to dismissal of six workers, who had committed acts of misconduct such as violence and assaulting co-workers. It disputes the complainant's allegation regarding Mr Divijendran stating that the MRFUWU did not exist at the time of his dismissal. It further states that one of the six workers involved has since been employed in the Tamil Nadu police services. The Government acknowledges that the Tribunal has dismissed Approval Petitions after 18 years, against which decision the management has appealed, although, since the award had binding force, the management paid 700,000 rupees to each of the six dismissed workers.
- 37.** With regard to the events of 30 July 2009, the state Government transmits the allegations of the company, according to which the procession was conducted by a mob that was involved in criminal activity and unleashed threats at the company's office. It states that the so-called mob threatened the lives of staff members working at the office and indulged in acts of vandalism, caused damage to property, shouted slogans, hurled stones and chappals and created a tense situation and panic besides causing public nuisance on the road. Participants in the procession stopped the company buses and did not permit the

willing workers to enter the factory for work. The state Government acknowledges that, in the wake of these events, criminal cases were registered against members of the complainant union, which are pending before the local magistrate's court. The Government states that the police took appropriate steps and the Department of Labour cannot interfere with the police action in a law and order situation.

38. The Government states that all the allegations and averments of the complainant union are far from truth, made with mala fide intention of tarnishing the image of the company, as well as the Governments of India and Tamil Nadu in the international arena, while there are protective laws and legal remedies available in the domestic legal order. The Government of Tamil Nadu has taken all earnest steps to solve the issues and the plant is running smoothly without any disruption of productivity. The Government concludes by stating that each and every observation of the Committee has been carefully examined by the Government and all possible actions within the legal framework have been taken; and requests the Committee to close Case No. 2512.
39. *The Committee takes note of the information provided by the Government and the complainant. With regard to the continued non-recognition of the complainant union by the employer, the Committee notes the allegation of the complainant union that the employer has entered into new settlements with two other trade unions present in the factory, and that the binding force of the second settlement is extended to the members of the complainant union according to the law, although they were not represented in the settlement. The Committee notes the information provided by the Government in response to this allegation, which acknowledges that the last settlement was extended to the members of the complainant union, despite the fact that their representatives were not involved in concluding the agreement, which the Government states is a long-term wage settlement. The Committee also notes that the Government states that the Conciliation Officer gave ample opportunities to the complainant union to participate in the conciliation process, but the latter finally refused to continue the process to the end and to sign the final agreement. The Committee recalls that when the extension of the agreement applies to non-member workers of enterprises covered by the collective agreement, this situation in principle does not contradict the principles of freedom of association, in so far as under the law it is the most representative organization that negotiates on behalf of all workers [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 1052]. Therefore, in order to appreciate the conformity of the extension of the settlement with principles of freedom of association, the most representative union would need to be determined at the outset. The Committee is bound to recall that, as of the beginning of its examination of this case, it has observed that the lack of a clear, objective and precise procedure for determining the most representative union has led to the lack of resolution of this matter and has fomented continuing conflict within the company, which is not conducive to harmonious industrial relations. In the light of the information provided by the Government and the complainant union, the Committee is bound to note that this matter remains unresolved. The Committee deeply regrets that the Government does not provide any detailed information in its last communication as to the measures taken for establishing objective rules for the designation of the most representative union and once again requests the Government to actively consider, in full and frank consultations with the social partners, establishing objective rules for the designation of the most representative union for collective bargaining purposes and to keep it informed in this regard.*
40. *With regard to the anti-union dismissals denounced by the complainant, the Committee notes with great concern that nearly all legal proceedings concerning dismissals remain pending many years after the termination of the plaintiffs' employment. Twenty-four cases remain pending before the Madras High Court, two of which concern workers that were dismissed in 2004. The Committee furthermore notes that nine cases filed by workers*

dismissed in 2011 and 2012 remain pending before the Industrial Tribunal, Chennai. The Committee once again recalls that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious. Cases concerning anti-union discrimination 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 dismissed by the enterprise, constitute a denial of justice and therefore a denial of trade union rights of the persons concerned [see *Digest*, op. cit., paras 820 and 826]. In view of the extremely long delay in concluding the proceedings, the Committee firmly urges the Government to ensure that the judgments of the court of first instance directing reinstatement of workers with continuity of service and back wages are implemented pending the appeal proceedings before the Madras High Court, and to provide it with detailed information on the progress made in this regard. With regard to the cases of allegedly false criminal charges being brought against members and officials of the MRFUWU, the Committee deeply regrets that, despite its request, the Government has not provided any detailed observations on the outcome of the investigations, neither has it produced copies of the rulings. The Committee urges once again the Government to provide detailed and updated information on all such cases, including the case registered against members of the complainant union at the wake of the events of 30 July 2009 in Chennai, CC No. 1223 of 2010, which is pending before the Court of Chief Metropolitan Magistrate, Egmore, Chennai. Furthermore, the Committee once again requests the Government to give due consideration to the adoption of legislative provisions that further the goal of preventing anti-union discrimination, including by providing for sufficiently dissuasive sanctions against such acts.

41. The Committee notes the allegation of the complainant union that excessive police force has been used in response to a peaceful procession organized in Chennai on 30 July 2009, to request the implementation of the recommendations of the Committee; and that this resulted in serious injuries to several workers and one child. The Committee notes that, in response to this allegation, the Government has not provided any observations, but only transmitted the allegations of the employer as to the violent nature of the said procession. The Committee recalls that the right to organize public meetings and processions constitutes an important aspect of trade union rights and observes that a procession to request the implementation of the recommendations of the Committee falls within the exercise of trade union rights. The Committee is bound to recall 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 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 urges the Government to conduct an independent judicial inquiry into the abovementioned events with a view to clarifying the facts and determining the justification for police action and responsibilities and to keep it informed of the outcome.

### **Case No. 2991 (India)**

42. The Committee last examined this case, which concerns excessively long registration procedures, denial of registration due to imposition of restrictive conditions of eligibility (occupational requirement) for union office and union membership, and minimum membership requirement of 100 workers to establish a union in its June 2013 meeting [see 368th Report, paras 545–566]. On that occasion, the Committee requested the Government to register the Garment and Allied Workers' Union (GAWU) without delay; to take the necessary measures to modify the minimum union membership requirement in section 4(1)



of the Trade Unions Act, 1926, as amended in 2001, so that the establishment of organizations is not unduly hindered; and to take steps to ensure that the period necessary for registration of workers' organizations is not excessively long.

43. In its communication dated 31 October 2013, the Government indicated that the complainant has lodged an appeal under section 11 of the Trade Unions Act, 1926, against the decision of the Registrar, Trade Unions, Haryana, to refuse to register the trade union, before the Industrial Tribunal-cum-Labour Court, Gurgaon (Appellate Court). The Government states that the Appellate Court has taken cognizance of the appeal and the matter is sub judice and hence, the Registrar is not empowered to take any action. With regard to modification of the minimum union membership requirement in section 4(1) of the Trade Unions Act, 1926, as amended in 2001, the Government considers, to the contrary, that the provision is too liberal and does not require any review. With regard to the period necessary for registration of workers' organizations, the Government states that the Haryana State Labour Policy, 2006, clearly provides for a time schedule for disposal/functions under various labour laws in which it is stipulated that an application for registration should be disposed in not more than four months. The Government further states that as per to the said policy, the period is four months where the papers are complete; while, when the matter is complicated naturally, more time for disposal of cases is needed. However, the Haryana state Government endeavours to strictly respect the four months' time frame. The Government concludes by assurances of its commitment to the rights and welfare of the workers and its will to ensure all efforts to protect them against all forms of exploitation.
44. *The Committee takes note of the information provided by the Government. While the Committee understands that, at the time of communication an appeal was pending on the registration refusal, it observes that nearly two years later, no further information has been provided on developments. The Committee recalls that judges should be able to deal with the substance of a case concerning a refusal to register, so that they can determine whether the provisions on which the administrative measures in question are based constitute a violation of the rights accorded to occupational organizations by Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 304]. The Committee requests the Government to provide information as to the status of the appellate proceedings, and, if a judgment was handed down, to transmit a copy of it. The Committee also invites the complainant organization to provide information as to the status of its appeal.*
45. *With regard to the requirements of section 4(1) of the Trade Unions Act, 1926, as amended in 2001, pertaining to minimum union membership required for registration, the Committee recalls that it has repeatedly observed that, while a minimum membership requirement is not in itself incompatible with Convention No. 87, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered [see **Digest**, op. cit., para. 287]. In the light of the foregoing, the Committee once again requests the Government to engage with the social partners to review section 4(1) of the Trade Union Act, 1926, as amended in 2001, in line with the above principles and to keep it informed of the progress made in this regard.*
46. *With regard to the period necessary for registration, the Committee notes the information provided by the Government according to which Haryana State Labour Policy, 2006, specifies that an application for registration should be disposed in not more than four months. However, the Committee observes that in the case at hand more than one year elapsed before the application of the complainant union was decided. The Committee recalls that a long registration procedure constitutes a serious obstacle to the establishment of organizations and amounts to a denial of the right of workers to establish organizations without previous authorization and requests the Government to encourage*

*Haryana State to review the implementation of its registration procedures so as to ensure that the period for registration of workers' organizations in practice does not become excessively long.*

### **Case No. 2304 (Japan)**

47. The Committee last examined this case at its October 2013 meeting [see 370th Report, paras 58–61]. On that occasion the Committee requested the Government to keep it informed of the decision of the Tokyo High Court on the complainant organization's appeal concerning the status of four union members who were dismissed by the company and whose dismissal with prejudice was recognized in the decision of Tokyo District Court dated 17 October 2012. With regard to Tomio Yatsuda and Kakunori Oguro, the two dismissed union members on whose case the Tokyo District Court decided to recognize their status as employees, the Committee requested the Government to indicate whether the company has reinstated them with payment of unpaid wages following the court decision.
48. In communications dated 7 October 2014, 5 February and 5 October 2015, the Japan Confederation of Railway Workers' Unions (JRU) provided follow-up information. In its October 2014 communication, the complainant indicated that the Tokyo High Court concluded its hearings on the appeal case of six dismissed trade union members on 20 May 2013. The judge announced that the sentence could be delivered on 27 November and recommended the parties to seek a settlement through mediation in the meantime. Three mediation sessions were scheduled that ended in failure as the positions of the parties could not be reconciled: the dismissed workers insisted on their request for reinstatement while the company wished to settle the dispute through payment of monetary compensation. Finally the High Court delivered its decision on 11 December 2013, rejecting the reinstatement claims of all six workers dismissed as a result of their involvement in the JR Urawa electric train depot incident. The plaintiffs remained dissatisfied with this decision and initiated the procedure to take the case before the Supreme Court for final appeal. In its communication of February 2015, the complainant provided further information, indicating that by a ruling dated 3 October 2014, the Supreme Court confirmed the validity of punitive dismissal of the six workers involved in the JR Urawa electric train depot case and rejected their claims to reinstatement. This decision marks the end of all judicial proceedings related to the Urawa incident.
49. In its communications of February and October 2015, the complainant organization further indicates that government organs and agents keep affirming that Kakumaru faction activists have infiltrated and exercise influence on the JRU and its affiliates such as the East Japan Railway Workers' Union (JREU) and the Hokkaido Railway Workers' Union (JRHU), and that mass media as well as other trade unions cite and misuse those declarations. In this regard the complainant refers to similar statements in the Diet, as well as to the fact that the assertions of the police in this regard have been deemed reasonable and relied upon during the judicial proceedings. The JRU qualifies these statements as untrue and as libellous slander, complains that they have a negative effect on the activities and social standing of the union and its affiliates and considers that they amount to oppression.
50. In a communication dated 28 January 2015, the Government indicated that following the appeal lodged by both the dismissed workers and the company against the decision of the Tokyo District Court annulling the punitive dismissal of two out of six plaintiff workers, the Tokyo High Court quashed the decision of the District Court and issued a ruling that rejected the plaintiffs' claims for recognition of their employment and unpaid wages. The Government presents a summary of the grounds adduced for the judgment, according to which the Court states that the acts of the six dismissed union members corresponded to the crime of coercion as found in criminal proceedings and therefore the grounds for

disciplinary measures existed. The Court then proceeds to examine whether the company has abused its disciplinary power. Considering that the six union members engaged several times in acts of coercion against the victim, which left him with no choice but to resign from his work and so caused him significant damage; and considering that the union members' acts constituted criminal actions committed within the company's worksite while on duty, significantly disturbing the order and going against the rules at the workplace; the Court concluded that the JR East company did not abuse its disciplinary power in dismissing the six workers. The Government indicates that the plaintiffs filed an objection to the ruling of the High Court and appealed the case to the Supreme Court. The Supreme Court dismissed their appeal on 3 October 2014 and thus the decision validating the punitive dismissals of the six became final. The Government has attached copies of both judgments to its communication.

51. *The Committee takes note of the information provided by the complainant and the Government. The Committee notes that all the judicial proceedings related to the JR Urawa electric train depot incident have now ended and rulings have been finalized in the Supreme Court. The Committee takes note of the judgments communicated by the Government and the grounds adduced therefore. With regard to the public assertions of authorities as to the infiltration of the complainant union by Kakumaru faction, the Committee recalls that the police should abstain from any declaration which might damage the reputation of a trade union as long as the matters in question have not been confirmed by the judicial authorities [see 335th Report, para. 1018]. While observing that the complainant and Government have contradictory views in relation to the motivation for the dismissals in this case, the Committee considers that there are no remaining elements calling for further examination.*

### **Case No. 2844 (Japan)**

52. The Committee last examined this case which concerns allegations that the dismissal of workers by Japan Airlines International (JAL) was carried out in such a way as to discriminate against workers who are members of certain trade unions, at its October 2013 meeting [see 370th Report, paras 62–66]. On that occasion, with respect to the lawsuit filed by 146 workers (cabin attendants and flight crews) to request confirmation of the existence of legally binding contracts between themselves and Japan Airlines Ltd (hereafter the company), while noting that the lawsuit was rejected on March 2012 and that the plaintiffs appealed to the Tokyo High Court in April 2012, the Committee requested the Government to keep it informed of the decision of the Tokyo High Court, as well as any follow-up measures taken as a result. With reference to the appeal lodged by the company to the Tokyo District Court concerning the order of remedies of the Tokyo Metropolitan Labour Relations Commission (LRC) whereby it found that the Enterprise Turnaround Initiative Corporation (ETIC) interfered in the management of the Japan Airlines Flight Crew Union (JFU) and the Japan Airlines Cabin Crew Union (CCU) during negotiations in November 2010 and ordered the company to issue a letter of apology, the Committee requested the Government to keep it informed of any outcome to the appeal. Finally, the Committee called for full and frank consultations between the company and the trade unions concerned in the framework of the new recruitment campaign so that views concerning the rehiring of workers following termination for economic reasons would be taken into account.
53. In a communication dated 10 October 2014, the JFU and the CCU regret that the Tokyo High Court declined the claims by the cabin crew and by the flight crew in decisions handed down respectively on 3 and 5 June 2014. In the view of the complainants, the High Court neglected common judicial rules, and gave absolute priority to maintaining the company's rehabilitation regime backed by the rehabilitation plan. The consequence of such a ruling is that it deprives workers of the right to access to court and it could

accelerate job cuts by companies that take advantage of the Corporate Rehabilitation Law. Finally, the complainants consider that the ruling neglected aviation safety since the excessive job cuts have resulted in a massive reduction in the number of experienced workers thus increasing safety incidents.

54. While having made a final appeal, the complainants had expressed the hope that the company would start negotiations in view to resolve the dismissal issues rather than waiting for the trials to be concluded. The CCU and the JFU however observed that while many new cabin attendants had been recruited lately, the company had not made a single offer of reinstatement to the dismissed workers. The complainants urged the Government to implement the Committee's recommendations regardless of the progress of the trials.
55. In communications dated 15 January and 14 September 2015, the Government confirms that the Tokyo High Court dismissed the appeals lodged by flight crews and cabin attendants dismissed by the company against the June 2014 decisions. The Government states that these had confirmed the need for staff cutbacks and acknowledged efforts made by the company to consult regularly with the trade unions, to apply reasonable and objective criteria for the selection of dismissed staff, and to offer alternatives to the dismissals (such as voluntary retirement programmes). The Government further indicates that the cabin attendants and the flight crew did appeal the rulings to the Supreme Court on 17 and 19 June 2014. In a communication dated 15 April 2015, the Government transmits the views of the company on the dismissal issue. The company refers to the final decision rendered by the Supreme Court in February 2015 where it considered the redundancy lawful and valid. In view of this ruling, the company considers it difficult to rescind the redundancy and to accept the request for reinstatement. Because of the bankruptcy the company had suffered, 5,700 workers left the company, including those who applied for voluntary retirement. It would not be considered fair to make an arrangement to save only some of them, namely 165 workers made redundant, merely because the financial condition and the business performance of the company was improving.
56. The Government further indicates that, as regards the question of consultation between employers and trade unions, it shares the view of the Committee on the importance of full and frank consultations. In order to ensure such consultations, refusal of collective bargaining by employers without due reason is prohibited in Japan as an unfair labour practice and any grievance in this respect may be filed with the Labour Relations Commission (LRC) to seek remedies. If the LRC finds that the employer refused to negotiate without proper reasons, it may order the employer to engage in collective bargaining. Given that the LRC is a quasi-judicial body which decides unfair labour practices independently, the Government considered that it was inappropriate to actively intervene to mediate the issues between labour and management.
57. The company also refers to the numerous negotiation and consultation meetings held with the trade unions concerned during the period under consideration. According to the data provided by the company, between September 2010 and March 2015, it met with the CCU and the JFU 83 and 69 times, respectively. It also met with the largest trade union of the company, namely the Japan Airlines Friendship and Improvement Organization (JALFIO), which confirmed in writing that it provided the union members who were subject to redundancy, necessary information and support for obtaining new jobs. However, it has not received any request for reinstatement from its members.
58. Finally, with regard to the appeal lodged by the company to the Tokyo District Court concerning the order of remedies of the LRC, the Government indicates that on 28 August 2014 the Tokyo District Court rejected the claim of the company, which appealed the judgment to the Tokyo High Court on 9 September 2014. On 18 June 2015, the Tokyo High Court issued a decision rejecting the claim of the company. On 1 July 2015, the

company appealed the decision to the Supreme Court and the case is still pending at present.

59. *The Committee takes due note of the information provided by the Government and the complainant organizations on the latest developments in the present case. With regard to the order of remedies of the Tokyo Metropolitan Labour Relations Commission, the Committee requests the Government to keep it informed of any outcome to the appeal pending before the Supreme Court. With respect to the lawsuit filed by 146 workers to request confirmation of the existence of legally binding contracts between themselves and the company, the Committee notes that the Supreme Court ruled in final decisions dated 4 and 5 February 2015 that the redundancy was lawful and valid.*
60. *The Committee also notes the company's statement following the Supreme Court decision, in particular that it finds it difficult to rescind the redundancy or to accept any request for reinstatement. The company further stated that it would not be considered fair to make an arrangement to save 165 workers made redundant out of 5,700 who left the company merely because the financial condition and the business performance of the company was improving. In view of the latest developments in this case, the Committee once again underlines the importance of maintaining a meaningful dialogue between the company and the trade unions. The Committee observes that there is a difference of opinion between the unions and the employer as to whether there has been true engagement on the matter of redundant workers. The Committee trusts that the company will remain open to discussing this issue with all the unions concerned at the enterprise and notes that the complainant may take the matter to the LRC if it considers that there has been a refusal to bargain collectively in accordance with the law.*
61. *Lastly, the Committee takes note of the communication dated 5 September 2015, whereby the complainant unions refer to comments made by the Government before the Diet in March–April 2015 calling for union–management negotiations towards the settlement of the dispute, as well as the decision of the Tokyo High Court dated 18 June 2015 in relation to Case No. 369 on unfair labour practice by JAL. The Committee requests the Government to provide its comments thereon.*

### **Case No. 2977 (Jordan)**

62. The committee last examined this case concerning a refusal by the authorities to register the complainants at its March 2013 meeting [367th Report, paras 851–862, approved by the Governing Body at its 317th Session (March 2013)]. On that occasion, the Committee urged the Government to take the necessary measures to ensure that the labour legislation and all relevant decisions are amended to ensure the free exercise by all workers of their right to establish and join organizations of their own choosing; to ensure, given the apparent discretionary authority bestowed upon the Minister in section 98(B) of the Labour Act, the immediate registration of the Independent Trade Union of Phosphate Sector Workers (ITUPSW) and the Independent Trade Union of Workers in the Jordanian Electricity Company (ITUWJEC); and lastly to institute an independent investigation into the alleged acts of discrimination in favour of non-strikers and to ensure appropriate remedies if found true.
63. In its communication dated 10 January 2014, the Government submitted a report of a committee set up by the Ministry of Labour and tasked with examining the Committee's recommendations. It is indicated in this report that the Supreme Court of Justice (the highest administrative court in Jordan) was seized on 9 January 2012 with an action to appeal the decision of the Registrar rejecting the application for registration of an independent trade union for employees in the phosphate sector. The Supreme Court upheld, in its decision rendered on 27 February 2012, the Registrar's decision on grounds

of lack of legal justification for such appeal (a copy of the decision was annexed to the Government's reply). Following inquiries with the management of the electricity company, it was ascertained that: (1) the complainant's claim that the company issued a decree declaring non-striking workers as loyal and paid them a bonus was untrue as all workers, regardless of whether or not they took part in the strike, enjoy all the privileges prescribed by the collective agreements signed by the General Trade Union; (2) following pressure by the lawfully registered General Trade Union Of Electricity Employees, the company management halted the deductions in respect of the 17-day period of the illegal strike, hence allowing all the workers to receive their full entitlements; and (3) a majority of the workers who had called for the creation of an independent union sent a memorandum to the president of the General Trade Union and finance director of the Jordanian Electric Power Company to the effect that all signatures on statements of the independent union are to be considered null and void after discovering that the latter did not meet their demands.

64. Lastly, the Government indicates that the committee set up by the Ministry of Labour to examine the Committee's recommendations advised the tripartite committee on labour affairs responsible for classifying the professions and industries in which workers may not establish more than one union to review the decree on professional categorization in order to give greater scope to union plurality and requested the ministry to seek technical assistance from the ILO to develop the labour law in order to expand union activity.
65. *The Committee takes due note of the information provided by the Government. Welcoming the indication that the tripartite committee on labour affairs was advised to review the decree on professional categorization and to develop the labour law so as to give greater scope to union plurality and to expand union activity, and noting that the Minister of Labour was requested to seek the technical assistance of the ILO to this end, the Committee requests the Government to indicate the actions taken or envisaged to give effect to these recommendations and trusts that the Government will engage with the ILO with a view to bringing its laws and practice into conformity with the principles of freedom of association.*
66. *With regard to the registration of the complainants, while noting the decision of the Supreme Court of Justice upholding the initial decision of the Registrar to reject the application for registration of the ITUPSW on the grounds that a duly registered general trade union already exists in the sector concerned (phosphate sector) and that no more than one trade union shall be established in each sector, the Committee wishes to recall nonetheless that provisions which require a single union for each enterprise, trade or occupation are not in accordance with Article 2 of Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 317]. As regards the ITUWJEC, although a majority of the workers who had called for its creation are said to have withdrawn their support, the Committee requests the Government and the complainant to indicate whether there are officers and members that have remained in the ITUWJEC, and if so, the Committee expects the Government, in the framework of the recommended review of the decree on professional categorization and labour law reform aimed at expanding union plurality and activities, to take measures to ensure its registration as well as that of the ITUPSW. It requests the Government to keep it informed with respect to these remaining matters.*

### **Case No. 2907 (Lithuania)**

67. The Committee last examined this case which concerns violations of the right to strike in law and in practice at its March 2013 meeting [367th Report, paras 881–900, approved by the Governing Body at its 317th Session (March 2013)] on which occasion it invited the Government to engage in consultations with the social partners as regards the need to review the relevant provisions governing collective bargaining and requested the

Government as well as the complainant to provide information concerning the current status of collective bargaining negotiations in the company. The Committee further requested the Government to promote the negotiation of a dispute resolution mechanism in the event of disagreement in relation to any annual wage revision process foreseen in current or future collective agreements.

68. In a communication dated 29 January 2014, the Government indicates that a meeting was held on 3 September 2013 with the following social partners: the Ministry of Social Security and Labour, the Confederation of Lithuanian Trade Unions, the Union of Utenos alus workers, the trade union of JSC Svyturys-Utenos alus and the representative of the employer JSC Svyturys-Utenos alus. On that occasion, the conclusions and recommendations of the Committee were discussed, with the representative of the Confederation of Lithuanian Trade Unions submitting a project for the amendment of section 78(3) of the Labour Code and also highlighting the need to modify the conciliation procedures set out in the Labour Code. The representatives of the Ministry of Social Security and Labour also agreed that the Labour Code could be improved by determining fast and impartial mechanisms by which individuals or collective complaints could be examined. According to the Government, it was jointly decided by the participants to the meeting to initiate amendments to the Labour Code consisting, inter alia, in setting up a Labour Arbitration mechanism tasked with handling collective labour disputes, eliminating third-party court mechanism deemed ineffective in solving collective labour disputes, and assigning the function of hearing collective disputes in the public service to labour arbitration instead of the Government as the latter cannot be party and judge in those disputes.
69. The Government further indicates that, on 30 October 2013, a Member of Parliament submitted a draft law with a view to amending, among others, sections 71, 75, 78 and 81 of the Labour Code. Lastly, the Government, stressing that all the proposed amendments take into account the recommendations of the Committee and have met with the agreement of the social partners, asks the Committee to close the present case.
70. *The Committee takes note of the above information and in particular the Government's indication that a meeting bringing together social partners was held on 3 September 2013 during which the recommendations of the Committee were discussed as well as a number of amendment proposals to the Labour Code with a view to determining fast and impartial mechanisms through which collective disputes could be settled. The Committee specifically welcomes the general agreement that emerged between the social partners on the need to improve labour dispute resolution mechanisms.*
71. *The Committee further notes from the information provided by the Government in the framework of its annual reports on the application of ratified Conventions that the sections of the Labour Code dealing with collective labour disputes were indeed amended by Parliament on 15 May 2014. In this regard, the Committee notes with satisfaction that the restriction to declare a strike, pursuant to the recently adopted amendments, is not applicable when the negotiations provided for in the collective agreement (such as annual wage revision in this case) result in a disagreement of the parties (section 78(3) of the Labour Code). The Committee also notes the introduction of Labour Arbitration, a new mechanism for handling disputes relating to minimum services which is formed under the jurisdiction of the district court where the registered office of the enterprise is located (sections 71 and 75 of the Labour Code). It further notes with interest that, as a way of ensuring impartiality and neutrality, the claims put forward by workers in essential services are no longer settled by the Government, but fall under the remit of the Labour Arbitration (section 78(1) of the Labour Code).*

**Case No. 2637 (Malaysia)**

72. The Committee last examined this case, which concerns the denial of freedom of association rights to migrant workers, including domestic workers, in law and in practice, at its November 2012 meeting [see 365th Report, paras 101–104]. On that occasion, the Committee once again urged the Government to take the necessary measures, including legislative, to ensure in law and in practice that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. Additionally, the Committee urged the Government once again to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers so that they may fully exercise their freedom of association rights, and requested the Government to keep it informed of the progress made in this regard. Recalling the provisions of Convention No. 189 concerning decent work for domestic workers, in particular Article 3 with respect to freedom of association and the effective recognition of the right to collective bargaining of domestic workers, the Committee also invited the Government to consider ratifying Convention No. 189.
73. In a communication dated 2 October 2013, the Government expresses appreciation of the Office's offer of technical assistance, which was translated in a workshop conducted with the ILO's regional expert to discuss the three remaining core Conventions which Malaysia has yet to ratify. The Government indicates that even though it has yet to ratify Convention No. 87, Malaysia has always endeavoured to observe and respect the principle of freedom of association as outlined in the 1998 ILO Declaration. According to the Government, this is evidenced by the fact that under the Trade Unions Act 1959, both workers and employers, including foreign workers, have the right to unionize and be members of existing unions, which, in the Government's view, is very important to ensure greater protection and advancement of worker rights of all workers, including foreign workers. The Government further indicates that at the end of December 2012, 19,437 foreign workers were members of trade unions and that foreign workers, just like any other local workers, have the right to access local labour courts and the Industrial Court. The Government also states that Malaysia had ratified Convention No. 98, the spirit and intention of which are embodied in the Industrial Relations Act 1967, which protects the right of workers and employers to form, join or assist in the formation of their respective unions. The Government further indicates that its stand in respect of unionization of workers is reflected in the National Labour Policy, which recognizes the right of workers to form trade unions in order to promote positive work and productivity attitudes among the workforce and to enter into collective agreements bargaining in consonance with the labour laws of the country.
74. The Government further indicates that despite not having ratified Convention No. 189, it respects the rights of foreign domestic workers employed in Malaysia as demonstrated by the Government's collaboration with the Indonesian Government in relation to the employment of Indonesian domestic workers in Malaysia. The Government states that in 2011 both countries signed a Protocol to Amend the Memorandum of Understanding for recruitment and placement of Indonesian domestic workers, which protects Indonesian domestic workers by providing terms such as rest days, wages payment through bank account, competency training and passport to be kept by the domestic worker. According to the Government, this mechanism shows that the Government is serious in upholding and respecting the rights of foreign domestic workers.
75. *The Committee takes note of the above information provided by the Government. While appreciating the Government's collaboration with the Indonesian Government and the measures taken to address certain rights and welfare of Indonesian domestic workers, the Committee deeply regrets that despite its previous recommendations, no legislation or policy has been adopted to allow domestic workers to form and join organizations for the*



*defence of their occupational interests, nor has the association of migrant domestic workers been registered. The Committee is therefore obliged to reiterate its recommendation that the Government urgently take the necessary measures, including legislative, to ensure in law and in practice that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. The Committee invites once again the Government to avail itself of the technical assistance of the Office in this respect. It further urges the Government once again to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers so that they may fully exercise their freedom of association rights. The Committee requests the Government to keep it informed of all steps taken in relation to the rights of migrant domestic workers to form and join organizations for the defence of their occupational interests.*

### **Case No. 2756 (Mali)**

76. The Committee last examined this case at its March 2011 meeting, concerning the repeated refusal of the Government to nominate the Trade Union Confederation of Workers of Mali (CSTM) to the Economic, Social and Cultural Council, and to national tripartite consultation bodies in general. On that occasion, the Committee noted that the trade union landscape of Mali consisted of two trade union confederations, the Union Confederation of Workers of Mali (UNTM) and the CSTM, and that the Labour Code provided for the organization of professional elections in order to determine the percentage of representativeness of each trade union confederation. However, those elections had yet to be organized due in particular to disagreements over their funding and the voting method to be employed.
77. The Committee also noted that the Government continued to exclude the CSTM from the membership of the Economic, Social and Cultural Council through a November 2009 decree, whereas the previous two nomination decrees of 1999 and 2004, which had similarly excluded the CSTM, had been overturned by the Supreme Court on the grounds that the Government had abused its authority by obscuring trade union pluralism and denying the right of each union organization to have its say. While the Government justified the 2009 decree on the basis that, when issuing its ruling, the Supreme Court presumed the representativeness of the CSTM which had still not been proven under the Labour Code, it had nevertheless recognized that it had not made use of its prerogatives to designate the most representative organizations. Consequently, the Committee drew the Government's attention to the fact that, in the interest of promoting open and constructive social dialogue, it would be desirable to ensure a place for a range of voices based on objective and predefined criteria, rather than necessarily identifying a single organization with a view to granting it exclusive trade union representation. The Committee therefore requested the Government to amend Decree No. 09-608/P-RM of 12 November 2009 in order to include the CSTM in the list of representatives of public and private sector employees of the Economic, Social and Cultural Council, in accordance with the Supreme Court rulings, and in order to encourage plurality of views among representative organizations. Along those same lines of dialogue, the Committee urged the Government to take the necessary measures to enable the CSTM to participate in the tripartite consultation bodies in which it expressed interest. Lastly, the Committee expected the Government to organize the professional elections provided for in the Labour Code as soon as possible, keeping in mind the principles of freedom of association. It further requested the Government to keep it informed of the objective criteria employed, in consultation with the trade union organizations so as to determine their representativeness.
78. The Committee notes the communication dated 13 May 2015 from the CSTM, alleging that it has once again been excluded from the membership of the Economic, Social and Cultural Council by Decree No. 2015-0024/P.RM of 29 January 2015 (copy attached to the

complaint). *The Committee deeply regrets that, by adopting the 2015 decree, the Government had decided to disregard the Committee's prior recommendations, which were moreover similar to several decisions of the highest court of the country on the same matter.*

- 79.** *The Committee notes the report of the high-level Office mission to Mali which took place from 17 to 19 June 2015, at the request of the Government, to address the issue of the representative nature of professional organizations of workers. In this regard, the Committee notes that the mission met with all the national social partners and through discussions, it became clear that there was unanimous agreement that professional elections were the best means of assessing trade union representativeness and that they be organized as a matter of urgency.*
- 80.** *The Committee welcomes the Government's efforts to resolve the issue of trade union representativeness with the Office's assistance. Meanwhile, in the absence of unanimity among the parties concerned, the Committee believes that it is for the Government to make tangible progress on this issue by making relevant decisions. Consequently, the Committee expects the Government to take all necessary measures to organize the professional elections which have been unanimously requested by the social partners as soon as possible. The Committee urges the Government to keep it informed on any progress made on this matter.*
- 81.** *Meanwhile and in the absence of a defined level of representation, the Committee urges the Government to adopt an attitude of complete neutrality by amending Decree No. 2015-0024/P.RM of 29 January 2015 in order to include the CSTM in the membership of the Economic, Social and Cultural Council. In more general terms, in the interest of having harmonious professional relationships, the Committee expects the Government to allow the CSTM to participate in the tripartite consultation bodies in which it has expressed interest.*

### **Case No. 2916 (Nicaragua)**

- 82.** The Committee last examined this case at its June 2013 meeting and on that occasion it made the following recommendation [see 368th Report, para. 699]:

The Committee requests the Government to keep it informed of any rulings handed down with respect to the transfer and subsequent dismissal of trade union officials Mr William José Morales Peralta, Mr Randy Arturo Hernández López and Mr Orlando José Jiménez Hernández.

- 83.** In its communications of September 2013, March 2014 and December 2014, the Administrative Workers' and Teachers' Union of the Ministry of Education (SINTRADOC) enclosed a copy of the decision of the National Labour Appeals Tribunal (a court of second instance) ordering the reinstatement of the trade union official Mr Randy Arturo Hernández López and payment of outstanding wages. SINTRADOC states that while his reinstatement took place on 12 February 2014, proceedings before the labour courts for failure to pay the 13th salary owed to him in accordance with labour law are pending. SINTRADOC also emphasizes that the first-instance rulings concerning the actions brought by the trade union officials Mr William José Morales Peralta and Mr Orlando José Jiménez Hernández are currently pending.
- 84.** In its communication of 31 October 2014, the Government indicates that the Constitutional Chamber of the Supreme Court of Justice rejected the appeal for *amparo* (for violation of constitutional rights) submitted by Mr Orlando José Jiménez Hernández and Mr Randy Arturo Hernández López against the dismissal decision issued by the administrative

authority. The Government states, however, that, in conformity with the ruling of the National Labour Appeals Tribunal, on 12 February 2014 Mr Randy Arturo Hernández López was reinstated. The Government also encloses proof of payment of lost wages. Lastly, the Government requests that the SINTRADOC communications signed by Mr Orlando José Jiménez Hernández be dismissed as he is not registered as the Secretary-General of SINTRADOC.

85. *The Committee takes note of this information, in particular with regard to the reinstatement of trade union official Mr Randy Arturo Hernández López and requests the Government to keep it informed of any final rulings handed down concerning the industrial actions brought by the trade union officials Mr William José Morales Peralta and Mr Orlando José Jiménez Hernández. The Committee requests the complainant to provide information on the status of the appeal submitted to the labour courts for failure to pay Mr Randy Arturo Hernández López's 13th salary. Highlighting that the complaints were submitted on 5 December 2011, the Committee recalls that justice delayed is justice denied and firmly expects the judicial authority to issue a ruling soon regarding the outstanding issues mentioned.*

### **Case No. 2400 (Peru)**

86. The Committee last examined this case at its June 2013 meeting, when it asked the Government to inform it of the outcome of the cassation appeal filed by the trade unionist, Mr William Alburquerque Zevallos, relating to his dismissal from the enterprise CrediScotia Financiera SA (the appeals court had upheld the first instance ruling that had ruled against him) [see 368th Report, para. 85].
87. In its communication dated 16 January 2014, the Government states that, in a ruling dated 9 October 2013, the Standing Chamber of Constitutional and Social Law of the Supreme Court of Justice of the Republic upheld the cassation appeal, thus declaring the first instance ruling null and void and finding the appealed ruling of 31 January 2012 without merit. The Government adds that, on 27 December 2013, the decisions were returned to the originating court.
88. *The Committee takes note of this information. The Committee finds the excessive delay in the judicial proceedings regrettable and requests the Government to keep it informed of any ruling handed down by the originating court relating to the dismissal of the trade unionist, Mr William Alburquerque Zevallos, from the enterprise CrediScotia Financiera SA.*

### **Case No. 2966 (Peru)**

89. At its October 2013 meeting, the Committee made the following recommendations on the issues that remained pending [see 370th Report, para. 642]:

The Committee requests the Government to keep it informed of the outcome: (1) of the appeals filed by trade union official Mr Agustín Mendoza Champion, Culture and Training Secretary of the Trade Union of Registry Zone IX, Ica Zone, against the penalties of suspension imposed on him; and (2) of the appeal filed by Mr Holguín Nacarino, General Secretary of the Trade Union of Registry Zone V of Trujillo, against the administrative decision penalizing him, as well as on the outcome of the pending administrative disciplinary proceedings against him.

90. In its communication dated 7 February 2014, the Government states the following with regard to the appeals filed by Mr Agustín Hermes Mendoza Champion: (1) through decision No. 03407-2012-SERVIR/TSC, of 24 May 2012, the Civil Service Tribunal

dismissed an appeal by the trade union official against a penalty of 60 days' suspension without pay imposed in June 2011 for failing to obey the order to cease trade union activities; (2) through decision No. 00187-2013-SERVIR-TSC, of 27 February 2013, the Civil Service Tribunal upheld the appeal filed by the trade union official against the penalty of 30 days' suspension imposed in November 2010 and revoked that sanction; and (3) with regard to the constitutional appeal for protection (*amparo*) filed, through decision No. 23, of 19 June 2013, the Second Civil Court of Ica partially granted the request and declared the administrative disciplinary proceedings instituted to be null and void. Mr Mendoza Champion filed an appeal against this decision and the case was scheduled to be heard on 15 January 2014. Lastly, the Government states that Mr Mendoza Champion continues to be employed as public registrar in the Ica office and has not stopped his trade union activities. *The Committee requests the Government to keep it informed of the result of the appeal.*

91. With respect to the appeals filed by Mr Carlos Holguín Nacarino, the Government states that with regard to the penalty imposed for failing to comply with article 44, paragraphs (a) and (i) of the regulations of the National Superintendence of Public Registries (SUNARP), through departmental decision No. 393-2012-SUNARP/Z.R, of 9 July 2012, administrative responsibility was established and a penalty of 30 days' suspension without pay was imposed. Mr Holguín Nacarino challenged that decision before the Civil Service Tribunal and through decision No. 01045-2013-SERVIR/TSC the appeal was upheld and the decision to impose a sanction was revoked. The Government also states that with regard to the administrative disciplinary proceedings for failing to fulfil duties, departmental decision No. 716-2012-SUNARP/Z.R, of 6 December 2012, was issued, declaring that administrative responsibility had not been established. Finally, the Government states that Mr Holguín Nacarino is employed as an asset and stock control manager in the Trujillo office. *The Committee notes with interest this information.*

### **Case No. 2528 (Philippines)**

92. The Committee last examined this case at its October 2013 meeting [see 370th Report, paras 75–87], when it:
- reiterated its previous observation that cases of alleged extrajudicial killings should, due to their seriousness, be investigated, and where evidence exists prosecuted *ex officio* without delay;
  - expressed its expectation that the Government do its utmost to ensure that the investigation of the case of John Jun David et al. (Hacienda Luisita incident) is pursued thoroughly and expeditiously and that the guilty parties are brought to trial and convicted;
  - urged the Government to do its utmost to ensure the swift investigation and prosecution as well as a fair and speedy trial for the other ten cases still under investigation by the Department of Justice, the remaining on-trial cases, and the four cases referred back to the Philippine National Police Task Force Usig and the Commission on Human Rights (CHR) for further investigation and requested the Government to keep it informed of developments;
  - expressed its expectation that the totality of cases of murder and attempted murder brought forward by the complainant on 30 September and 10 December 2009, as well as June 2010, be reviewed by the Tripartite Industrial Peace Council, that the Government make every effort to ensure the speedy investigation, prosecution and judicial examination of those allegations and urged the Government to indicate without delay the progress made in this regard;

- requested 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;
  - expressed its firm expectation 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 be the subject of inquiries and investigations for evidence including forensic evidence;
  - requested 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;
  - requested the Government to indicate progress made in ensuring the full and swift resolution by the CHR of the remaining alleged cases of harassment and intimidation and keep it informed of the outcome;
  - reiterated its previous recommendations (e), (f) and (i) [see 364th Report, para. 970] as the Government had not provided any information in response to them.
- 93.** The Government sent information in communications dated 26 May 2014 and 12 February 2015. In its 26 May communication the Government indicates that on 5 July 2013 the court delivered a judgement on the case of extrajudicial killing of William Tadena, acquitting the accused as his guilt could not be established beyond reasonable doubt.
- 94.** The Government further indicates that the Inter-Agency Committee (IAC) on Extrajudicial Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty and Security of Persons that was created pursuant to Administrative Order No. 35 (AO 35) has already finished the evaluation of all reported cases of extrajudicial killings of trade union leaders and members. The Government indicates that AO 35 sets out the following criteria for extrajudicial killings:
- (a) the victim was either:
    - (i) a member of, or affiliated with, an organization, including political, environmental, agrarian, labour or similar causes; or
    - (ii) an advocate of above-named causes; or
    - (iii) a media practitioner; or
    - (iv) person(s) apparently mistaken or identified to be so.
  - (b) the victim was targeted and killed because of the actual or perceived membership, advocacy, or profession;
  - (c) the person(s) responsible for the killing is a state agent or non-state agent; and
  - (d) the method and circumstances of attack reveal a deliberate intent to kill.
- 95.** In addition to the four cases that were decided on in the Supreme Court (the cases of Teotimo Dante; Ricardo Ramos; Antonio Pantonial and William Tadena) the IAC considered six out of 35 remaining cases as extrajudicial killings based on the criteria cited above. The six cases that were identified as AO 35 cases include those of Diosdado Fortuna; Florante Collantes; Paquito Diaz; Abelardo Ladera; Samuel Bandilla and Tirso Cruz. They are now assigned to different IAC structures (namely special investigation

teams, special investigation team for unresolved cases and special oversight team) for case build-up and constant monitoring. The Government further indicates that the IAC is in the process of re-evaluating the other cases with reliance on recommendations of labour groups in order to determine which other cases may fall under AO 35. Cases not covered by AO 35 shall be handled and investigated through regular process of criminal investigation and prosecution. The Government further indicates that the alleged cases of harassment and abduction of trade union leaders and members are likewise under evaluation in the IAC.

- 96.** With regard to the dismissed workers of Nestlé Philippines Inc., against whom criminal charges were filed before the municipal trial court of Cabuyao and regional trial court of Biñan, Laguna, the Government recalls that the filing of these charges was deemed to be a form of harassment as the concerned workers were unable to obtain clearance from the National Bureau of Investigation (NBI) despite dismissal of the said cases and were consequently barred from employment locally and abroad; moreover certain dismissed workers such as Rene Manalo, Ariel Legaspi and Noel Sanchez allegedly experienced intimidation which they linked to their active participation in the 14 January 2002 strike. The Government indicates that pursuant to the ILO High Level Mission's recommendation, the Department of Labour and Employment took the following steps to ensure the clearing up of NBI records of the dismissed workers: representations were made to the Office of the Deputy Court Administrator to seek assistance in securing certificates of finality on the dismissed criminal cases against affected workers so that NBI clearances may be issued to the workers upon their application. The certificates of finality were forwarded to NBI for updating of records and positive results were reported.
- 97.** In its 12 February 2015 communication, the Government reiterates the information submitted previously and recalls that the National Tripartite Industrial Peace Council - Monitoring Body (NTIPC-MB) had previously adopted the recommended closure of the following extrajudicial killing cases: Edwin Bargamento; Manuel Batolina; Renato Pacaide; Antonio Mercado; Nenita Labordio; Alberto Teredano; Federico de Leon; Nilo Bayas; Mario Fernandez; Felipe Lapa; Charlie Solayao; Crisanto Teodoro; Dalmacio Cepeda; Francis Noel Desacula; Roberto dela Cruz and Emerito Lipio.
- 98.** *The Committee notes with interest the information provided by the Government on the creation of the IAC on Extrajudicial Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty and Security of Persons and its re-evaluation of unresolved cases with reliance on recommendations of labour groups. However, the Committee is bound to note with deep regret that nine years after the date of the complaint that initiated this case, and while the killings at issue occurred between 2001 and 2006, only two cases, namely those of Teotimo Dante and Antonio Pantonial, have been resolved with the conviction of those responsible, and that in no other case have the perpetrators been brought to justice and convicted. In particular, the Committee deeply regrets that the Government does not, provide any information on the eventual progress made in the investigation and resolution of the case of John Jun David et al., pertaining to the Hacienda Luisita incident, that on 14 November 2004 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 in relation to which nine police officers had previously been identified as suspects and recommended to be charged for multiple homicide; neither did it provide any information with regard to the investigation and eventual prosecution of the other alleged murders and attempted murders [see 359th Report, para. 1115 and 364th Report, para. 952]. The Committee once again recalls that in the event that judicial investigations into the murder and disappearance of trade unionists are rarely successful, it has considered it indispensable that measures be taken to identify, bring to trial and convict the guilty parties and has pointed out that such a situation means that, in practice, the*

guilty parties enjoy impunity which reinforces the climate of violence and insecurity and thus has an extremely damaging effect on the exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, para. 51]. The Committee therefore once again urges the Government to do its utmost to ensure expeditious investigation of all the unresolved cases of murder of trade union members and leaders, and to ensure that the perpetrators are brought to justice. It also once again 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.

99. The Committee further notes with deep regret that the Government has not provided any information on the progress made in the investigation, prosecution and trial of cases of abduction and enforced disappearance; and reiterates its firm expectation that the Government take expeditious and effective measures in this regard and keep it informed of the steps taken and the relevant court rulings as soon as they are handed down; and to provide information on the progress made in the adoption of the Bill concerning enforced and involuntary disappearances or any other relevant legislative measures.
100. The Committee notes with interest the information provided by the Government on the situation of dismissed workers of Nestlé Philippines Inc., against whom criminal charges were filed and who could finally obtain clearance from the NBI as a result of the steps taken by the Government pursuant to the ILO High Level Mission's recommendations. It once again requests the Government to provide information on the eventual progress made in ensuring the full and swift resolution by the CHR of the remaining alleged cases of harassment and intimidation.
101. In the absence of any information provided in response to its previous recommendations, the Committee once again requests the Government to keep it informed of the review by the Supreme Court and the CHR of the witness protection programme on the writ of amparo adopted in 2007; on any application of the Anti-Torture Act No. 9745 as well as of Act No. 9851 on crimes against international humanitarian law, genocide and other crimes against humanity.
102. The Committee further urges the Government to provide further specific information in relation to 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; 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. The Committee also requests the Government to communicate the texts of any judgments handed down in the above cases, together with the grounds adduced therefore; and to keep it informed of the outcome of the cases against 19 workers of Karnation Industries [see 364th Report, paras 966 and 970(i)(iii)].

### **Case No. 2652 (Philippines)**

103. The Committee last examined this case at its October 2013 meeting [see 370th Report, paras 88–92]. The present case concerns the alleged failure of the Government to secure the effective observance of Conventions Nos 87 and 98, with respect to several allegations of infringements of the rights to organize and collective bargaining on the part of Toyota Motor Philippines Corporation (TMPC), such as interference in the trade union's establishment and activities, refusal to bargain collectively despite the certification of the union as the sole and exclusive bargaining agent, anti-union discrimination through the dismissal of union members further to their participation in union activities and strike

action. During the last examination of the case, the Committee noted with satisfaction the final court judgment which had permanently dismissed, on 28 May 2013, the criminal cases against several Toyota Motor Philippines Corporation Workers' Association (TMPCWA) union officers and members, had directed the parties to live in peace and not to take any retaliatory action against each other, and had ordered the cancellation of any arrest warrants issued against the accused. Furthermore, the Committee understood that the complainant was addressing its claims (for reinstatement or payment of adequate compensation to approximately 100 workers) to the Department of Labor and Employment (DOLE), and trusted that the Government would continue to do its utmost to intercede with the parties with a view to reaching, in the near future, an equitable and mutually satisfactory negotiated solution in this longstanding case.

- 104.** In its communication dated 11 October 2014, the complainant states that in December 2013 and April 2014 it launched and conducted the “Shame on Toyota” campaign and held a series of protests aimed at pushing the company to respect the Committee’s recommendations. The complainant alleges that these campaigns resulted in a series of harassment incidents and threats against TMPCWA President, Ed Cubelo, that were most probably perpetrated by the company. The TMPCWA further alleges that, in March 2014: (i) people who introduced themselves as agents from the National Bureau of Investigation (NBI) visited Ed Cubelo’s house and menaced the trade union leader; (ii) other agents and police intelligence persons were seen conducting surveillance in some of the TMPCWA’s protest actions; and (iii) state forces from the Criminal Investigation Division (CID) visited Ed Cubelo’s house, talked to his family and left a message saying Ed Cubelo should report to the CID’s Office in the Makati Police station. The complainant indicates that, in response to the harassment, letters have been sent to DOLE and to the Department of Justice to inform them about the incidents and to seek help.
- 105.** In relation to the claim for reinstatement or payment of adequate compensation to the dismissed workers, the complainant asserts that DOLE, acting in line with the November 2012 and October 2013 recommendations, made genuine efforts to reach out to the company and to persuade it to cooperate in finding an adequate and equitable solution to the longstanding labour dispute but that despite these efforts, the company did not show any sign of cooperation and blatantly continued to ignore the Committee’s recommendations. Concerning the amount of compensation due to the dismissed workers, the complainant indicates that it communicated to DOLE its view that compensation should be granted to all 233 workers and should be based on indemnification according to the TMPCWA’s interpretation of the terms “equitable negotiated solution” and “adequate compensation” used in the Committee’s November 2012 recommendation.
- 106.** Concerning the dismissal of four union members arising out of an incident that occurred in June 2010, the complainant indicates that on 7 August 2014, the dismissed members filed a petition to the Supreme Court for review on certiorari of the decision and resolution of the Court of Appeals issued on 15 January 2014 and 2 June 2014, both favouring the company by validating the dismissal and declaring that there was no unfair labour practice on the respondent’s part.
- 107.** In its communication dated 12 May 2015, the Government indicates that most of the Committee’s recommendations and requests had already been addressed. In relation to the complainant’s claim for reinstatement or payment of adequate compensation to approximately 100 workers who had not previously accepted the compensation package offered by the company, the Government remarks that while the company has been firm that reinstatement is not possible since the Supreme Court has ruled with finality on the validity of the dismissal and non-entitlement to severance pay of the dismissed workers, it has offered financial assistance to the dismissed workers and out of the 233 dismissed union members, 158 have allegedly individually requested and accepted the assistance



package. The Government further asserts that it continuously engaged with both the union and the company, through DOLE, to search for an equitable and mutually satisfactory solution to the current dispute, pursuant to the Committee's October 2013 recommendation. The Government explains that initially the dismissed union members, through Ed Cubelo, requested the payment of a 1 billion Philippine peso (PHP) (US\$21,387,725) settlement package to compensate for the back pay and separation pay of all 233 dismissed workers and cost of litigations, while the company only manifested readiness to release the checks to those dismissed workers who had not previously received the assistance package, with the total amounting to more than PHP8 million (\$171,102). According to the Government, the union insisted that the offered assistance did not satisfy the Committee's recommendation as to the payment of "adequate compensation", proposed a reduced monetary package settlement of PHP600 million (\$12,832,635) and manifested the willingness to negotiate further. The Government also specifies that DOLE communicated the reduced proposal to the company but the management maintained that given the finality of the decision of the Supreme Court, their gesture of offering financial assistance to the dismissed workers should already be considered as satisfactory and urged DOLE to exert further efforts aimed at resolving the issue of financial assistance for the remaining 75 workers who had not previously claimed the assistance package.

- 108.** The Government further states that, aside from shepherding the discussions on the monetary settlement, DOLE also presented to both parties the idea of setting up a Livelihood Project that would benefit workers, where the company and DOLE shall defray the financial requirements of the same on a 50-50 basis, each providing an amount not exceeding PHP500,000 (\$10,694). Both the union and the company were open to the said proposal with some reservations on the company's part, stemming from the concern on how such a project would be managed to ensure that all affected workers benefit from it. The company expressed the belief that the management and the implementation of such a project should redound to the benefit of all concerned former employees and reiterated its openness in setting up the said Livelihood Project. In connection with this out-of-the-box settlement effort, the Government indicates that DOLE is currently trying to locate and communicate with the dismissed workers to verify their employment or livelihood and possible assistance to be extended. DOLE obtained information that 102 of the dismissed workers have found re-employment abroad after their separation and others are locally employed or self-employed. The Government assures the Committee that it is continuously exerting efforts to find out-of-the-box options for an equitable solution to this issue.
- 109.** *The Committee notes the detailed information provided by the complainant as well as the Government's reply. In relation to the claim for reinstatement or payment of adequate compensation to the dismissed workers who had not previously accepted the compensation package offered by the TMPC, the Committee welcomes the Government's out-of-the-box settlement initiative to set up a Livelihood Project equally financed by the Government and the company that would benefit all dismissed workers and invites the Government to keep it informed of any developments in this regard.*
- 110.** *Regarding the dismissal of four union members, two of which were union officials, arising out of an incident that occurred in June 2010, the Committee had previously observed that there was a divergence of views between the complainant and the company with respect to the legality and anti-union character of the dismissals. The Committee notes that on 15 January 2014 and 2 June 2014, the Court of Appeals confirmed the dismissals due to serious misconduct and that on 15 October 2014, the Supreme Court issued a resolution denying the petition for review on certiorari filed by the four workers against the decision and resolution of the Court of Appeals. In light of these judicial decisions and absent additional information from the complainant or the Government, the Committee, emphasizing that it does not have sufficient elements at its disposal to deduce an anti-union character of the dismissals, will not pursue the examination of this allegation.*

**111.** *Finally, the Committee expresses deep concern over the new allegations of harassment, intimidation and threats experienced by TMPCWA President, Ed Cubelo, especially the dispatch of persons who presented themselves as agents from the NBI to the President's house and a visit to his house from the CID forces. The Committee notes the complainant's view that the harassment incurred by the President is the result of the complainant organization's continued protest actions against the company, and observes with regret that the Government did not provide any information in this regard. The Committee firmly expects that the Government will conduct an expeditious investigation into these serious allegations and requests it to take all necessary measures to ensure that freedom of association may be exercised by the complainant, its members and officials, in a climate free from violence, harassment and threats of intimidation of any kind, and to keep it informed of the progress made in this regard.*

### **Case No. 2815 (Philippines)**

**112.** The Committee last examined this case at its November 2012 meeting [see 365th Report, paras 1259–1278]. At that occasion, it made the following recommendations:

- (a) With respect to Cirtek Electronics Corporation, the Committee:
  - (i) expects that the TTCEC will review the initial allegations of the complainant relating to the dismissals of three sets of trade union officials without further delay and once again requests the Government to provide detailed information with regard to the results of the conducted inquiry;
  - (ii) requests that, should it be found in the course of that inquiry that the abovementioned trade union officials were dismissed due to their exercise of legitimate trade union activities, the Government take the necessary steps to ensure that they are fully reinstated without loss of pay and keep it informed of any developments in this respect;
  - (iii) requests to continue to be kept informed of the final outcome of any relevant judicial or other proceedings and of all measures of redress taken;
  - (iv) requests to be informed whether, in the meantime, the collective bargaining agreement between the union and the management has been concluded, and, if not, expects that the Government will take measures to promote collective bargaining between the parties so that, in line with the decision of the Supreme Court, a collective bargaining agreement will be concluded in the near future either through negotiation or, if necessary, with the assistance of voluntary conciliation, mediation or arbitration; and
  - (v) urges the Government to ensure that the above inquiry examines the new allegations of anti-union interference and harassment as a matter of priority, and requests the Government to keep it informed of any developments in this respect.
- (b) With respect to Temic Automotive Philippines, the Committee:
  - (i) noting with interest the creation of an impartial Tripartite Team composed of members of the Regional Tripartite Monitoring Body-National Capital Region with the mandate to conduct a plant-level verification of the parties' claims, requests the Government to provide detailed information with regard to the conduct and outcome of such an inquiry;
  - (ii) requests that, should it be found in the course of the inquiry that the 28 dismissals were anti-union in nature and aimed at eliminating any union representation for the departments concerned, the Government take the necessary steps to ensure that the union members and officials concerned are fully reinstated without loss of pay, and keep it informed of any developments in this respect; and

- (iii) firmly expects that the principles enounced in its conclusions will be taken into account in practice, in a manner so as to ensure that, in the remaining still ongoing legal proceedings, the relevant bodies will effectively consider in their review the allegations put forward by the complainant that the outsourcing plan was actually aimed at eliminating any form of union in the departments concerned, and requests to be kept informed of the outcome of the pending legal proceedings.

**113.** The complainant provided follow-up information in communications dated 2 May 2013, 16 July 2013 and 14 January 2014.

#### Temic Automotive Philippines

**114.** With regard to the case of Temic Automotive Philippines, the complainant indicates that on 24 January 2013, the TAPIEU-FFW and the Temic Automotive Philippines Inc. (TAPI) management entered into a compromise agreement to settle all pending cases between the parties.

- The company will rehire Mr Dumolong in its EBS production department and he keeps the same salary without loss of seniority, rights and privileges.
- The union shall then withdraw all the cases pending before the national courts and the ILO.
- The Department of Labor and Employment (DOLE) will extend financial assistance to those workers of the two departments who availed themselves of the voluntary retirement packages (VRP), in a form of grant depending on the project proposal that they will submit, with the recommendation of the TAPIEU-FFW.

In conclusion, the complainant submits: “In consideration of the above agreement, and with the recommendation of the Union, may we submit that the complaint filed by the TAPIEU-FFW against the TAPI on violations of Conventions 87 and 98 particularly on the dismissal of Endrico Dumolong be deemed closed and terminated”.

#### Cirtek Electronics Corporation

**115.** With regard to the case of the Cirtek Electronics Corporation (CEC), the complainant organization alleges the continuation of threat and harassment of the Cirtek Employees Labour Union-Free Federation of Workers (CELU-FFW) leaders in its 16 July 2013 communication. The complainant describes one instance in which the HR manager of the CEC is said to have told Soledad A. Romero, President, and Ana Fernandez, Vice-President of the CELU-FFW, that they should stop acting as union leaders because she did not want anything to happen to them, and she knew that it had already happened to other leaders. Both union leaders complained to the investigator of Baranggay Loma, Biñan, Laguna, reporting serious threats against their lives. Copies of the blotter and the affidavit of Soledad Romero are attached to the communication. The complainant affirms that the HR manager continuously prods the officers of the union to resign from their jobs. Ana Fernandez was forced to resign as a result of the above threat. The complainant affirms that the HR manager was behind the illegal termination of previous sets of officers that are the subject of the complaint before the Committee. Two sets of the CELU-FFW presidents, Antoniette Eredilla and Victoria Tiptdas, and some of its officers, namely Lorena Montañez and Marivic Pinca, already resigned as a result of her instigations. According to the communication, the HR manager also took a strong stance to oppose the existence of the genuine union in the company.

**116.** With regard to the merger of the two unions and creation of the United Cirtek Employees Association (UCEA), the complainant recalls that, in the referendum on the merger, the

majority of the bargaining unit, 331 against 14, voted for the merger. Also a majority of 258 against 87 voted for retaining affiliation with the FFW. The complainant further indicates that practically nothing happened thereafter. All efforts to conduct elections of a new set of officers for the UCEU were foiled by the management. No constitution and by-laws were agreed on and, most importantly, no collective bargaining agreement was entered into between management and the workers. DOLE Regional Office No. IV-A which chaired and spearheaded the Tripartite Team for Cirtek Electronics Corporation (TTCEC) neither took any follow-up nor conducted any further actions to ensure that the merged group can move to the next level. The complainant alleges that the HR manager interfered in the meantime, reviving the UCEA by appointing Alma Tinay as President and other officers in the “hoax union”. DOLE Regional Office No. IV-A issued them a registration despite knowing and spearheading the TTCEC. It appears that the TTCEC has been a futile tool. At this instance, unless the SOLE herself directly takes action, it would appear there is no end to the trampling of the rights of the workers in Cirtek.

- 117.** In its 14 January 2014 communication, the complainant confirms the conclusion of the Memorandum of Agreement (MOA) among officers of the CELU-FFW and the “other group of employees in Cirtek who usurped the name of the UCEA” and the CEC represented by its President and other officers. DOLE Secretary Rosalinda Baldoz and Regional Director Zenaida Angara attested to the proceedings of the agreement. The complainant further confirms the holding of elections of UCEA officers on 26 October 2013 under the supervision of DOLE Regional Office No. IV-A. However, it alleges that Alvin Gonzales, Chairman of the Trade Federation for Metals, Electronics, Electrical and Other Allied Industries (TF4), and another representative of the FFW were isolated from observing the proceedings at the initiative of the HR officer of the company. They were forced to stay in the car the entire day until 2 a.m. the following day when the counting of the ballots ended. The DOLE representative could not do anything about the situation for alleged lack of jurisdiction on the matter. The election pushed through and the original group from the CELU-FFW won all the posts, from the president down to the 14 board members with a huge advance.
- 118.** The complainant further indicates that despite their victory, the newly elected officers of the union were subjected to continued harassment upon order of the abovementioned HR officer: in November 2013, the guards conducted a thorough search among the union officers and confiscated all the papers they were carrying in relation to union check-off and prohibited them from distributing them to all union members. According to the complainant, at the time of the communication harassment still continued at the plant level particularly because management was supporting the other group. That group who lost filed a baseless protest against the elections they freely participated in. The complainant indicates that it cannot help doubting that disputing the elections is a management-initiated action and is part of the harassment against the winning union officers who had the overwhelming mandate among the rank and file employees of the company.
- 119.** The complainant recalls that the agreement of 2 September 2013 requires the withdrawal of all cases, including the complaint filed before the ILO. However, in view of the situation described in the communication, it considers itself to be in a position to request only a conditional withdrawal of the complaint and states that, should the situation change for the better as regards the exercise of the union’s freedom of association and the right to collectively bargain at the plant level, and subject to the full recognition of the newly elected union officers and full compliance with the 2 September 2013 MOA, it would withdraw the complaint.
- 120.** In communications dated 2 May 2013, 26 September 2013 and 7 November 2013, the Government provided supplementary information.

## Cirtek Electronics Corporation

- 121.** With regard to anti-union practices in the CEC, the Government recalls in its 2 May 2013 communication that through the facilitation of a TTCEC, a new set of the CELU-FFW officers were elected and the FFW appointed CELU President, who was suspended from employment, was recalled. The Government further indicates that the final report of the TTCEC, submitted to the DOLE Secretary on 27 March 2012, found that the conduct of the CELU-FFW election of a new set of officers and registration of a new union disproved the alleged suppression of workers' rights at Cirtek; and that the series of TTCEC meetings facilitated the early termination of the case before the Supreme Court, as well as the early payment of monetary benefits to workers.
- 122.** The Government also provides information on the merger process of the two unions present at the plant, namely the CELU-FFW, and the Cirtek Electronics Corporation-Independent Labour Union (CED-ILU), into the UCEA. Recalling that in a referendum held on 26 October 2011, 331 of 345 employees voted for the merger, the Government indicates that the official registration of the UCEA stalled because of disagreement between the two combining unions on the constitution and by-laws. The DOLE regional office organized several meetings between them for discussing the issues, but none pushed through. The CELU-FFW insisted to push for ratification of the UCEA constitution and by-laws, but the CEC-ILU disagreed on union dues and other issues. The Chairman of the TTCEC suggested that the issues on the Constitution and by-laws be settled among the general membership. The CELU-FFW was amenable to the conduct of a certification election to settle the issue of representation.
- 123.** In its communication dated 26 September 2013, the Government indicates that on 2 September 2013, the CEC, the CELU-FFW and the UCEA entered into a MOA, a copy of which is attached to the communication. The agreed terms are as follows:
- i. The election of the new set of union officers of the merged unions which resulted into a single union now registered and known as United Cirtek Employees Association (UCEA) will be conducted on October 26, 2013 and supervised by DOLE Regional Office No. IV-A;
  - ii. The Constitution and By-Laws of UCEA shall be reviewed and ratified by the members of the union two weeks after the election of officers mentioned above;
  - iii. The new CBA concluded between CIRTEK and UCEA shall be subjected to a review to ensure that the provisions thereof are in accordance with the Labour Code of the Philippines and its Implementing Rules and Regulations and in no way has the new CBA resulted in diminution of existing benefits;
  - iv. The FFW Legal Centre shall continue to be the legal adviser of UCEA;
  - v. All cases filed by any party to this agreement against each other, including the petition for certification election pending before DOLE Regional Office No. IV-A, the unfair labour practice before the NLRC Regional Arbitration Branch No. IV-A and the ILO case filed by FFW shall be withdrawn;
  - vi. All outstanding issues and concerns affecting the employees and the company shall be discussed at the plant level through the immediate activation of the grievance machinery;
  - vii. The undersigned parties hereby commit to ensure that stable and harmonious labour-management relations shall be the cornerstone of a mutually beneficial management-union relationship at CIRTEK ELECTRONICS CORPORATION.

The Government concludes that with this agreement it is hoped that all the issues have been addressed and a good labour-management relationship will finally ensue. The DOLE, through Regional Office No. IV-A, shall monitor the parties' adherence to the MOA.

124. In a communication dated 7 November 2013, the Government indicates that, on 26 October 2013, in compliance with the agreement, the election of officers of the merged UCEA was conducted and states that the election of a new set of officers will set in motion the organizational review of the union constitution and by-laws and the provisions of their collective bargaining agreement. With this, the Government requests the closure of ILO Case No. 2815.

#### Temic Automotive Philippines

125. With regard to TAPI, the Government provides supplementary information in its 2 May 2013 communication. Recalling the creation of the Tripartite Team for Temic Automotive Philippines Inc. (TTTAPI) upon recommendation of the Committee, the Government indicates with regard to the fate of 28 workers affected by the outsourcing who had accepted the VRP that, at the first meeting of the TTTAPI, the representative of management gave an option to rehire the 28 in other positions. An agreement was reached that both union and management will prepare profiles of the 28. The DOLE-National Capital Region (NCR) conducted the profiling using the Computerized National Manpower Registry of Skills form used for displaced workers to assess their needs in terms of assistance and possible placement for wage employment and non-wage employment (i.e. livelihood and entrepreneurship). Accordingly, 11 are presently employed under the contractors of TAPI; three are self-employed; one is working in Makati; two cannot be contacted and 11 are unemployed. The DOLE shall extend livelihood grants to the 28 upon submission of their project proposal.
126. With regard to the case of Mr Endrico Dumolong who did not avail himself of the VRP, was dismissed for redundancy and whose case was pending before the Court of Appeals, the Government indicates that the DOLE-NCR scheduled a meeting with him to discuss possible solutions and amicable settlement in relation to his illegal dismissal case before the Court of Appeals. Two options were offered to him: the company would rehire him without regard to previous years of employment, but with payment of a separation package; or the company will absorb him with continuous employment in the EBS production department, without loss of seniority, rights and benefits, keeping the same salary, and without payment of a separation package. He preferred the second option, and agreed to withdraw his petition before the Court of Appeals. On 24 January 2013, a compromise agreement was signed between TAPI, the TAPI Employees Union (TAPIEU); TF4 and Mr Endrico Dumolong. A copy of the agreement is attached to the Government's communication. The trade unions have agreed to withdraw the cases before the Committee and the Supreme Court.
127. *The Committee takes note of the information provided by the Government and the complainant organization. With regard to Temic Automotive Philippines, the Committee welcomes the conclusion of a compromise agreement between the company, the trade unions and Mr Endrico Dumolong, in accordance with which Mr Dumolong will be rehired without loss of salary, rights and privileges. The Committee notes with interest the indication of the Government that, at the first meeting of the TTTAPI, the company gave an option to rehire the 28 workers affected by the outsourcing of warehouse and facilities departments in other positions and that the DOLE-NCR conducted the profiling of those workers with a view to providing them with grants upon submission of their project proposals. The Committee also notes that the complainant organization, in application of the abovementioned compromise agreement, submitted the request that the complaint filed by the TAPIEU-FFW concerning Temic Automotive Philippines Inc., on violations of Conventions Nos 87 and 98, particularly on the dismissal of Endrico Dumolong, be deemed closed and terminated.*

128. *The Committee takes fully into account the complainant organization's wish to withdraw the complaint concerning Temic Automotive Philippines Inc. Considering the concurrent information provided by the Government and the complainant and the reasons put forward to explain the withdrawal, the Committee observes that the complainant has expressed its wish in full independence and the complaint has become without object. Hence, the Committee concludes that the complaint concerning Temic Automotive Philippines does not require any further examination.*
129. *With regard to the CEC, the Committee welcomes the conclusion of the MOA between the company and the trade unions present at the plant in the presence of the Secretary of Labour and Employment and notes with interest that the agreement settled important issues concerning the election of officers of the UCEA, review and ratification of its constitution and by-laws, and review of the collective bargaining agreement between the UCEA and the company. The Committee notes that the agreement also required the withdrawal of all cases filed by all parties, including the present case before the Committee.*
130. *The Committee welcomes the conduct of elections of officers of the UCEA on the date required by the MOA under the supervision of the DOLE regional office representative and notes the indication of the complainant that the CELU-FFW candidates won all the positions. However, the Committee notes with concern the allegations of the complainant organization, according to which the management of the company subjected the newly elected officers to continuous harassment, including through searches, confiscation of papers related to union check-off and prevention of distribution of those papers among union members. The Committee also notes with concern the allegation of the complainant as to the interference of management into trade union affairs, through alleged support of the other group and its disputing the elections held in compliance with the MOA. The Committee observes that, in view of the situation of the union's freedom of association and the right to collectively bargain at the plant level, the complainant organization sees itself only in a position to request a conditional withdrawal of the complaint subject to the full recognition of the newly elected union officers and full compliance with the 2 September 2013 MOA.*
131. *Considering that the Committee has received no further information from the Government or the complainant organization with regard to the actual implementation of the MOA, and considering that despite the transmission of the allegations of anti-union practices at the CEC, the Government has not provided any additional information on the eventual steps taken to clarify and remedy the situation, the Committee, while noting with interest the steps taken by the Government to implement its recommendations, requests the Government and the complainant organization to provide it with any additional follow-up information on the developments between the union and the company and in particular to indicate whether any further acts of anti-union interference have been detected.*

### **Case No. 3037 (Philippines)**

132. *The Committee examined this case at its March 2014 meeting [see 371st Report, paras 766–813] when it requested the Government and the complainant to keep it informed as to the manner in which the Court of Appeals' decision of 7 October 2013 regarding the Trade Union Congress of the Philippines (TUCP) leadership dispute has been, and is being, applied. The Committee also requested the Government to keep it informed of the judicial developments in relation to the motions for reconsideration filed by the parties and expressed the firm expectation that the judicial proceedings will result in the final resolution of the abovementioned dispute in the very near future.*

133. In communications dated 26 May 2014 and 12 February 2015, the Government provided follow-up information. The Government indicates that, on 16 June 2014, the Court of Appeals denied the motion for partial reconsideration filed by Mr Umali, Mr Perez and Mr Diwa, claiming recognition as General Secretary and members of the General Council. The Court also amended its 7 October 2013 decision, annulling and setting aside the Bureau of Labour Relations' (BLR) 10 August 2010 order, as well as the 28 May 2013 and 5 July 2013 resolutions of the Secretary of Labor and Employment; affirming the declaration of invalidity of the elections of Mr Victorino Balais and Mr Jose Umali as the General Secretary, the invalidity of the 16 March 2012 Convention and the expulsion of Alyansa ng mga Manggagawa at Pilipino Organizado (AMAPO) and the Philippine Federation of Labor (PFL) from TUCP; declaring Mr Herrera and the other elective members of the Executive Board at the time of Mr Mendoza's resignation as the lawful officers of the TUCP in a hold-over capacity until their successors are duly elected and qualified; directing the members of the TUCP General Council to convene to elect a General Secretary who shall also serve in a hold-over capacity; directing the BLR to determine the members of the TUCP and Mr Herrera to submit the updated list of member unions to the BLR; ordering the TUCP General Council to call a Special Convention to elect the federation's new set of officers and affirming that President Herrera and the other petitioners shall have full access to TUCP offices.
134. The Government further indicates that a petition for certiorari was filed before the Supreme Court against the decision of the Court of Appeals. The Supreme Court dismissed that petition on 27 August 2014. On 2 December 2014, Mr Mendoza filed a motion for reconsideration, requesting that the case be referred to the Court en banc en consulta. The Government indicates in its communication that this motion is pending before the Court.
135. *The Committee notes with interest the information provided by the Government. The Committee observes that the Court of Appeals has annulled certain decisions of the administrative authorities with regard to the conflict within the TUCP while upholding others, and has instructed the BLR and the trade union about the measures that must be taken on the disputed matters. The Committee further notes that a certiorari petition and a motion for reconsideration of the abovementioned decision of the Court of Appeals were rejected by the Supreme Court. The Committee understands that this resolution of the Supreme Court marks the end of the judicial proceedings in this case and that the terms of the final and definitive judicial settlement of the leadership dispute within the TUCP are embodied in the 16 June 2014 ruling of the Court of Appeals. The Committee recalls that, while it has no competence to make recommendations on internal disputes in trade unions, it has consistently pointed out that judicial settlement is one of the appropriate means of resolving such disputes. In particular, the Committee has pointed out that judicial intervention would permit a clarification of the situation from the legal point of view for the purpose of settling questions concerning the management and representation of the trade union federation concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, para. 1124]. The Committee welcomes the final and definitive judicial resolution of the TUCP leadership dispute and considers that the case calls for no further examination.*

### **Case No. 2988 (Qatar)**

136. The Committee last examined this case, which concerns restrictions on the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing, to strike and bargain collectively, as well as excessive state control of trade union activities, at its March 2014 meeting [see 371st Report, paras 814–862]. On that occasion, the Committee made the following recommendations:



- (a) The Committee urges the Government to take the necessary measures without delay in order to amend the Labour Law (in particular through the revision of sections 3, 116, 119, 120, 123 and 130 and adoption of further enabling provisions) in accordance with the principles enunciated in its conclusions so as to give effect to the fundamental principles of freedom of association and collective bargaining. It expects that this labour reform process will include the full participation of the social partners. The Committee requests the Government to keep it informed of all measures taken or envisaged in this respect and reminds it that it may avail itself of the technical assistance of the Office.
- (b) Observing the Government's indication that migrant workers account for 93 per cent of Qatar's economically active population, the Committee urges the Government to eliminate any restrictions placed on the freedom of association rights of migrant workers.
- (c) The Committee requests the Government to provide:
  - a copy of the procedures regulating the formation, membership and activities of workers' organizations, adopted pursuant to the last sentence of section 116 of the Law; and
  - a copy of the Decision to which reference is made in section 127 of the Labour Law and to indicate the manner in which this is applied in practice.

**137.** In its communication dated 20 February 2015, the Government reiterates that the Labour Law sufficiently protects the right of workers to establish trade unions to defend their interests and for the purpose of representation in collective bargaining with employers, and that protection of trade union activity to this end is guaranteed by sections 122 and 145 of the Labour Law. According to the Government, labour organizations are granted complete independence to engage in activities relating to labour affairs, and national law provides for the right to adopt statutes and rules necessary to carry out the particular area of activity. The Government considers that it endeavours to ensure the right to work of all workers, whether nationals or migrants, that it follows a balanced policy of recruitment and employment of migrant labour and that it focuses on creating suitable conditions for workers to enable them to work safely and comfortably rather than on finding solutions to problems which have yet to arise. The Government refers to the recent development of labour market legislation and legislation concerning migrant workers in the area of entry, exit and residence, housing, wage protection and occupational safety and health, stressing that the Ministry collaborates and coordinates with the representatives of employees and employers on issues relating to their affairs. The Government also enumerates several measures taken since the last examination of the case to protect workers' rights such as awareness-raising initiatives, establishment of branch labour offices across the country to handle grievances, and development of the labour inspection department to improve enforcement. As regards benefiting from ILO technical assistance, the Government indicates that the Ministry of Labour and Social Affairs is already collaborating with the ILO to complete a draft strategy for proper employment. Furthermore, the Government supplies a copy of Decree No. 10 of 2006 of the Ministry of Civil Service Affairs and Housing publishing model statutes for labour organizations adopted under section 116(4) of the Labour Law (hereafter, Decree No. 10/2006) and states that no decision has yet been issued under section 127.

**138.** *The Committee takes due note of the information provided by the Government concerning the adoption of various legislative and other measures aiming at the protection of migrant workers. It regrets to note however that the recent legislative steps taken by the Government including amendments to the Labour Law, do not address the issues raised by the Committee in the area of freedom of association. With respect to the Government's statement that it focuses on creating suitable conditions for workers to enable them to work safely and comfortably rather than on finding solutions to problems which have yet to arise, the Committee recalls that freedom of association is one of the primary safeguards of peace and social justice. Noting the Government's previous indication that*

*social justice is enshrined in article 30 of the Constitution of the State of Qatar, which declares that the relation between workers and employers is based on social justice, the Committee further highlights the commitments made by ILO member States through the 2008 Social Justice Declaration to respect, promote and realize the fundamental principles and rights and work, with an emphasis on freedom of association and effective recognition of collective bargaining as particularly important to the attainment of the four strategic objectives of the ILO Decent Work Agenda. In view of the above, the Committee, highlighting the need to give effect to the fundamental principles of freedom of association and collective bargaining, once again urges the Government to take the necessary measures without delay to amend the Labour Law (in particular through the revision of sections 3, 116, 119, 120, 123 and 130 and adoption of further enabling provisions) in accordance with the principles enunciated in its previous conclusions [see 371st Report, paras 837–861]. It firmly expects that this labour reform process will benefit from the full participation of the social partners.*

- 139.** *Furthermore, noting that Decree No. 10/2006 supplied by the Government provides that the statutes of labour organizations (committees) shall conform to the annexed model statute, the Committee advises that any obligation on a trade union to base its constitution on a compulsory model (apart from certain purely formal clauses) would infringe the rules which ensure freedom of association. The case is quite different, however, when a government merely makes model constitutions available to organizations that are being established without requiring them to accept such a model. The preparation of model constitutions and rules for the guidance of trade unions, provided that there is no compulsion or pressure on the unions to accept them in practice, does not necessarily involve any interference with the right of organizations to draw up their constitutions and rules in full freedom [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, para. 384]. The Committee requests the Government to amend Decree No. 10/2006 so as to ensure that the model statute shall serve only as guidance.*
- 140.** *Moreover, the Committee considers that a number of provisions of the model statute annexed to Decree No. 10/2006, for example concerning the presence of a Ministry representative at meetings of the general assembly, pose a serious risk of interference by the public authorities. As regards specifically the Qatari nationality as a condition of union membership, the Committee notes that section 4 of the model statute provides that union members shall be Qatari, and that non-Qatari workers, while they may affiliate on condition that they are in possession of work permits and have worked in the country for at least five years, shall not have the right to vote, nominate candidates or attend general assemblies but only to select a representative to express their point of view to the board. With respect to this denial of fully fledged trade union rights to non-Qatari workers, the Committee reiterates that freedom of association should be guaranteed without discrimination of any kind based on nationality and again considers that such restriction on the right to organize prevents migrant workers from playing an active role in the defence of their interests, especially in sectors where they are the main source of labour. The Committee requests the Government to take all necessary measures to ensure that non-Qatari workers enjoy full freedom of association rights, including the amendment of section 4 of the model statute as well as section 116 of the Labour Law. It also asks the Government to supply copies of the decision referred to in section 127 of the Labour Law once adopted.*
- 141.** *The Committee urges the Government to keep it informed of all measures taken or envisaged in respect of the above, and reminds it that, within the framework of the ongoing collaboration with the ILO, it may avail itself of the specific technical assistance of the Office to bring national legislation and practice into full conformity with the principles of freedom of association.*

**Case No. 2892 (Turkey)**

142. The Committee last examined this case at its March 2014 meeting [see 371st Report, paras 926–936] when it requested the Government to renew its efforts, in consultation with the social partners, so as to bring Act No. 4688 into conformity with Convention No. 87 to ensure the right of judges and public prosecutors to establish trade unions to defend their occupational interests. It once again urged the Government to take the necessary measures to immediately register YARGI-SEN as a trade union organization of judges and prosecutors so as to ensure that it can function, exercise its activities and enjoy the rights afforded by the Convention to further and defend the interests of these categories of public servants. The Committee also once again urged the Government to institute an independent inquiry without delay into the alleged acts of anti-union discrimination through the imposed transfer of union leaders Dr Rusen Gültekin, Omer Faruk Eminagaoglu and Ahmet Tasurt, and should these acts be found to be of an anti-union nature to take appropriate remedial steps. The Committee requested the Government to keep it informed of the developments with regard to the measures undertaken in implementation of its recommendations.
143. In its communication dated 5 May 2014, the Government reiterates that according to sections 4 and 15 of Act No. 4688, judges and prosecutors cannot establish trade unions and the Labour Court of Ankara ruled that YARGI-SEN be dissolved in application of the said provisions. The Government indicates that the Supreme Court has upheld this ruling, and the Ministry of Labour and Social Security is now bound to implement the judgments in accordance with article 138 of the Constitution of the Republic of Turkey. The Government also indicates that the scope of section 15 of Act No. 4688 that excludes certain groups of public servants from the right to establish trade unions or be members thereof has been diminished as a result of legislative reform and judgments of the Constitutional Court. Law No. 6289, adopted on 4 April 2012, repealed parts of subparagraphs (c) and (j) of section 15 of Act No. 4688 that excluded “chief managers and their assistants of the workplaces employing 100 and more public servants” and “private security staff of public institutions and organizations”. In addition to those legislative amendments, the Constitutional Court issued a judgment published in the *Official Gazette* dated 12 July 2013 that allowed civil servants in the Ministry of National Defence and the Turkish armed forces to join trade unions. With regard to the allegation of anti-union acts, the Government refers to the second paragraph of section 18 of Act No. 4688, where the law states that the public employer cannot relocate workplace trade union representatives, as well as at the district and provincial level representatives and union managers, “unless the fact is clearly and precisely indicated”. The Government states that this legal protection is reflected in the circulars of the Prime Ministry in order to protect the right to organize, to avoid restricting the freedom of organization and to provide sufficient protection against discrimination. The Government concludes that the entity established by judges, prosecutors or those considered to be members of these professions under Act No. 4688 cannot be incorporated, and that those professionals cannot establish trade unions and cannot be members of trade unions.
144. *The Committee takes note of the information provided by the Government. The Committee deeply regrets that despite its previous recommendations, the Government reiterates that in accordance with the legislation in force, judges and prosecutors are not entitled to establish trade unions or be members thereof and maintains that the Ministry of Labour and Social Security is bound to comply with the judgment ordering the dissolution of YARGI-SEN. The Committee notes with deep concern that subparagraph (b) of section 15 of Act No. 4688 remains in force and continues to deny the judges’ and prosecutors’ right to organize. The Committee is hence bound to note that the reforms undertaken have fallen short of bringing Act No. 4688 into harmony with principles of freedom of association with regard to judges and prosecutors. The Committee firmly expects that the Government*

*renew its efforts, in consultation with the social partners so as to bring Act No. 4688 into conformity with Convention No. 87 with regard to the organizational rights of judges and public prosecutors and invites the Government to avail itself of the technical assistance of the Office in this respect, if it so desires. The Committee also expects that the Government take the necessary measures to register YARGI-SEN as a trade union organization of judges and prosecutors, and requests the Government and the complainant organization to keep it informed of the developments in this regard.*

- 145.** *The Committee notes with concern that, despite its repeated recommendations to this effect, no information has been provided by the Government as to the conduct of an independent inquiry into alleged acts of anti-union discrimination through imposed transfer of YARGI-SEN leaders Dr Rusen Gültekin, Omer Faruk Eminagaoglu and Ahmet Tasurt. The Government merely refers to section 18 of Act No. 4688 that prohibits the relocation of trade union representatives and managers “unless the fact is clearly and precisely indicated”. The Committee recalls that all protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 781]. Protection against acts of anti-union discrimination is particularly desirable in the case of trade union officials in order to allow them to perform their trade union duties in full independence and to ensure that the workers’ organizations effectively have the right to elect their representatives in full freedom. The importance of this protection requires that allegations of acts of anti-union discrimination against trade union officials and leaders be promptly and effectively investigated so that, if they are found to be grounded, effective remedial steps can be taken. In view of the foregoing, the Committee firmly expects the Government to institute an independent inquiry into the alleged anti-union acts without further delay, to indicate the current status of the union leaders and to keep it informed of the outcome of the inquiry and the follow-up measures taken. The Committee also invites the complainant organization to provide information on these matters.*

### **Case No. 3011 (Turkey)**

- 146.** The Committee last examined this case at its June 2014 meeting [see 372nd Report, paras 619–651], when it welcomed the agreement reached by the bipartite commission composed of representatives of Hava-İş and Turkish Airlines (THY) on 19 December 2013 for the reinstatement of the vast majority of dismissed workers, and requested the Government to make every effort to ensure, if this is not already the case, that the dismissed workers be swiftly and effectively reinstated in their jobs under the terms and conditions prevailing prior to their dismissal with compensation for lost wages and benefits. The Committee also requested the Government to review, together with the social partners, section 58(2) of Act No. 6356 and article 54(1) of the Turkish Constitution, so as to ensure that lawful industrial action is no longer limited to strikes linked to a dispute during the collective bargaining process. In view of the alleged excessiveness of fines provided for in section 78(1) of Act No. 6356, the Committee requested the Government to consider reviewing the system of fines in line with its conclusions, in consultation with the social partners. As regards the allegations of excessive police presence during the strike called by Hava-İş on 15 May 2013, the Committee deeply regretted that the Government had not submitted any response and urged it to provide observations without delay. With regard to the alleged recourse to use of labour drawn from outside the undertaking to replace the strikers, the Committee requested the Government to provide a copy of the decision of the Appeal Court, together with information on the reasons given for reversing the ruling of the Istanbul Labour Court.

147. In a communication dated 15 September 2014, the International Transport Workers' Federation (ITF), one of the two complainant organizations, indicated that as of 15 September 2015, 322 dismissed workers were reinstated in their original jobs, but with loss of seniority and no back pay. The ITF also states that the THY refused to reinstate 25 workers, claiming that their dismissals were grounded on disciplinary offences and bore no relation with the protest action. The ITF indicates that Hava-İş, the other complainant organization, contests this claim of the employer and continues to call for the reinstatement of these 25 workers. The ITF informs the Committee that five dismissed workers chose not to return to the THY following agreement for their reinstatement. The ITF adds that the Turkish Government has so far not taken any steps to revise Act No. 6356 in accordance with the recommendations of the Committee.
148. In a communication dated 30 January 2015, the Government, responding to the communication of the ITF, reiterates that a commission of six, in which the THY and Hava-İş each had three representatives, looked into the cases of 305 dismissed workers and decided to reinstate 256. Later the commission also reinstated 33 union members out of 39 working in Technical Co. at the time of the collective negotiations. The Government also reiterates that the parties reached an agreement that some of the union members could not be reinstated due to their disciplinary action. The Government states that the Ministry of Labour and Social Security (MoLSS) is assessing claims of severance loss presented by reinstated workers, that the MoLSS is opening negotiation channels, uses tripartite dialogue mechanisms and plays an active role in the resolution of the conflict. With regard to the reviewing of section 58(2) of Act No. 6356 and article 54(1) of the Constitution, the Government reiterates that the subsection of article 54(1) of the Constitution that contained a prohibition on politically motivated strikes has been repealed and that Act No. 6356 does not contain such prohibition either. The Government further emphasizes that in the preparation of Act No. 6356, social dialogue mechanisms have been used effectively in accordance with ILO Convention No. 144, and as a result of this dialogue all provisions in previous laws allowing for imprisonment sanctions were revoked and replaced by provisions imposing administrative fines.
149. *The Committee welcomes the effective reinstatement of the great majority of dismissed workers. However, it notes with concern the information provided by the ITF according to which 322 reinstated workers have lost seniority and back pay. The Committee notes with interest the observations of the Government on the role of the MoLSS in assessing and channelling the severance loss claims of the reinstated workers, and recalls that in this case and many other cases of dismissal of trade unionists on the grounds of their trade union membership and activities, the Committee has requested the Government to ensure that the persons in question are reinstated in their jobs without loss of pay [see 372nd Report, Case No. 3011, paras 647 and 651(a)]. The Committee once again requests the Government to ensure that the reinstated workers have effectively regained their jobs under the same terms and conditions prevailing prior to their dismissals, with compensation for lost wages and benefits and to keep it informed of the progress made in this regard.*
150. *With regard to the workers who were not reinstated on the grounds that their dismissals were for disciplinary reasons unrelated to the protest action, the Committee notes a divergence between indications provided by the complainant organization and the Government: the complainant maintains that Hava-İş rejects the view that these dismissals were unrelated to the trade union activities of the workers concerned (who according to the ITF are 25) and calls for their reinstatement, while the Government maintains that an agreement was reached between the company and the union that some of the workers could not be reinstated due to their disciplinary action. The Committee requests the Government to carry out independent investigations to determine the grounds for the 25 dismissals in question and, if it finds that they constitute anti-trade union acts, to take*

*measures to ensure the reinstatement of the workers concerned and to keep it informed of the measures taken.*

- 151.** *With regard to its request that section 58(2) of Act No. 6356 and article 54(1) of the Constitution be reviewed so as to ensure that lawful industrial action is no longer limited to strikes linked to a dispute during the collective bargaining process, the Committee notes that the Government reiterates that the constitutional and legal prohibitions of politically motivated strikes, solidarity strikes and general strikes have been repealed and Act No. 6356 does not replicate them. The Committee understands that the said provisions do not expressly prohibit other types of industrial action. However, it notes that they do restrict lawful strikes to disputes during collective bargaining negotiations. The Committee is bound to note that such a restriction cannot but affect the exercise of the right to strike in a broader context. Recalling that the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement and that workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 531], the Committee once again requests the Government to, in consultation with the social partners, review the provisions in question in order to bring them into conformity with the principles of freedom of association.*

\* \* \*

- 152.** 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>
1787 (Colombia)	March 2010	June 2014
2096 (Pakistan)	March 2004	March 2011
2362 (Colombia)	March 2010	November 2012
2434 (Colombia)	March 2009	–
2595 (Colombia)	June 2009	October 2013
2602 (Republic of Korea)	March 2012	March 2015
2603 (Argentina)	November 2008	November 2012
2654 (Canada)	March 2010	March 2014
2684 (Ecuador)	June 2014	–
2715 (Democratic Republic of the Congo)	June 2014	–
2750 (France)	November 2011	March 2014
2755 (Ecuador)	June 2010	March 2011
2758 (Russian Federation)	November 2012	June 2015
2775 (Hungary)	June 2011	June 2015
2780 (Ireland)	March 2012	–
2797 (Democratic Republic of the Congo)	March 2014	–
2820 (Greece)	November 2012	–
2850 (Malaysia)	March 2012	June 2015
2870 (Argentina)	November 2012	June 2015
2871 (El Salvador)	June 2015	–
2872 (Guatemala)	November 2011	–

Case	Last examination on the merits	Last follow-up examination
2896 (El Salvador)	June 2015	–
2925 (Democratic Republic of the Congo)	March 2014	–
2934 (Peru)	November 2012	–
2947 (Spain)	March 2015	–
2973 (Mexico)	October 2013	–
2998 (Peru)	March 2015	–
3004 (Chad)	June 2015	–
3010 (Paraguay)	June 2015	–
3022 (Thailand)	June 2014	–
3041 (Cameroon)	November 2014	–
3043 (Peru)	March 2015	–
3063 (Peru)	June 2015	–
3066 (Peru)	June 2015	–
3085 (Algeria)	June 2015	–
3105 (Togo)	June 2015	–

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

**154.** In addition, the Committee has received information concerning the follow-up of Cases Nos 1865 (Republic of Korea), 1962 (Colombia), 2086 (Paraguay), 2153 (Algeria), 2173 (Canada), 2341 (Guatemala), 2430 (Canada), 2434 (Colombia), 2488 (Philippines), 2533 (Peru), 2540 (Guatemala), 2583 (Colombia), 2656 (Brazil), 2667 (Peru), 2678 (Georgia), 2699 (Uruguay), 2700 (Guatemala), 2706 (Panama), 2708 (Guatemala), 2710 (Colombia), 2716 (Philippines), 2719 (Colombia), 2725 (Argentina), 2745 (Philippines), 2746 (Costa Rica), 2751 (Panama), 2752 (Montenegro), 2763 (Bolivarian Republic of Venezuela), 2768 (Guatemala), 2788 (Argentina), 2789 (Turkey), 2793 (Colombia), 2807 (Islamic Republic of Iran), 2816 (Peru), 2827 (Bolivarian Republic of Venezuela), 2833 (Peru), 2840 (Guatemala), 2852 (Colombia), 2854 (Peru), 2856 (Peru), 2860 (Sri Lanka), 2883 (Peru), 2895 (Colombia), 2900 (Peru), 2915 (Peru), 2917 (Bolivarian Republic of Venezuela), 2924 (Colombia), 2929 (Costa Rica), 2937 (Paraguay), 2946 (Colombia), 2947 (Spain), 2952 (Lebanon), 2953 (Italy), 2954 (Colombia), 2960 (Colombia), 2962 (India), 2964 (Pakistan), 2976 (Turkey), 2979 (Argentina), 2980 (El Salvador), 2981 (Mexico), 2985 (El Salvador), 2992 (Costa Rica), 2995 (Colombia), 2998 (Peru), 2999 (Peru), 3002 (Plurinational State of Bolivia), 3006 (Bolivarian Republic of Venezuela), 3013 (El Salvador), 3020 (Colombia), 3021 (Turkey), 3024 (Morocco), 3026 (Peru), 3033 (Peru), 3036 (Bolivarian Republic of Venezuela), 3039 (Denmark), 3054 (El Salvador), 3057 (Canada), 3058 (Djibouti), 3070 (Benin), 3077 (Honduras) and 3084 (Turkey), which it will examine at its next meeting.

CASE NO. 2743

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

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

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

- 155.** The Committee last examined this case at its March 2013 meeting, when it presented an interim report to the Governing Body [see 367th Report, approved by the Governing Body at its 317th Session (March 2013), paras 153–162].
- 156.** The Confederation of Argentine Workers (CTA) sent additional information in a communication of May 2013.
- 157.** The Government sent its observations in communications of 30 May 2013, September 2013, February 2014 and 27 May 2015.
- 158.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. Previous examination of the case**

- 159.** In its previous examination of the case at its March 2013 meeting, the Committee made the following recommendations [see 367th Report, para. 162]:
- (a) Regarding the alleged intervention and violent repression by the federal police of Argentina aimed at preventing the installation of a protest stand outside the INDEC entrance, on 22 August 2007, the Committee again requests the Government to send its observations on the matter without delay.
  - (b) The Committee requests the Government to inform it of the outcome of the ongoing court proceedings against the ATE delegate Mr Luciano Osvaldo Belforte.  
  
[In its initial conclusions, the Committee made reference to legal proceedings concerning defrauding the public administration (see 360th Report, paras 219 and 223(c)).]
  - (c) Regarding the alleged dismissal of 13 workers (whose names the Committee requested from the complainant) from the Consumer Price Index and Continuous Household Survey Department, on 1 November 2007, for having participated in meetings and direct action organized by the trade union, the Committee once again requests the CTA to send the names of the workers who were allegedly dismissed without delay so as to enable the Government to send concrete information on the allegations.



## B. Further information from the complainant

160. In a communication of May 2013, the CTA names the 13 workers who were allegedly dismissed and states that the Government knew of them, as they were listed in an appendix to the document signed on 8 November 2007, in the context of the dispute settlement committee of the National Institute of Statistics and Censuses (INDEC), between the Office of the Cabinet of Ministers, the Ministry of Economy and Production, and the Association of State Workers (ATE).

## C. The Government's reply

161. In its communication dated 30 May 2013, the Government submits the report of the Office of the Superintendent of Metropolitan Security of the federal police force on the events of 22 August 2007 concerning the actions of the federal police infantry to prevent the installation of a protest stand outside the INDEC entrance. The report outlines the investigatory proceedings in a case characterized as "assault on and resistance to authority". The Government states that the investigation found that it was the intervening law enforcement officers who were attacked. The Office of the Superintendent's report gathers officers' statements that when the police informed the protesters that they could not set up their stands because they did not have the necessary authorization, a riot ensued, during which the protesters began to attack the police officers. As a result, the report states that a number of officers sustained various types of injury and the infantry had to intervene to restore order. The Government informs the Committee that the case is being handled by the Investigating Prosecutor's Office, which will determine the responsibility of the relevant parties.

162. In its communication of February 2014, the Government encloses the INDEC report on the ongoing cases against Mr Luciano Osvaldo Belforte, an ATE delegate. INDEC alleges that it has been established that Mr Belforte committed fraud against the public administration by being absent without authorization and signing documents as if he had been performing services, for which he received compensation for census hours and overtime. In relation to the proceedings against Mr Belforte for fraud, INDEC informs the Committee that the criminal court concluded the case without a conviction and that the decision not to prosecute Mr Belforte is final. In its communication dated 27 May 2015 in relation to the second case against Mr Belforte seeking to revoke his trade union immunity, the Government indicates that the proceedings are pending before the National Labour Appeals Chamber.

163. In its communication of September 2013, the Government submits a report by INDEC noting that the State complied with the agreement of 8 November 2007 establishing the continued employment of the 13 workers named by the complainant who had allegedly been dismissed. INDEC indicates that the workers in question were not dismissed and are currently under contract, working for the Ministry of Economy and Public Finance.

## D. The Committee's conclusions

164. *With regard to recommendation (a) from its previous examination of the case (on allegations concerning the events of 22 August 2007, the intervention and violent suppression by the federal police infantry to prevent the installation of a protest stand outside the INDEC entrance), the Committee observes that, according to the investigation conducted by the Government, after informing the trade unionists that they could not set up stands without authorization, the law enforcement officers were attacked by the protesters, which resulted in several officers sustaining injuries. The Committee wishes to recall that the principles of freedom of association do not protect abuses consisting of criminal acts*

while exercising protest action. The Committee notes that the case is before the judge of the Investigating Prosecutor's Office, who will determine the responsibilities. The Committee expects that the allegations of violent repression by the federal police of trade unionists who were setting up a protest stand will be brought to the attention of the judge so that they may be considered, and requests the Government to keep it informed of the outcome of the proceedings.

**165.** *With regard to recommendation (b) from the previous examination of the case (outcome of the legal proceedings against the trade unionist Mr Belforte), the Committee notes that the criminal proceedings concerning the defrauding of the public administration were concluded without a conviction against Mr Belforte. With regard to the proceedings seeking to revoke Mr Belforte's trade union immunity, the Committee notes that the case is pending before the National Labour Appeals Chamber, and requests the Government to keep it informed of the outcome.*

**166.** *With regard to recommendation (c) of the previous examination of the case (allegations concerning the dismissal of 13 workers), the Committee duly notes the information provided by the Government that the 13 workers in question are under contract, in accordance with the agreement of 8 November 2007 concerning their continued employment.*

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

**167.** *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 keep it informed of the outcome of the proceedings before the judge of the Investigating Prosecutor's Office concerning the allegations of attacks on police officers by trade unionists who were setting up a protest stand at the INDEC entrance. The Committee expects that the allegations of violent repression of the said trade unionists by the federal police will be brought to the attention of the judge so that they may be considered.*

*(b) The Committee requests the Government to keep it informed of the outcome of the ongoing proceedings seeking to revoke the trade union immunity of the ATE delegate, Mr Luciano Osvaldo Belforte, before the National Labour Appeals Chamber.*

CASE No. 3046

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

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

***Allegations: The complainant organization  
alleges that workers in the municipal public  
sector have no scope for collective bargaining***

- 168.** The complaint is contained in a communication dated 10 September 2013 from the Confederation of Municipal Workers of Argentina (CTM).
- 169.** The Government sent its observations in communications dated 22 May and 29 October 2014 and 27 May 2015.
- 170.** 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 complainant's allegations**

- 171.** In its communication of 10 September 2013, the CTM alleges that workers in the municipal public administration have no scope for collective bargaining, in violation of Convention No. 154. The CTM argues that this lack of collective bargaining in the municipal administration is the result of the CTM being excluded from tripartite consultation and social dialogue. The CTM also alleges that the exclusion of municipal workers from the scope of the legal provisions governing labour relations and collective bargaining obstructs their access to the guarantees provided by minimum protection floors established by international labour standards. The CTM indicates that since it was established in December 2005 it has unsuccessfully taken various actions and filed complaints with the municipal, provincial and national administrations with a view to establishing collective bargaining for workers in municipal administrations.

**B. The Government's reply**

- 172.** In its communications of 22 May and 29 October 2014 and 27 May 2015, the Government states that it has not violated the provisions of Convention No. 154 and denies that municipal workers have in any way been excluded from the scope of the legal provisions governing labour relations or that any restriction has been placed on their access to the guarantees provided by minimum protection floors established by international labour standards. The Government observes that the complainant has not provided any details with regard to the municipalities where there is supposedly no collective bargaining. Furthermore, it emphasizes that, under the federal structure of the Argentine Republic, provinces and municipalities have a great deal of autonomy. Hence, the general complaint presented by the complainant comes within the scope of the autonomy of the municipalities. The Government also underlines the complexity of the communal structure of the country, which includes over 2,200 entities, and the multiplicity of forms that can be used to implement social dialogue, through collective agreements or other arrangements.

The Government also refers to the Committee's comments and those of the Committee of Experts concerning the need to find a fair and reasonable compromise between the need to preserve the autonomy of the parties in collective bargaining and the duty of the authorities to take the necessary steps to overcome budgetary difficulties. In view of the above, the Government considers that the complainant needs to specify the municipalities where the workers do not have access to collective bargaining. In contrast, as an example of social dialogue in the municipal sphere, the Government cites the experience of the province of Buenos Aires, the laws of which promote collective bargaining in the municipalities and grant powers to the ministerial authorities to facilitate the conclusion of agreements. In the aforementioned province, various municipalities have adopted the system of collective bargaining established by the provincial legislation. Lastly, the Government emphasizes its willingness to mediate in the institutional dialogues of the various federal collaborative bodies and to assist the municipalities that have not yet made use of any collective bargaining mechanisms, with a view to improving the application of Convention No. 154.

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

- 173.** *The Committee observes that the complainant organization alleges that workers in the municipal public administration have no scope for collective bargaining, in violation of Convention No. 154, and asks for collective bargaining to be implemented for workers in the municipal administration. The complainant considers that this lack stems from the CTM being excluded from tripartite consultation and social dialogue, despite the action it has taken and the complaints filed with the municipal, provincial and national administrations. Furthermore, the Committee observes that the Government denies that there has been any violation of Convention No. 154 or that municipal workers have in any way been excluded from the scope of the legal provisions governing labour relations, indicating that the issue raised in the complaint comes within the scope of the autonomy of the municipalities and stating that in order to address the allegations of the CTM it would be necessary to have details of the municipalities affected. The Government underlines as an example of social dialogue in the municipal sphere the experience of the province of Buenos Aires, referring to the provincial legislation that promotes collective bargaining in the municipalities and indicating that various municipalities in this province have adopted the legal system of collective bargaining.*
- 174.** *The Committee observes that collective bargaining in the local administrations is a reality at least in the case of the province of Buenos Aires and that the issues raised by the complainant appear to be limited to certain provinces. The Committee appreciates the Government's offer to facilitate collective bargaining in municipalities where it is not yet used and invites the Government to encourage dialogue between the provincial and municipal authorities, the CTM and the other most representative trade union organizations of public employees, with a view to promoting the full application of Convention No. 154 in its respective spheres. In this context, the Committee invites the complainant organization to provide more information to the Government on the municipalities where municipal employees have no access to collective bargaining. The Committee invites the Government to keep it informed of all progress made in this regard.*

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

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

*Appreciating the Government's offer to facilitate collective bargaining in municipalities where it is not yet used, the Committee invites the Government to encourage dialogue between the provincial and municipal*

*authorities, the CTM and the other most representative trade union organizations of public employees, with a view to promoting the full application of Convention No. 154 in its respective spheres. The Committee invites the complainant organization to provide more information to the Government on the municipalities where municipal employees have no access to collective bargaining and invites the Government to keep it informed of all progress made in this regard.*

CASE NO. 3075

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

**Complaint against the Government of Argentina  
presented by  
the Single Trade Union of Port Administration Workers  
(SUTAP)**

*Allegations: The complainant organization alleges the illegal administrative revocation of its representative trade union status and delays in the processing of its appeal to the judicial authorities*

- 176.** The complaint is contained in a communication dated 20 May 2014 from the Single Trade Union of Port Administration Workers (SUTAP).
- 177.** The Government sent its observations in communications dated November 2014 and 3 March 2015.
- 178.** 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**

- 179.** In its communication of 20 May 2014, the complainant organization alleges that administrative action in 1989 resulted in it being unlawfully deprived of the representative trade union status that had been conferred on it in 1987 by Ministry of Labour Decision No. 390/87. That decision had been appealed against by another union, the Railways Union (UF), and in 1989 the Ministry of Labour issued new Decision No. 165/89 revoking Decision No. 390/87 and granting representative trade union status to the UF. SUTAP appealed against Decision No. 165/89 but the Ministry of Labour took 15 years to refer it to the judicial body, the National Labour Appeals Chamber (CNAT), without it being possible to ascribe that delay to the complainant. SUTAP also objects to the fact that there has still been no final judicial ruling on its claim for restitution of its representative trade union status.
- 180.** SUTAP alleges that under national law (section 56 of the Trade Unions Act) and also Article 4 of Convention No. 87 and the principles of freedom of association (specifically, the prohibition on suspending or dissolving organizations by administrative authority), the

administrative authority had no power to revoke, cancel or suspend its representative trade union status and that such power belonged to the judicial body. Furthermore, the complainant alleges the lack of representativeness of the UF with regard to the workers employed by the port administration and indicates that in 1989, citing the data contained in Decision No. 165/89 itself, SUTAP had a greater number of contributing members (more than 10 per cent more, a total of 1,986 compared with the UF total of 1,795).

**181.** The complainant also objects that during the processing of its appeal the administrative file was mislaid, which damaged SUTAP's capacity to bring its claims before the judicial body. As a result, the judicial body was obliged in 2004 to refer the proceedings back to the Ministry of Labour for verification of the size of the membership of both trade unions in a new period, with a view to then referring the proceedings to the judicial body for a ruling. After various attempts in which the UF was unable to submit the relevant documentary proof, the administrative authority referred the proceedings to the judicial body, which considered that the administrative authority had not satisfied the judicial request for verification, and hence it returned the file to the Ministry so that it could establish the number of contributing members of each trade union. The complainant states that it complied with the judicial request on 27 September 2007 and that, as shown by the subsequent ministerial decision, SUTAP had a significantly greater number of contributing members (a total of 298, compared with 121 contributing members for the UF). However, on 17 June 2008 the judicial body again considered that the administrative authority had not completed the assigned task of verification. The administrative authority then issued a decision on 23 October 2008, stating that SUTAP had not supplied documentary proof of the number of its contributing members, despite having done so at two verification hearings. This administrative decision was contested in 2008 by the complainant but no ruling had been issued on this challenge by the time the complaint was presented to the Committee.

**182.** SUTAP denounces the fact that the proceedings for the restitution of its representative union status were obstructed by the irresponsible and negligent actions of the Ministry, which allegedly told the complainant informally that the file in question had been mislaid once again. The complainant considers that the Ministry's conduct violates the principles of freedom of association and infringes its right to due process, and requests the Ministry to submit the necessary information to the national labour justice system so that a ruling can be issued on the restitution of representative trade union status to SUTAP.

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

**183.** In its communication of November 2014, the Government states that the file in question was duly processed in a timely fashion and when the initial contents were mislaid in 1991 the lost file was reconstituted by order. The Government indicates that the delays and the mislaying of the file were due to the fact that the administrative proceedings were referred to the judicial body several times, as a result of another claim being filed in connection with the recognition of the representative status of the trade union and the competent court having requested the documentation to be forwarded.

**184.** In its communication of 3 March 2015, the Government sent a copy of new administrative Decision No. 1242 of 13 November 2014, rejecting the complainant's challenge to Decision No. 165/89, which had revoked its representative union status in 1989. The Government also indicates that it referred the proceedings to the judicial body, as demanded by SUTAP. Decision No. 1242 of 2014 summarizes the administrative and judicial proceedings that have taken place since representative union status was granted to SUTAP, including several hearings for the purpose of verifying its representativeness. Accordingly, the 2014 decision refers to the administrative decision of 23 October 2008, according to which SUTAP had been unable to duly certify the size of its contributing

membership and the UF had a greater number of contributing members. The 2014 decision, emphasizing that the substance of the issue was pending before the competent judicial body, specified that the proceedings were being referred back to the latter body.

### C. The Committee's conclusions

185. *The Committee observes that SUTAP alleges that in 1989 it was unlawfully deprived of its status as most representative trade union organization. As a result, SUTAP has filed a number of administrative and judicial appeals but its claims are still awaiting a judicial ruling. SUTAP states that on various occasions it gave proof of its numerical superiority with regard to the other trade union organization (UF) and that this has been reflected in ministerial decisions. Moreover, the Committee observes that the administrative decision of 23 October 2008 considered that the complainant organization had been unable to duly certify the size of its contributing membership. The Committee notes that, notwithstanding the specific details of numerical superiority supplied by SUTAP in its allegations, the Government in its reply has not provided specific figures or details relating to representativeness for SUTAP and the UF, nor has it explained the precise reasons why the administrative authority considered that SUTAP was unable to certify its number of contributing members. The circumstances described and the excessive delay in the proceedings are, in the Committee's view, unsatisfactory and incompatible with the normal exercise of trade union rights. The Committee also emphasizes that excessively long proceedings necessarily have to take account of changes in the membership levels of the organizations, thereby complicating the issue that needs to be resolved (namely, which of the two organizations is more representative).*
186. *The Committee considers that where administrative decisions on the granting or revocation of most representative trade union status are challenged, the administrative and judicial proceedings need to take place without delay. The Committee notes with concern the delay of 26 years in the processing of the judicial appeal filed by the complainant against the revocation of its representative union status. The Committee is bound to reiterate the principle that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 105]. In this respect, the Committee notes with regret: (1) the mislaying of the file, with the resulting delays and harm caused; (2) the 15 years' delay on the part of the administrative authority in bringing the appeal before the judicial body, quite apart from the delay in fully complying with the judicial instructions received; and (3) the fact that the challenge to the administrative decision of 23 October 2008, stating that SUTAP had been unable to duly certify its number of contributing members, was not settled by the competent administrative authority until 13 November 2014, after the presentation of the complaint to the Committee. This being the case, the Committee firmly expects that the judicial proceedings concerning the claim for restitution of most representative trade union status to SUTAP will be concluded in the very near future and requests the Government to inform it of their outcome.*
187. *The Committee also observes that there are other cases where it has already examined problems and delays similar to those described in the present complaint [see, for example, 375th Report, paras 15–21, or 360th Report, paras 246–262]. In view of this, the Committee invites the Government to ensure that proceedings for recognizing or challenging most representative trade union status are the subject of tripartite discussions with a view to improving their functioning and requests it to keep it informed of any measures taken in this regard.*
188. *As regards the complainant's argument that the situation described (revocation of most representative trade union status) amounts to suspension or dissolution by the administrative authority, the Committee is bound to clarify that such an equivalence*

*cannot be made. Indeed, the principle that measures of suspension or dissolution by the administrative authority constitute serious infringements of freedom of association does not appear to be applicable in this case since the revocation of most representative union status does not entail the suspension or dissolution of a trade union but a change in legal status, from “most representative organization” to “merely registered organization” (a status that applies to less representative organizations), which does not imply either loss of legal personality by the organization or loss of the right to defend the interests of its members, though it does mean loss of exclusive powers in the sphere of collective bargaining.*

## **The Committee’s recommendations**

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

- (a) Deeply regretting the excessive delays in the processing of the appeal filed by the complainant organization, the Committee firmly expects that the judicial proceedings concerning the claim for restitution of most representative trade union status to SUTAP will be concluded in the very near future and requests the Government to inform it of their outcome.*
- (b) The Committee invites the Government to ensure that proceedings for recognizing or challenging most representative trade union status are the subject of tripartite discussions with a view to improving their functioning and requests it to keep it informed of any measures taken in this regard.*

CASE NO. 3083

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

### **Complaint against the Government of Argentina presented by the Association of Staff of Supervisory Bodies (APOC)**

***Allegations: The complainant organization alleges that collective bargaining is being hindered by the Court of Audit of Santa Fe Province***

- 190.** The complaint is contained in a communication of May 2014 from the Association of Staff of Supervisory Bodies (APOC).
- 191.** The Government sent its observations in a communication of 27 October 2014.
- 192.** 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 complainant's allegations

- 193.** In its communication of May 2014, the complainant organization alleges that the Court of Audit and the legislature of Santa Fe Province are hindering the exercise of the right to bargain collectively in the sector.
- 194.** APOC considers that the authorities of the Court of Audit of Santa Fe Province have unduly delayed the establishment of a bargaining committee, thereby preventing the complainant organization from participating in joint negotiations in the sector and from discussing and negotiating working conditions and wage policies, as would be appropriate for an organization with trade union status. APOC alleges that the aforementioned Court (which operates under the authority of the legislature and has the power to take decisions concerning the pay and working conditions of its staff, subject to the involvement and opinion of the Legislative Audit and Oversight Committee) makes it compulsory, however, to apply the working conditions and wage policies determined by the Joint Committee under Act No. 10052, a committee from which the complainant organization is excluded and the scope of which is limited to the staff of the provincial public administration, which operates under the authority of the executive branch. APOC also alleges that the Court's employees are affiliated to an organization, APOC, which has trade union status (status of most representative organization for the purposes of collective bargaining) and competence to act in matters pertaining to the Court. Therefore, the complainant organization filed a complaint with the Ministry of Labour, which subsequently issued Opinion No. 3411 in 2011, calling for the appointment of the members of the bargaining committee. However, the Court did not establish the committee, claiming that it was prevented by law from doing so on the grounds that it was not fully constituted, as it was lacking one of its five members. APOC considers this reason to be unfounded and dilatory. At present, the members of the Court of Audit continue to take all decisions relating to staff and salaries, but employees are prevented from discussing and negotiating their conditions of work and pay. As the situation had not been resolved, in April 2013 APOC lodged an appeal against Decree No. 522/2013 of the government of Santa Fe Province, which provided for the application of the working conditions approved by the Joint Committee under Act No. 10052 to the employees of the Court of Audit. In the absence of a reply, an application for *amparo* (enforcement of constitutional rights) on the grounds of delays was filed with the Santa Fe courts of justice. In 2014, there was a further refusal to establish a bargaining committee and the Joint Committee under Act No. 10052 agreed on increases and working conditions for the staff of the Court of Audit which were endorsed by the Court without APOC being able to participate. As a result, APOC submitted a list of demands by the staff of the Court of Audit with the signatures of 170 employees (over 60 per cent of the staff). This initiative was supported by the General Confederation of Labour for the Santa Fe region; the Chamber of Senators endorsed most of the points set out in a request for information sent to the Court of Audit in April 2014.
- 195.** The complainant organization also alleges that the provincial state, through its legislature, has not established the Legislative Audit and Oversight Committee, which plays a very important role in the bargaining process, as the only instance with higher supervisory authority over the court, including in pay and labour-related matters.

## B. The Government's reply

- 196.** In its communication of 27 October 2014, the Government forwards the reply by the government of Santa Fe province to the allegations made by APOC and stresses that other trade union organizations hold the most representative status based on objective criteria. The Government considers the matter to be a dispute between trade union organizations, which should be settled by those concerned in accordance with the principles of freedom of association.

- 197.** Regarding the allegations of obstruction and delays, the provincial government indicates that the Court of Audit stated that it was not able to participate in the negotiations because it was not fully constituted (at present, two of the five regular members have not been appointed). Similarly, the Government reports that the Court does not have the power to make decisions pertaining to the labour and wage arrangements applicable to staff, because the Legislative Audit and Oversight Committee has not yet been established and by law such decisions are subject to the involvement and preliminary opinion of that Committee.
- 198.** The provincial government's report states that the Court of Audit, with the endorsement of opinions by the State Prosecutor's Office, has adopted resolutions that make the regulations and collective agreements relating to the provincial public administration, which operates under the authority of the executive branch, applicable to the Court's staff. It states that, in the context of the provincial public administration operating under the authority of the executive branch, the capacity for concluding collective agreements lies with the organization with trade union status that is most representative in the area of activity. It states that this status is held by the Association of State Workers (ATE) and the National Civil Servants' Union (UPCN). It concludes that, accordingly, the public employees of the Court of Audit are not without means of defending their rights, as they are represented by these organizations in the Joint Committee under Act No. 10052.
- 199.** The provincial government indicates that APOC participates in the meetings of employees with members of the Court and its inputs and suggestions are taken into account. It states that APOC is seeking to establish its own joint committee, awarding itself the status of sole representative union on the grounds of its specific nature, but that it does not have the approval of the other trade union organizations in this respect.

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

- 200.** *Regarding the allegations that the exercise of collective bargaining is being hindered and delayed by the Court of Audit to the detriment of the complainant organization, the Committee notes that, despite an opinion by the Ministry of Labour calling for the appointment of members of a bargaining committee, the Court of Audit has not yet established the committee. The provincial government indicates that the fact that the court is not fully constituted (two regular members had not been appointed) and the fact that the Legislative Audit and Oversight Committee has not been established are hindering the bargaining process. The Committee expects that the measures necessary to resolve these problems will be taken soon.*
- 201.** *The Committee notes that the Government also claims that two other organizations hold the status of most representative organization and that the public employees of the Court are not without means of defending their rights, as they are represented by these organizations in collective agreements. The Committee notes, however, that the complainant organization has recognized union status (and is therefore recognized as most representative organization) in its area of activity.*
- 202.** *In this regard, the Committee considers the complainant organization's demand to negotiate on behalf of the employees of the Court of Audit to be legitimate, given that employees in this sector (who fall under the authority of the legislature) may have interests that differ from those of employees of the provincial public administration, who fall under the authority of the executive branch and who are represented by the other two trade unions. Hence, the Committee firmly expects that the Government will take steps so that the public authorities concerned will soon adopt the institutional measures that are necessary to allow for the establishment of the Court of Audit's bargaining committee and to effectively promote collective bargaining with the complainant organization (APOC) and that the Government and the complainant organization will keep it informed of*

*developments. The Committee also requests the Government to keep it informed of the outcome of the appeals lodged by the complainant organization in connection with this case.*

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

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

- (a) Considering that APOC should be able to bargain collectively in respect of the Court of Audit of the province on behalf of its members, the Committee firmly expects that the Government will take steps so that the public authorities concerned will soon adopt the institutional measures that are necessary to allow for the establishment of the Court of Audit's bargaining committee and to effectively promote collective bargaining with the complainant organization. The Committee requests the Government and the complainant organization to keep it informed of developments.*
- (b) The Committee also requests the Government to keep it informed of the outcome of the appeals lodged by the complainant organization in connection with this case.*

CASE NO. 2318

INTERIM REPORT

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

***Allegations: The murder of three trade union leaders and the continuing repression of trade unionists in the country***

- 204.** The Committee has already examined the substance of this case on numerous occasions, most recently at its March 2015 meeting where it issued an interim report, approved by the Governing Body at its 323rd Session [see 374th Report, paras 113–128].
- 205.** The Committee, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, invited the Government to come before it to provide information on the steps taken in relation to the pending matters. The Government provided information in a written communication dated 25 March 2015 and made an oral presentation before the Committee during its May 2015 session.
- 206.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

**A. Previous examination of the case**

207. In its previous examination of the case, while deeply deploring the fact that, despite the time that had elapsed since it last examined the case, the Government had not provided any observation, the Committee made the following recommendations [see 374th Report, para. 128]:

- (a) The Committee deeply deplores that, despite the time that has passed since it last examined this case, the Government has not provided its observations, although it has been invited on a number of occasions, including through urgent appeals, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future. The Committee reminds the Government of the possibility to avail itself of the technical assistance of the Office.
- (b) In light of the continuing failure of the Government to provide the information requested by the Committee in the present case and the seriousness of the matters raised since June 2005, the Committee invites the Government, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, to come before the Committee at its next session in May 2015 so that it may obtain detailed information on the steps taken by the Government in relation to the pending matters.
- (c) As a general matter regarding all the subsequent issues, the Committee firmly expects the Government to commit itself to bring to an end the prevailing situation of impunity in the country, including, in particular, impunity in relation to violent acts against trade unionists, by promptly and persistently instituting independent judicial inquiries in order to fully uncover the underlying facts and circumstances, identify those responsible, punish the guilty parties, and prevent the repetition of such acts. The Committee further stresses the importance of the Government taking meaningful measures as a matter of urgency to ensure that the trade union rights of all workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free from intimidation and risk to their personal security and their lives, and that of their families.
- (d) The Committee strongly urges the Government to keep it duly informed of the investigation into the murder of Chea Vichea and to ensure that the perpetrators and the instigators of this heinous crime are brought to justice.
- (e) The Committee expects that the Government will conduct an independent and impartial investigation into the prosecution of Born Samnang and Sok Sam Oeun, including allegations of torture and other ill-treatment by police, intimidation of witnesses and political interference with the judicial process, and requests the Government to keep it informed of the outcome and the measures of redress provided for their wrongful imprisonment.
- (f) The Committee once again strongly urges the Government to ensure that thorough and independent investigations into the murders of Ros Sovannareth and Hy Vuthy are also carried out expeditiously and to keep it duly informed of the progress made in this regard.
- (g) The Committee requests the Government to keep it informed on the effect given to the sentence against Chhouk Bandith by the appeals court.
- (h) The Committee expects that the Government will act promptly in cases of violence and intimidation against the trade union movement in the future and that it will keep it informed of the steps taken to resolve the long outstanding allegations of assault

against the leaders and members of the FTUWKC and the Free Trade Union of the Suntex garment factory.

- (i) Given the lack of progress on these very essential points, the Committee is bound, once again, to call the Governing Body's special attention to the extreme seriousness and urgency of the issues in this case.

## B. The Government's reply

**208.** In its communication dated 25 March 2015, in relation to the murder of Mr Chea Vichea, the Government indicated that the relevant authorities acted promptly after the incident since, following the investigation, two suspects, Mr Born Samnang and Mr Sok Sam Oeun, were arrested and sent to the Phnom Penh Municipal Court for further actions. The case went through all the court proceedings. Following the appeal of both suspects, the Supreme Court held the second hearing on 31 December 2008, issued a verdict to release them on bail and ordered a new investigation. Based on the reinvestigation and the new evidence provided to the Court, it was found that both suspects were not the real perpetrators of Mr Chea Vichea's murder. Consequently, the Supreme Court decided to drop the charge against Mr Bom Samnang and Mr Sok Sam Oeun on 25 September 2013 and to order their release.

**209.** The Government specified that the case is presently under a new investigation. However, while more efforts are being made to bring the real perpetrators to justice, some of the investigation process cannot be disclosed to the public for the moment. The Government declared itself highly committed to cooperate with the judiciary and all stakeholders in the criminal proceedings. The Government also indicated that it highly regarded the dedication of Mr Chea Vichea as a trade union leader and, as such, honoured his memory by contributing to the construction of his statue in a public park in Phnom Penh.

**210.** In relation to the murder of Mr Ros Sovannareth on 7 January 2004, the Government reiterated that this case had already been concluded following the arrest and sentencing of Mr Thach Saveth aka Chan Sopheak. He was sentenced to 15 years of imprisonment on 15 February 2005 for premeditated murder and is currently serving his term in the prison.

With regard to the murder of Mr Hy Vuthy on 24 February 2007, the Government acknowledged that the case is still under investigation. It again expressed its commitment to bring the perpetrators to justice.

**211.** In its communication, the Government also referred to the incident in which three female workers were shot and injured at a protest outside a garment factory in Svay Rieng SEZ by the ex-governor of Bavet City – Mr Chhouk Bandith. The Government declared that following the incident, Mr Chhouk Bandith was administratively removed from his position and was also brought to the Svay Rieng Provincial Court where he was charged for unintentional violence. Following the appeal from the victims, Mr Chhouk Bandith was called to appear before the Court of Appeal in Phnom Penh on 27 February 2013. In March 2013, the Court of Appeal issued a verdict in absentia of Mr Chhouk Bandith and his lawyer ordering the Svay Rieng Provincial Court to reinvestigate the case. On 21 June 2013, the Svay Rieng Provincial Court issued a verdict whereby Mr Chhouk Bandith was convicted in absentia for shooting and injuring the three workers and sentenced to an 18 months imprisonment and the payment of compensation to the three victims amounting to 38 million Riel (KHR) (US\$9,500). Even though the sentence against Mr Chhouk Bandith is not welcomed by some non-governmental organizations, the Government recalled that the Court made the ruling which it found appropriate, in total independence. Hence, the role of the Government is only to ensure that the Court's decision is effectively enforced.

- 212.** In this regard, the Government indicated that an arrest warrant was issued against Mr Chhouk Bandith who is still at large. The Cambodian authorities also issued a “Red Note” to Interpol seeking their support in implementing this arrest warrant. The Government further publicly announced its decision to reward anyone who would provide information leading to the arrest of Mr Chhouk Bandith.
- 213.** Finally, the Government stated that by Letter No. 68 dated 16 January 2015, it decided to set up a special inter-ministerial committee, whose membership is comprised of representatives from the Ministry of Labour and Vocational Training, the Ministry of Justice and the Ministry of Interior, to investigate all outstanding cases examined by the ILO. Following its establishment, the committee had several meetings and the Government intends to keep the Committee informed of any new development.

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

- 214.** *The Committee recalls that it has been considering on numerous occasions this serious case which relates, inter alia, to the murder of trade union leaders, Mr Chea Vichea, Mr Ros Sovannareth and Mr Hy Vuthy, and to the climate of impunity that exists surrounding acts of violence directed towards trade unionists, due to the absence of any reply from the Government for many years. This situation has led the Committee to have recourse to paragraph 69 of its procedure and invite the Government to come before it to expose the steps taken regarding the long-standing matters for which the Government had not been providing the information requested.*
- 215.** *While regretting that it had to decide to apply a measure of special nature to obtain information from the Government on the present case, the Committee welcomes the constructive engagement of the Cambodian Government which provided a written communication and made an oral presentation. The Committee recalls the importance for all governments of providing within a reasonable time frame complete replies concerning allegations made against them or in follow-up to the Committee’s recommendations.*
- 216.** *The Committee recalls, with regard to the murder of Mr Chea Vichea, that it had previously welcomed a decision dated September 2013 by the Supreme Court which had definitively acquitted Mr Born Samnang and Mr Sok Sam Oeun and ordered the dropping of all charges against them, and further ordered the Phnom Penh Municipal Court to reopen the investigation. The Committee takes due note of the latest information provided by the Government to the effect that the competent authorities are still investigating to determine culpability for the murder. The Committee once again urges the Government to keep it duly informed of any development with regard to the investigation into the murder of Mr Chea Vichea and to ensure that the perpetrators and the instigators of this heinous crime are brought to justice.*
- 217.** *Furthermore, the Committee reminds the Government that it had previously called for an independent and impartial investigation into the prosecution of Mr Born Samnang and Mr Sok Sam Oeun, including allegations of torture and other ill-treatment by police, intimidation of witnesses and political interference with the judicial process. In the absence of any observation or information from the Government in this respect, the Committee once again urges the Government to investigate into all the allegations mentioned above and to keep it informed of the outcome and any measure of redress provided for the wrongful imprisonment of Born Samnang and Sok Sam Oeun.*
- 218.** *With regard to the information from the Government concerning the arrest and sentence to 15 years of imprisonment in February 2005 of Mr Thach Saveth for the premeditated murder of Mr Ros Sovannareth, the Committee recalls that It had previously deplored the fact that Mr Thach Saveth had been sentenced to prison in a trial characterized by the*

absence of full guarantees of due process and had urged the Government to ensure that he may exercise his right to a full appeal before an impartial and independent judicial authority [see 351st Report, para. 252]. Consequently, the Committee requests the Government to investigate and indicate whether Mr Thach Saveth was effectively given the opportunity to appeal against the Court ruling and, if so, whether he had exercised his right to appeal.

- 219.** *With regard to the murder of Mr Hy Vuthy on 24 February 2007, the Committee takes note of the statement from the Government that the case is still under investigation. The Committee once again urges the Government to keep it duly informed of any progress made in this regard.*
- 220.** *In relation to the shooting of three workers engaged in a strike by former Governor Mr Chhouk Bandith and the circumstances related to his subsequent trial, the Committee takes note of the Government's indication that on 21 June 2013, the Svay Rieng Provincial Court issued a verdict whereby Mr Chhouk Bandith was convicted in absentia for shooting and injuring the workers and sentenced to 18 months imprisonment and the payment of compensation to the three victims amounting to KHR38 million (\$9,500). The Committee also notes that, along with the arrest warrant against Mr Chhouk Bandith, the Cambodian authorities had issued a red notice to Interpol seeking its support in implementing the arrest warrant.*
- 221.** *In this regard, the Committee was informed through a press release that Mr Chhouk Bandith handed himself over to police on 8 August 2015. The Committee urges the Government to indicate whether Mr Chhouk Bandith had paid the compensation awarded to the victims and is serving his jail term as ruled by the Svay Rieng Provincial Court.*
- 222.** *Finally, the Committee takes due note of the indication that by Decision No. 68 of 16 January 2015, the Government decided to set up a special inter-ministerial committee, whose membership is comprised of representatives from the Ministry of Labour and Vocational Training, the Ministry of Justice and the Ministry of Interior, to investigate all outstanding cases examined by the ILO, and that the said committee has already met several times. In this regard, the Committee strongly encourages the Government to take steps to investigate into the assault of trade unionists of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) and of the Free Trade Union of the Suntex Garment Factory reported by the complainant in October 2006 (Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San). The Committee also urges the Government to investigate into the current employment status of three activists of the Free Trade Union of Workers of the Genuine Garment Factory (FTUWGGF) (Mr Lach Sambo, Mr Yeom Khun and Mr Sal Koem San) who were allegedly dismissed in 2006 following their convictions for acts undertaken in connection with a strike at the Genuine Garment Factory. The Committee trusts that the present engagement of the Cambodian Government to tackle all pending issues before the ILO will also materialize in concrete steps to resolve these long outstanding matters raised by the Committee since 2007. The Committee urges the Government to ensure that the Special Inter-ministerial Committee keep the national employers' and workers' organizations, including the complainants in this case, informed on a regular basis of the progress of its investigations with a view to promoting social dialogue and putting an end to the climate of impunity that exists surrounding the acts of violence against trade unionists.*
- 223.** *As a concluding remark, and while welcoming recent steps taken to investigate the violent acts against trade unionists alleged in this case, some of which date back to 2005, the Committee emphasizes the importance of taking concrete and meaningful steps to fully uncover the underlying facts and circumstances, identify those responsible and punish the*

guilty parties, and expresses the firm expectations that a full report on the reopened investigations will be transmitted to it in the very near future and will have a significant impact on the impunity prevailing in the country with respect to the matters raised in this case. Lastly, the Committee once again draws the Governing Body's attention to the extremely serious and urgent nature of this case.

## **The Committee's recommendations**

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

- (a) While regretting that it had to decide to apply a measure of special nature to obtain information from the Government on the present case, the Committee welcomes the constructive engagement of the Cambodian Government which provided a written communication and made an oral presentation. The Committee recalls the importance for all Governments of providing within a reasonable time frame complete replies concerning allegations made against them or in follow-up to the Committee's recommendations.**
- (b) The Committee once again urges the Government to keep it duly informed of any development with regard to the investigation into the murder of Mr Chea Vichea and to ensure that the perpetrators and the instigators of this heinous crime are brought to justice.**
- (c) The Committee once again urges the Government to investigate into the allegations of torture and other ill-treatment by police, intimidation of witnesses and political interference with the judicial process during the prosecution of Mr Born Samnang and Mr Sok Sam Oeun and to keep it informed of the outcome and any measure of redress provided for their wrongful imprisonment.**
- (d) While recalling that it had previously deplored the fact that Mr Thach Saveth had been sentenced to prison in a trial characterized by the absence of full guarantees of due process and had urged the Government to ensure that he may exercise his right to a full appeal before an impartial and independent judicial authority, the Committee requests the Government to investigate and indicate whether Mr Thach Saveth was effectively given the opportunity to appeal against the Court ruling and, if so, whether he had exercised his right to appeal.**
- (e) With regard to the investigation into the murder of Mr Hy Vuthy, the Committee once again urges the Government to keep it duly informed of any progress made in this regard.**
- (f) While noting that Mr Chhouk Bandith handed himself over to police on 8 August 2015, the Committee urges the Government to indicate whether the latter had paid the compensation awarded to the victims and is serving his jail term as ruled by the Svay Rieng Provincial Court.**
- (g) The Committee strongly encourages the Government to take steps to investigate into the assault of trade unionists of the FTUWKC and of the Free Trade Union of the Suntex Garment Factory reported by the**



*complainant in October 2006. The Committee also urges the Government to investigate into the current employment status of three activists of the FTUWGGF who were allegedly dismissed in 2006 following their convictions for acts undertaken in connection with a strike at the Genuine Garment Factory. The Committee trusts that the present engagement of the Cambodian Government to tackle all pending issues before the ILO will also materialize in concrete steps to resolve these long outstanding matters raised by the Committee since 2007.*

- (h) The Committee urges the Government to ensure that the Special Inter-ministerial Committee keep the national employers' and workers' organizations, including the complainants in this case, informed on a regular basis of the progress of its investigations with a view to promoting social dialogue and putting an end to the climate of impunity that exists surrounding the acts of violence against trade unionists.*
- (i) While welcoming recent steps taken to investigate the violent acts against trade unionists alleged in this case, some of which date back to 2005, the Committee emphasizes the importance of taking concrete and meaningful steps to fully uncover the underlying facts and circumstances, identify those responsible and punish the guilty parties, and expresses the firm expectations that a full report on the reopened investigations will be transmitted to it in the very near future and will have a significant impact on the impunity prevailing in the country with respect to the matters raised in this case.*
- (j) The Committee once again draws the Governing Body's attention to the extremely serious and urgent nature of this case.*

CASE NO. 2655

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

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

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

- 225.** The Committee has already examined the substance of this case on numerous occasions, most recently at its March 2015 meeting where it issued an interim report, approved by the Governing Body at its 323rd Session [see 374th Report, paras 129–141].

**226.** The Committee, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, invited the Government to come before it to provide information on the steps taken in relation to the pending matters. The Government provided information in a written communication dated 22 May 2015 and made an oral presentation before the Committee during its May 2015 session.

**227.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

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

**228.** In its previous examination of the case, the Committee made the following recommendations [see 374th Report, para. 141]:

- (a) The Committee deeply deplores that, despite the time that has passed since the last examination of the case, the Government has not provided the information requested, despite being invited to do so, including by means of an urgent appeal. The Committee urges the Government to be more cooperative in the future. The Committee reminds the Government of the possibility to avail itself of the technical assistance of the Office.
- (b) In light of the continuing failure of the Government to provide the information requested by the Committee in the present case, the Committee invites the Government, by virtue of its authority as set out in paragraph 69 of the Procedures for the examination of complaints alleging violations of freedom of association, to come before the Committee at its next session in May 2015 so that it may obtain detailed information on the steps taken by the Government in relation to the pending matters.
- (c) The Committee urges the Government and the complainant to provide information on the implementation of the Arbitration Council's award (No. 175/09-APSARA), issued on 5 February 2010, in relation to the dispute involving the APSARA authority.
- (d) The Committee urges the Government to take the necessary measures to ensure that both the APSARA and the Angkor Golf Resort engage in good faith negotiations with their respective unions, and to keep it informed in this regard.
- (e) Given that the allegations in this case refer to enterprises, the Committee urges the Government to solicit information from the employers' organization concerned with a view to having at its disposal the organization's views, as well as those of the enterprise concerned on the questions at issue.
- (f) Taking into account the absence of a reply from either the Government or the complainant in respect of its previous requests for information, the Committee once again reiterates its previous recommendations and requests both the Government and the complainant to keep it informed of any developments relating to the pending matters.

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

**229.** In its communication dated 22 May 2015, the Government indicated, in relation to the dispute involving the Authority for the Protection and Management of Angkor and the Region of Siem Reap (APSARA), that the case concerned the termination of three union leaders – namely Mr Breng Barn, Mr Yarn Nol and Mr Nhib Sokum – who claimed that the termination of their employment contracts was due to union discrimination. The Government further indicated that it was a collective labour dispute, under article 302 of the Cambodian Labour Law, which should be settled according to the procedure provided for by Chapter XII, section 2 of this Law, Prakas No. 317 MoSALVY dated 29 November

---

2001 on the Collective Labour Dispute Resolution and Prakas No. 099 MoSALVY dated 21 April 2004 on the Arbitration Council.

- 230.** While explaining that this case had gone through due process at the enterprise, ministerial and at the Arbitration Council level according to the labour dispute settlement procedure, the Government also specified that the parties opted for a non-binding award procedure, which allows any party who is dissatisfied with the arbitral decision reached by the Arbitration Council to lodge an objection with the Ministry of Labour and Vocational Training within eight days from the day the award is issued in order to invalidate it. According to the Government, following the Arbitration Council's award (No. 175/09-APSARA) issued on 5 February 2010, the award was objected to by the employer's side. As a result, the other party – the workers' side – had to consider either to send the case to court for judgment or to go on strike. However, the Government stated that in this case none of these two alternative actions has been taken by the workers' side so far.
- 231.** The Government further indicated that the Ministry of Labour and Vocational Training strongly encouraged the workers, through Letter No. 1111 MLVT dated 26 June 2014, to exercise their right to send the case to court. The Government explained that, under the circumstances exposed, it could not do anything more about the case.
- 232.** In relation to the dispute involving the Japan–APSARA Safeguarding Angkor (JASA) Authority, the Government indicated that, according to the facts provided in the arbitral award, the 42 workers involved in the dispute were those who used to work for the Japanese Government Team for Safeguarding Angkor (JSA) – a project established by the Japanese Government with funding from UNESCO and the Japanese Government for the purpose of maintaining and safeguarding the Angkor temple. These workers were employed by JSA on the project basis. In February 2005, the JSA terminated the contracts of all workers because the project ended. According to the Government, the workers were properly provided with termination benefits according to the Cambodian Labour Law.
- 233.** The Government further indicated that in early 2006, another project was launched by the Royal Government of Cambodia through the APSARA authority in collaboration with the Japanese Government. Being due to end in 2010, this new project was implemented by a new organization named the Japan–APSARA Safeguarding Angkor Authority. The Government explained that since JASA was a completely new organization which did not have anything to do with the JSA, JASA had the right under the Labour Law to recruit any worker so long as the decision was made without any discrimination.
- 234.** In respect of the implementation of the arbitral award concerning this case (No.177/09-JASA) which had rejected the claim for re-employment of the 42 workers, the Government merely indicated that the Authority has ceased to exist since the end of the project in 2010.
- 235.** Finally, with respect of the Angkor Golf Resort's case, the Government indicated that, according to Letter No. 1224 mkb dated 21 December 2009 from the Siem Reap Provincial Labour Department to the Secretary of State of the Ministry of Labour and Vocational Training reporting on the conciliation of the labour dispute at the Angkor Golf Resort, after receiving the complaint from the workers the Provincial Labour Department had tried to conciliate the dispute on several occasions, without any success. The case was then submitted to the Ministry of Labour and Vocational Training on 21 December 2009 for further action. The case was referred to the Arbitration Council by the Minister of Labour and Vocational Training according to the labour dispute settlement procedure.
- 236.** However, according to the Government, while it was under the arbitral proceedings, on behalf of the Building and Wood Workers Trade Union of Angkor Golf Resort, the Building and Wood Workers Trade Union Federation of Cambodia (BWTUC) wrote a

letter dated 19 January 2010 to the Arbitration Council to withdraw the complaint and ask the Council to close the case. The request was accepted by the Arbitration Council.

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

- 237.** *The Committee recalls that it has been considering this case which concerns acts of anti-union discrimination at three workplaces, including dismissals of trade union leaders and activists, on several occasions due to the absence of reply from the Government for some years. This situation has led the Committee to have recourse to paragraph 69 of its procedure and invite the Government to come before it to expose the steps taken regarding the long-standing matters for which the Government had not been providing the information requested.*
- 238.** *While regretting that it had to decide to apply a measure of special nature to obtain information from the Government on the present case, the Committee welcomes the constructive engagement of the Cambodian Government which provided a written communication and made an oral presentation. The Committee recalls the importance for all governments of providing within a reasonable time frame complete replies concerning allegations made against them or in follow-up to the Committee's recommendations.*
- 239.** *As a general remark, while underlining the considerable length of time that has elapsed since the dismissals of the workers concerned in the present case – respectively, in February 2005 (as to the dispute involving the JASA authority, December 2006 (as regards the dispute involving the APSARA authority) and April 2007 (as to the Angkor Golf Resort), the Committee cannot but observe the great length of time that has elapsed since the Department of Labour Dispute and Siem Reap Provincial Department of Labour and Vocational Training had submitted the disputes to the Arbitration Council (respectively on 22 December 2009 and 11 January 2010). In this regard, the Committee has recalled on many occasions the importance it attaches to legal proceedings being concluded expeditiously, as justice delayed is justice denied. The Committee expects that the Government will take all necessary measures to ensure that labour disputes, especially those involving dismissals of trade union leaders and activists, are concluded expeditiously in the future.*
- 240.** *With regard to the dispute involving the APSARA which concerned the termination of employment of three union leaders, namely Mr Breng Barn, Mr Yarn Nol, and Mr Nhib Sokum, the Committee recalls that it had previously noted the Arbitration Council's award (No. 175/09-APSARA), issued on 5 February 2010, which ordered the APSARA authority to reinstate three workers it had dismissed. The Committee takes due note of the Government's indication that in this case the parties had opted for a non-binding award procedure, which allows any party who is dissatisfied with the arbitral decision reached by the Arbitration Council to lodge an objection with the Ministry of Labour and Vocational Training within eight days from the day the award is issued in order to invalidate it. The Committee further notes the indication that the award issued on 5 February 2010 was objected to by the employer's side.*
- 241.** *The Committee notes that despite the Government's advice to the union to send the case to court – most recently through Letter No. 1111 MLVT dated 26 June 2014 – as provided by the Labour Law, the workers' side has not taken any action so far. In these circumstances, and in the absence of any additional information from the complainant organization on this issue since the filing of the complaint in 2008, despite earlier requests from the Committee, the Committee will not pursue its examination of this matter.*
- 242.** *With regard to the dispute involving the JASA authority, the Committee recalls that it had previously noted that an arbitration award (No. 177/09-JASA) of 22 January 2010 rejected*

*the workers demand for re-employment. The Committee had then requested information on any appeal lodged by the workers in relation to the arbitration decision. The Committee takes due note of the Government's indication that there has been no follow-up to the arbitration award since the JASA ceased to exist in 2010. The Committee urges the complainant organization to indicate whether workers have appealed the arbitration award of 22 January 2010 and any result of such appeal. In the absence of a reply from the complainant organization, the Committee will not pursue its examination of this matter.*

- 243.** *In respect of the Angkor Golf Resort's case, the Committee had previously noted that the parties reached an agreement. The Committee takes due note of the Government's indication that while the case was under the arbitral proceedings, on behalf of the Building and Wood Workers Trade Union of Angkor Golf Resort, the Building and Wood Workers Trade Union Federation of Cambodia (BWTUC) wrote a letter dated 19 January 2010 to the Arbitration Council to withdraw the complaint and ask the Council to close the case. The request was accepted by the Arbitration Council. The Committee considers that this aspect of the case does not call for further examination.*

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

- 244.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) While regretting that it had to decide to apply a measure of special nature to obtain information from the Government on the present case, the Committee welcomes the constructive engagement of the Cambodian Government which provided a written communication and made an oral presentation. The Committee recalls the importance for all governments of providing within a reasonable time frame complete replies concerning allegations made against them or the Committee's recommendations.*
  - (b) The Committee expects that the Government will take all necessary measures to ensure that labour disputes, especially those involving dismissals of trade union leaders and activists, are concluded expeditiously in the future.*
  - (c) With regard to the dispute involving the JASA authority, the Committee urges the complainant organization to indicate whether workers have appealed the arbitration award of 22 January 2010 and any result of such appeal. In the absence of a reply from the complainant organization, the Committee will not pursue its examination of this matter.*

CASE No. 3102

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

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

- **the National Confederation of Workers of the Bread and Food Industry (CONAPAN)**
- **the National Federation of Unions of Bus and Truck Drivers, and Related Activities of Chile (FENASICOCH)**
- **the Inter-Company-Union of Workers of Líder Supermarkets, the Federation of United Workers Trade Unions (AGROSUPER)**
- **the Inter-Company Union of Contractor Company Workers (SITEC)**
- **the Inter-Company Union of Actors of Chile (SIDARTE)**
- **the Inter-Company National Union of Professionals and Technicians of the Film and Audio-visual Sector (SINTECI)**
- **the Federation of ENAP Contractor Workers of Concón**
- **the Inter-Company Union of Professional Footballers**
- **the Federation of Trade Unions of Workers of ISS Holding Companies and Subsidiaries, and General Services (FETRASSIS) and**
- **the Inter-Company Union of Domestic Workers**

*Allegations: Obstacles to the right to collective bargaining and the right to strike of inter-company trade unions and decreased protection of workers against acts of anti-union discrimination such as dismissal*

**245.** The complaint is contained in communications of the National Confederation of Workers of the Bread and Food Industry (CONAPAN), the National Federation of Unions of Bus and Truck Drivers, and Related Activities of Chile (FENASICOCH), the Inter-Company Union of Workers of Líder Supermarkets, the Federation of United Workers Trade Unions (AGROSUPER), the Inter-Company Union of Contractor Company Workers (SITEC), the Inter-Company Union of Actors of Chile (SIDARTE), the Inter-Company National Union of Professionals and Technicians of the Film and Audio-visual Sector (SINTECI), the Federation of ENAP Contractor Workers of Concón, the Inter-Company Union of Professional Footballers, the Federation of Trade Unions of Workers of ISS Holding Companies and Subsidiaries, and General Services (FETRASSIS) and the Inter-Company Union of Domestic Workers, dated 22 April and 30 July 2013 (received by the Office on 11 September 2014).

**246.** The Government sent its observations in a communication dated 21 August 2015.

**247.** Chile 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**

**248.** In their communications dated 22 April and 30 July 2013, the National Confederation of Workers of the Bread and Food Industry (CONAPAN), the National Federation of Unions

of Bus and Truck Drivers, and Related Activities of Chile (FENASICOCH), the Inter-Company Union of Workers of Líder Supermarkets, the Federation of United Workers Trade Unions (AGROSUPER), the Inter-Company Union of Contractor Company Workers (SITEC), the Inter-Company Union of Actors of Chile (SIDARTE), the Inter-Company National Union of Professionals and Technicians of the Film and Audio-visual Sector (SINTECI), the Federation of ENAP Contractor Workers of Concón, the Inter-Company Union of Professional Footballers, the Federation of Trade Unions of Workers of ISS Holding Companies and Subsidiaries, and General Services (FETRASSIS), and the Inter-Company Union of Domestic Workers, allege that inter-company unions are legally defined in Chilean legislation as "... unions representing workers of two or more different employers;" (section 216(b) of the Labour Code). The complainant organizations state that they represent thousands of workers in a large number of production activities in various industrial, manufacturing and services sectors in Chile that are essential for the country's development, such as retail, transport, food, mining, energy (fuel and hazardous substances), arts and communications, industrial cleaning services, and the services provided by domestic workers, actors and professional footballers.

- 249.** However, the legislation makes the fundamental and basic right of the inter-company unions to represent their members in collective bargaining exclusively dependent on the willingness of employers: they decide whether they wish to engage in bargaining. Furthermore, if companies do agree to negotiations, the procedure is not regulated, that is there is no protection for workers, no trade union immunity nor the right to strike.
- 250.** The complainants explain that, in Chile, companies have a guaranteed constitutional right to engage in any kind of economic activity. The right to property gives employers extensive powers and protection, exceeding the provisions of basic social rights; the management and administrative powers of employers are fully protected, and they are fully entitled to organize themselves. They organize themselves under this framework, creating companies, reorganizing them through mergers and demergers; they can generate various business names to hide their real identity; and they can outsource all their services and production, including their own principal business line. This naturally leads to the fragmentation and weakening of trade unions. According to official statistics, 85.5 per cent of production units have not engaged in collective bargaining in the last five years.
- 251.** For instance, in the retail and supermarket sector, there are large chains in which each shop has a different business name, whereby the best means of uniting and bridging gaps to establish a balance of power between the company and the workers is the creation of inter-company trade unions, simply because, in practice, one company can make itself look like several smaller companies.
- 252.** In the transport sector there are various factors such as geography, the distance covered by road transport, work dynamics due to long-distance travel and a company's drivers being spread out in different parts of the country. This justifies the exercise of the right to organize through inter-company unions. Conditions in the transport sector are similar to the conditions of bakery and cleaning workers, who work on their own, or who carry out their activities or share a workplace with a very small number of fellow workers.
- 253.** According to the complainants, another characteristic of certain sectors in which inter-company unions operate is that they rely heavily on outsourcing, as in the case of communications experts and professionals, who are linked to television companies through one or more intermediate companies; this is also the case of workers in subcontractor companies, where the principal companies operate by breaking down and outsourcing their processes, thereby not appearing to be the employers and those responsible for the overall and final control of working conditions. There are also many other sectors in which

workers see their collective power undermined by the high level of business fragmentation that companies often pursue on false pretences.

- 254.** Given the option between two inter-company trade unions, an employer can choose to bargain with one and discriminate against the other without providing any justification for its decision.
- 255.** The complainants indicate that the system in Chile works as follows: once inter-company unions have met a number of legal requirements, they submit a draft collective agreement to the company or companies, which then have ten working days to communicate their discretionary decision to agree or refuse to enter into bargaining, without needing to provide a reason. If, by some miracle, they agree to enter into bargaining, the workers listed on the draft agreement run the risk of being dismissed, given that they are not legally protected by any kind of immunity during the bargaining process. The law does not provide any legal means of pressure, given that inter-company unions do not have the right to strike.
- 256.** In most cases, companies do not recognize the right to collective bargaining of inter-company trade unions, which have to be creative in finding alternative means of representing their members and bargaining. Some of these trade unions are obliged to hide behind the façade of negotiating groups, which are an anti-union practice, or simply to use collective strike action with the risk of disciplinary consequences for participants.
- 257.** Before 1973, road transport workers protected their conditions of pay and other benefits through collective bargaining similar to bargaining at the level of branch of activity, where the State established conditions such as travel allowances and a percentage for lorry sales, which have never since been required of workers. This sector is present throughout the country's productive industries and has, up till now, not been able to recover the possibility of bargaining at the level of branch of activity.
- 258.** The complainant organizations indicate that a special case is that of art and communications professionals (actresses and actors), who have been excluded from the Labour Code in practice by being put under pressure by television companies to register themselves as sole proprietorships, thereby undermining their identity as workers, even though the relationship of subordination and dependency continues on a permanent basis. The cinema and audio-visual industry works on the basis of fixed-term arrangements, by project or job (such as adverts, television series, documentaries or Chilean films). Accordingly, workers may have several employers throughout the year, which was the reason for creating an inter-company union. Likewise, the trade union in the National Copper Corporation of Chile (CODELCO) was created with the aim of responding to new ways of organizing work (outsourcing and workforce specialization were previously mainly used for work which fell outside the industry's core areas of expertise).
- 259.** According to the allegations, the above points to a clear violation of ILO Conventions Nos 87 and 98 in practice. Inter-company unions are discriminated against with respect to company unions, which can engage in bargaining without the employer's consent, and it is not uncommon that when a worker decides to join a union or take on a leading role within a union, the company immediately takes retaliatory action to prevent said decision.
- 260.** Lastly, the complainant organizations reiterate that the trade unions are made up of workers and that they are the ones who must decide which trade union they wish to join and be represented by in all the areas laid down by the union constitution, including in the area of collective bargaining.



## B. The Government's reply

**261.** In its communication dated 21 August 2015, the Government considers that, as regards the allegations made by the complainant trade union organizations, there has been no violation of freedom of association by the State of Chile. The above is without prejudice to errors or differences of opinion in considering the facts that may exist between the parties and that have been settled through the institutional procedures provided for in Chile, whether in administrative or judicial courts.

**262.** In this regard, the Government indicates that the Political Constitution of the Republic, under article 19, paragraph 2, states that: "The Constitution grants everyone equality before the law. In Chile no privileges are given to any person or group. In Chile there are no slaves and whoever sets foot on its territory is free. Men and women are equal before the law. Neither the law nor any other authority may create arbitrary differences." Article 19, paragraph 19, states that: "The Constitution guarantees the right to organize for all in the cases and under the procedures established by law ..."

**263.** The Labour Code also establishes the following:

- Section 2 ...

Acts of discrimination are contrary to the principles of labour law.

Acts of discrimination are distinctions, exclusions or preferences on the basis of race, colour, sex, age, civil status, union membership, religion, political opinion, nationality, national extraction or social origin, which seek to undermine or alter equality of opportunity or treatment in employment and occupation.

- Section 212. Workers in the private sector and in state-owned companies, whatever their legal status, have the right to establish, without prior permission, the trade unions that they consider appropriate, the only condition being that they abide by the rules and constitutions of such bodies.

- Section 214. Minors do not require permission to become members of a trade union, or to participate in its administration and management.

Membership of a trade union is voluntary, personal and may not be delegated.

No one may be obliged to become a member of a trade union organization in order to take up a job or carry out an activity. Nor should they be prevented from leaving a trade union. ...

- Section 215. The employment of a worker may not be made conditional on membership of or withdrawal from a trade union organization. In the same way, a worker may not be prevented or hindered from joining a trade union, or dismissed or prejudiced in any way due to trade union membership or participation in trade union activities.

- Section 216. Trade unions shall be constituted and named in accordance with the workers who become members. Among others, the following may be created:

(a) company unions: representing workers of one and the same company;

(b) inter-company unions: representing workers of two or more different employers;

(c) independent worker unions: representing workers who do not work for any employer; and

(d) unions for occasional or transitory workers: representing workers who are employed for seasonal or intermittent periods.

**264.** The Government also indicates that the legislation in force not only establishes the right to organize, elevating it to the status of a constitutional guarantee, but it also protects it by prohibiting its use as a means of discrimination. Regarding the specific case of inter-

company unions, they are specifically provided for and described in the aforementioned section 216, paragraph (b), of the Labour Code; it is therefore not true that they are not legally recognized in Chile. In order to initiate collective bargaining proceedings, that kind of trade union has two alternatives:

- The procedure laid down in section 334 of the Labour Code, in other words, attempting to reach a prior agreement with the employer or employers. In this case, the presentation of the draft collective agreement requires trade unions to meet two requirements: “(a) The respective trade union organization(s) shall reach a prior agreement with the respective employer(s), in writing and before a notary public”, and “(b) In the company concerned, an absolute majority of worker members entitled to engage in collective bargaining shall confer, by secret ballot, representation on the trade union concerned in an assembly and in the presence of a qualified witness”.
- Directly presenting a draft collective agreement in accordance with the provisions under section 334bis of the aforementioned legal text. In this case, even when, due to its legal status, the inter-company union represents workers of more than one employer, it is entitled to present a draft collective agreement, in representation of its members and of the workers who become members, to the employers of workers who are members of that trade union, without the prior consent of the respective employer or employers, as required by the rule governing the aforementioned procedure. It should be noted that, in this second procedure, negotiation with the inter-company trade union is voluntary or optional for the employer, but if it declines to enter into negotiations, which must be notified within a period of ten days, members of the trade union working for the same employer are entitled to bargain collectively in accordance with the general rules established by the Labour Code.

**265.** The Government indicates that, according to the official figures issued by the Labour Directorate, which is the technical body in charge of the registration of collective agreements, a total of 127 such agreements were registered in 2013, a total of 152 in 2014 and to date, 74 collective agreements have been registered in 2015. The above amounts to a total of 353 agreements, resulting from collective inter-company bargaining, directly benefiting 48,152 workers.

**266.** In the light of the above, it is considered that the inter-company collective bargaining model, despite its imperfections and differences in its interpretation, has been applied effectively, leading to many improvements in the working conditions of thousands of workers.

**267.** The Government reports that it is currently in the process of carrying out a reform to modernize the industrial relations system. With this objective, the Government submitted for examination (*Official Gazette* No. 1055-362) the draft act introducing the necessary amendments to the Labour Code, seeking to guarantee a balance between the parties and the full respect of freedom of association. This draft act (which the Government attaches to its reply) not only seeks to amend the current regulation of the right to strike, in order to strengthen its exercise, but it also makes the workers who are members of the trade union eligible to bargain collectively, prohibiting negotiation groups in those companies and regulating the existence of minimum bargaining rights and the extension of benefits.

**268.** As regards the allegations contained in the complaint, the Government indicates that the draft Act, currently under examination, recognizes the right of inter-company unions to bargain in the companies in which they have an equivalent number of members to that required for the creation of a company union for the purposes of bargaining, thereby giving them the necessary rights to act on behalf of their members. Evidence of the above is the

wording of the draft, under section 362, which was recently approved by the chamber of representatives as follows:

Section 362. Collective bargaining by inter-company unions. Inter-company unions may bargain in accordance with the collective bargaining procedure established in Title IV of this Book, pursuant to the amendments established in this Chapter. In this last case, the company may not refuse to enter into bargaining.

- 269.** As of 30 March 2015, the draft was qualified as urgent in the National Congress and is currently under examination by the National Senate at the second constitutional level, the general idea of legislating having been approved by a vote of 19 August 2015, which gave rise to the period during which the Government can present its observations.
- 270.** In the light of all the clarifications set out above and the current reform process on the legal framework for collective bargaining, the Government considers that the complaint is unfounded.

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

- 271.** *The Committee notes that the complainant organizations allege that: (i) the inter-company unions (“... representing workers of two or more employers” (section 216(b), of the Labour Code)) have not been guaranteed the fundamental right to represent their members in collective bargaining, given that this depends on a decision by the employer as to whether it wishes to engage in negotiations, whereby if the employer does agree to enter into negotiations, these are conducted outside the regulated procedure, without any protection against dismissal for the workers covered by the draft collective agreement (not participating in negotiations) and without being able to exercise the right to strike; (ii) this situation hampers bargaining in certain areas of activity and the representation and bargaining of workers who perform the same services (such as domestic workers, bakers, drivers, etc.), especially given that companies can fragment their structures, generating various business names in different parts of the country; (iii) in some cases, such as that of actors, workers are put under pressure to register themselves as sole proprietorships, even though their relationship of subordination and dependency continues; and (iv) some inter-company unions are obliged, in this context, to resort to the anti-union practice of forming “workers’ groups” or to use collective actions such as strikes, exposing themselves to legal sanctions as they do not have the right to strike. According to the complainants, the natural consequence of the above is trade union fragmentation and the consequent weakening of trade unions, which is the objective that has been pursued on many occasions.*
- 272.** *The Committee takes note of the legal and constitutional provisions in force, as set out by the Government in its reply and in its explanation of their scope, and the statistics on the number of collective agreements concluded by inter-company trade unions and their coverage of workers. The Committee also takes note of the Government’s opinion that the legislation in force does not violate freedom of association and that the complaint addresses problems that have been resolved by the relevant authorities, either through the administrative or the judicial courts; the Government’s reply indicates that, with certain majorities, the inter-company trade union may bargain collectively (section 334 of the Labour Code).*
- 273.** *The Committee also notes that the Government reports on a partial draft reform of the Labour Code as regards labour relations, which is under examination by the National Congress. The Committee notes that the Government declares that the draft in question: (1) recognizes the right of inter-company unions to bargain in companies (without companies being able to oppose this) when they have attained the number of members*

required for the establishment of a company union, thereby granting them the rights required to act on behalf of their members; (2) authorizes inter-company unions to use the regulated procedure for other types of trade unions, thereby granting members “bargaining immunity” (protection against dismissal); (3) prohibits the existence of negotiating groups (of workers); and (4) regulates the existence of minimum bargaining rights and the extension of benefits.

**274.** *The Committee requests the Government to communicate the text of the act amending the Labour Code as soon as it is adopted which, according to all information from the Government, recognizes the right to strike of inter-company unions. The Committee observes that the draft act addresses some of the points highlighted by the complaint in a manner that would bolster the principles of freedom of association and collective bargaining.*

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

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

*Noting that the partial draft reform of the Labour Code, currently under examination, contains provisions which address some of the points raised in the complaint in a manner so as to bolster the principles of freedom of association and collective bargaining, the Committee requests the Government to communicate the text of the act as soon as it is adopted.*

CASE NO. 3027

INTERIM REPORT

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

- **the General Confederation of Labour (CGT) and**
- **the Pricol Alimentos SA Workers’ Union (SINTRAPRICOL)**

***Allegations: The complainant organizations allege that the liquidation of the company Pricol Alimentos SA had the effect of destroying the trade union SINTRAPRICOL and eradicating trade union presence in the Facatativá production plant, owned by the Polar corporate group***

**276.** The complaint is contained in communications dated October 2012, February 2013, 22 October 2013, 30 May 2014, 22 October 2014 and 11 March 2015.

**277.** The Government sent its observations in communications dated 28 April 2014, 13 June 2014 and 21 July 2015.

**278.** 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

**279.** In their various communications, the complainant organizations allege that the process of liquidating the company Pricol Alimentos SA (hereinafter "the company") aimed at destroying the trade union SINTRAPRICOL and eradicating trade union presence in the Facatativá production plant, owned by the Polar corporate group. The complainant organizations particularly emphasize that the liquidation process did not at any point involve consultations with the trade union, that the company dismissed SINTRAPRICOL's leaders without obtaining legal annulment of their trade union immunity and that it applied to nullify the union's legal personality after dismissing the majority of its members. The complainant organizations add that the company and Alimentos Polar Colombia SAS formed a single business entity, and jointly operated the Facatativá production plant, and therefore the process of liquidating the company effectively dissolved the trade union and eradicated union presence in the aforementioned production plant.

**280.** The complainant organizations go on to detail the sequence of events connected to their allegations. The complainant organizations indicate that: (i) in 2002 the company, part of the Polar corporate group, acquired the assets of Productos Quaker SA, which had begun to operate in the late 1950s in Santiago de Cali; (ii) as a result of this change of ownership, the trade union SINTRAQUAKER, established in 1958, became SINTRAPRICOL; (iii) in 2006, the company's Cali plant had 103 workers, of whom 52 were SINTRAPRICOL members, the company and the union having signed, in 2005, a collective agreement which was valid until 2008; (iv) in November 2006, the company announced that all the workers at the plant would have to relocate, starting from January 2007, to the city of Facatativá (in the department of Cundinamarca); (v) at the same time the company began to put pressure on the workers to accept the termination of their contracts for derisory sums, rather than relocate to Facatativá; (vi) in December 2006, approximately 20 additional workers joined the trade union; (vii) between 24 November 2006 and 3 February 2008 the company terminated 45 workers' contracts, in violation of the provisions of the collective labour agreement; (viii) on 19 January 2007 the legal representative of SINTRAPRICOL filed an administrative labour complaint for illegal collective dismissal, which was unsuccessful; (ix) as a result of the abovementioned collective dismissals, the number of unionized workers fell to just 20; (x) the company made an application to nullify the union's legal personality, as its membership had fallen below the threshold of 25 – the outcome of which is still pending, in view of the reinstatement proceedings that numerous dismissed unionized workers have initiated; (xi) in June 2008 the company's workers, along with workers of other companies in the same sector, established an industry-level trade union, the National Union of Workers in Industry, Farming and Food Processing (SINALTRACINPROA); (xii) in March 2009, SINALTRACINPROA presented the company with a list of demands; (xiii) on 14 April 2009 negotiations with the company on the set of demands began, causing the circumstantial immunity provided for in Colombian law to come into effect, in favour of all union members; (xiv) on 4 May 2009, the company and the union not having reached an agreement, the direct settlement stage came to an end and the union requested the Ministry of Health and Social Protection to form an arbitration tribunal; (xv) despite his initial decision, in September 2009, to form an arbitration tribunal, the Deputy Minister of Labour Relations finally back-pedalled following the company's presentation of an administrative appeal; (xvi) on 21 October 2009 the company's shareholders decided, at their general meeting, to grant voluntarily the dissolution and liquidation of the business that constituted the legal entity under which the company operated; (xvii) under Colombian law, the next steps should have consisted in the company requesting permission from the Ministry of Health and Social Protection for its closure, and seeking authorization from the labour judges to dismiss the workers who were

protected by trade union immunity; (xviii) the workers were not informed of the liquidation process, nor of the application to close the company; (xix) in November 2009, the company specially requested the waiver of the trade union immunity of 14 trade union leaders (Mr Marino Villa Valencia, Mr Jorge Humberto Mayor Jiménez, Mr Ildebrando Zamora Cifuentes, Mr Luis Espper Cuadrado Gutiérrez, Mr Diego Rivera Tovar, Mr Abelardo Paz Herrera, Mr Diego Fernández Flores Loaiza, Mr Jairo Ossa Castillo, Mr Wilson Hernández Misas, Mr Jorge Heber Morales Cardona, Mr José Fernando Sánchez Muñoz, Mr Eimar Lider Martínez Gómez, Mr Gentil Aníbal Muñoz and Mr Jorge Alberto Quintero Rodríguez); (xx) on 18 December 2009, the company decided to dismiss the 20 unionized workers, who included the 14 trade union leaders mentioned above and Mr Héctor Fabio Morales Cano, Mr Luis Óscar Montes, Mr Fernando López Jiménez, Mr Nelson Yesid Castañeda Poloche, Mr Luis Eduardo Abadía Basto and Mr Campo Elías Qiroz Asmasa – despite the fact that at that time the company had not been given either ministerial authorization to close or legal authorization to waive their immunity; (xxi) at the same time, the company’s directors continued the process of liquidating the company, without having obtained the permission of the Ministry of Health and Social Protection for its closure; (xxii) when the Ministry requested the company to provide the documentation necessary to process the authorization for closure, the liquidator responded on 26 January that the company had already been liquidated; (xxiii) on 4 February 2010 the Ministry of Health and Social Protection withdrew its request to visit the company, which had been sent in January 2010 as part of the closure authorization procedure; (xxiv) on 5 January 2010 the union presented an administrative labour complaint relating to the 20 dismissals, based on the fact that the company had violated the legislation on collective dismissals and the trade union immunity that all the workers enjoyed, by virtue of the collective dispute which was still then in progress; (xxv) on 9 September 2010, the Ministry of Health and Social Protection decided to refrain from imposing any measures at all against the company; (xxvi) the union applied to the Ministry of Health and Social Protection for a declaration stating that the company and Alimentos Polar Colombia SAS were a single business entity, inasmuch as they shared the same corporate aims and jointly operated the Facatativá plant; (xxvii) the union’s application was rejected by the Ministry of Health and Social Protection; and (xxviii) the Supervisory Authority for Companies did not take into consideration the statement made by Agencia de Aduanas Agecoldex SA (Agecoldex Customs Agency, SA) indicating that the company failed to make clear, during the process of its dissolution and liquidation, the fact that it belonged to and was dependent on the Polar corporate group, to the serious detriment of its creditors and workers.

- 281.** In their communications of 2014 and 2015, the complainant organizations state that various judicial decisions recognize a violation of trade union immunity to the detriment of the trade union leaders of SINTRAPRICOL and SINALTRACINPROA, but that the judicial authorities refrain from ordering their reinstatement or the payment of indemnities because the company has already been liquidated.
- 282.** With regard to other legal proceedings seeking the reinstatement of workers in Alimentos Polar Colombia SAS, Polmacer Ltda and Inversiones Pricol CA, which continue to operate in the Facatativá plant, the complainant organizations state that various first instance rulings ordered the workers’ reinstatement, that these decisions were revoked by second instance rulings and that the outcomes of judicial reviews are now pending.
- 283.** In the same communications, the complainant organizations highlight the fact that the company has continued its productive activities in the Facatativá plant, owned by the Polar corporate group, as Pricol Alimentos SA and Alimentos Polar Colombia SAS are a single business entity. In this connection, the complainant organizations state that: (i) both companies had the same corporate aims; (ii) both companies were owned by the same people; (iii) the two companies identified with the same brand (Polar) – demonstrated by the fact that both companies’ names are on employees’ payslips and uniforms; (iv) the

company's productive activity in the Facatativá plant was taken over by Alimentos Polar Colombia SAS, with the same machinery being used to produce the same products as before; (v) there is continuity of service: many of the company's workers were transferred to Alimentos Polar Colombia SAS and given positions that reflected their time in the company's service prior to the relocation; and (vi) Alimentos Polar Colombia SAS recognized the validity of the collective agreement by which ex-company employees had been covered previously, and continued to accord them the rights that it established.

- 284.** On the basis of the above sequence of events, the complainant organizations state that the liquidation of the company had the effects of eradicating SINTRAPRICOL and enabling the Facatativá plant to operate without any trade union. They add that no Colombian company in the corporate group had trade unions when these events occurred, and that the group's practice consists in signing collective accords with non-unionized workers instead of committing to collective agreements. On the basis of what precedes, the complainant organizations request that Alimentos Polar Colombia SAS reinstate the leaders and members of SINTRAPRICOL and SINALTRACINPROA.

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

- 285.** In a communication of 28 April 2014, the Government of Colombia transmits the reply of the liquidated company Pricol Alimentos SA. The company states that freedom of association was never infringed, that the complaint concerns the individual rights of the dismissed workers and that, as such, the allegations are not within the purview of the Committee on Freedom of Association. Secondly, the company details the status of the various legal proceedings related to the case and mentioned by the complainant organizations, emphasizing that the results of the multiple appeals made by each of the claimants are pending.
- 286.** The Government goes on to communicate its own observations connected to the complainant organizations' allegations, stating that the transferral of the company from Santiago de Cali to Facatativá was legitimate, as the Constitution of Colombia provides for economic freedom, and that the trade unions do not explain how this relocation violates ILO Conventions on freedom of association and collective bargaining. The Government also states that the Colombian courts have handed down rulings on the complainants' claims, and that the decisions taken have not been in their favour.
- 287.** The Government also provides information concerning the administrative labour processes related to the present case, stating firstly that: (i) on 4 December 2009, the company applied for the authorization of the labour administration to permanently close its activities, as it found itself in a state of liquidation; (ii) on 7 December 2009 the labour administration requested the employers to provide information on whether or not trade unions existed, and on other matters relating to work and pensions; (iii) on 26 January 2010, the ex-liquidator of the company notified the labour administration that the company had been liquidated on 21 December 2009, without giving the requested information concerning the existence of trade unions or the other required information related to work and pensions; (iv) that same day, the labour administration informed the company that it would conduct a visit to the company's premises on 5 February 2010, and that the workers should be present; (v) on 4 February 2010, the ex-liquidator abandoned the application for closure authorization and stated that the company was already legally liquidated; and (vi) on 19 February 2010, the company's application for closure was filed. The Government states, secondly, that: (i) on 5 January 2010, various workers affiliated to SINALTRACINPROA, SINTRAPRICOL and SINALTRAINPROCED presented a complaint against the company, alleging collective dismissal and violation of trade union immunity; (ii) on 26 January 2010 an investigation was opened, and the parties were summoned to a meeting on 10 February 2010; (iii) the ex-liquidator of the company

notified the authorities that the company was legally liquidated; (iv) as a result of the above, the complaint was filed on 23 August 2011 due to the impossibility of initiating an investigation into a company which no longer had legal personality.

**288.** In a communication dated 21 July 2015, the Government provides an update on procedural advances in the different legal cases connected to the present case, based on information furnished by the liquidated company. The Government adds, on its own behalf, that: (i) the company merely exercised its economic freedom, and did not violate the ILO Conventions ratified by Colombia relating to freedom of association, and that this case is therefore not within the Committee's purview; (ii) the majority of the workers' legal claims have yet to be definitively resolved, most court decisions to date having been in favour of the company (this is true of the application for recognition that the company and Alimentos Polar Colombia SAS are a single business entity – the Supreme Court of Justice is still conducting an extraordinary judicial review of the previous decisions); and (iii) the Ministry of Labour took all the necessary actions in relation to SINTRAPRICOL's request for a declaration of business unity.

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

**289.** *The Committee observes that the present case concerns the liquidation of the company Pricol Alimentos SA (hereinafter "the company") and the related dismissal of company workers who were affiliated with the trade unions SINTRAPRICOL and SINALTRACINPROA. The Committee observes that the information provided by the complainant organizations, the company and the Government relates mainly to the following facts: (i) SINTRAPRICOL, a trade union whose origins date back to 1958, represented, in 2006, most of the workers of the company with which it had signed a collective agreement; (ii) in January 2007 the company, which was based in Santiago de Cali, began the process of moving its operations to the town of Facatativá; (iii) between November 2006 and February 2008 the company dismissed 45 workers; (iv) as a result of the dismissals the number of workers in the trade union fell below the legal minimum number, 25; (v) on the basis of the preceding facts, the company applied to the courts for the annulment of the trade union's legal personality – the definitive resolution of which claim is still pending; (vi) in 2008, the company's workers participated in the establishment of an industry-wide trade union, SINALTRACINPROA, which negotiated on a list of demands with the company between March and May 2009 without reaching an agreement; (vii) on 21 October 2009, the company's shareholders decided, at their general meeting, to liquidate the company voluntarily; on 18 December 2009, the company dismissed 20 unionized workers, among them 14 leaders of SINTRAPRICOL and SINALTRACINPROA; and (viii) on 20 December 2009 the liquidation of the company became effective.*

**290.** *The Committee notes that the complainant organizations allege, in particular, that: (i) consultations with the trade unions concerning the liquidation of the company were not held at any point; and (ii) the liquidation of the company was a manoeuvre intended to eradicate the trade unions; after all, the liquidated company continued its productive activity in the same place and using the same machinery, only under the new corporate name of the Polar corporate group, under which the company operated (hereinafter "the corporate group").*

**291.** *The Committee also notes, however, that the company and the Government state that the company merely exercised its economic freedom, without this violating the workers' rights related to freedom of association; that the present complaint does not fall within the purview of the Committee; and that most of the workers' legal claims have yet to be definitely resolved, most court decisions to date having been in favour of the company.*



292. *The Committee observes that the company and the Government do not respond to the allegation that there were no consultations with the trade unions in relation to the liquidation of the company. Recalling that in cases where new staff reduction programmes are undertaken, the Committee requested that negotiations take place between the enterprise concerned and the trade union organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 1082], the Committee requests the Government to take the necessary measures to ensure that, in future, the liquidation of companies involves consultations and negotiations with the relevant trade unions.*
293. *As regards the alleged anti-union nature of the process of liquidating the company, the Committee takes note that the trade union alleges that: (i) the liquidated company formed part of a corporate group; (ii) the company's liquidation did not mean the closure of its productive operations, but that the company's activities continued in the same plant, using the same machinery, merely under another of the corporate group's company names; (iii) the company was liquidated without the Ministry of Labour's authorization to close; (iv) the company's workers who benefited from trade union immunity were dismissed without the necessary prior judicial authorization; (v) some of the company's non-unionized workers continue to work in the plant under the new company name; and (vi) the liquidation of the company has resulted in the Facatativá plant operating without any trade union.*
294. *The Committee also notes that the Government states that: (i) on 4 December 2009, the company requested the labour administration's authorization to permanently close its activities, being in a state of liquidation; (ii) in January 2010, the ex-liquidator of the company informed the labour administration that the company had been liquidated on 21 December 2009, without having furnished the labour administration with the information that it had requested on the existence of company trade unions and other work and pensions matters; (iii) the labour administration set a date of 5 February 2010 for a visit to the company's premises; (iv) on 4 February 2010 the company withdrew its application for closure, being already in a state of liquidation, and the labour administration consequently closed the file; (v) the administrative labour complaint presented on 5 January 2010 by worker members of SINTRAPRICOL, SINALTRACINPROA and SINALTRAINPROCED for violation of the laws concerning dismissal and trade union immunity was filed, it being impossible to conduct an investigation of the liquidated company, which no longer had legal personality; (vi) the majority of the workers' legal claims relating to the liquidation of the company have yet to be definitively resolved, most court decisions to date having been in favour of the company, including the application for recognition that the company and Alimentos Polar Colombia SAS are a single company; and (vii) the Ministry of Labour took all the necessary actions in relation to SINTRAPRICOL's request for a declaration of business unity.*
295. *With regard to this second allegation, the Committee firstly recalls that its mandate consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions [see para. 14 of the Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association – Annex I]. Thus, while the legality of the process of the company's liquidation does not fall within its purview, it is appropriate for the Committee to examine whether this process entailed any acts of anti-union discrimination.*
296. *On the basis of the information provided by the complainant organizations, the company and the Government, including the attached court rulings, the Committee notes that the liquidation of the company was accompanied by the dismissal of all its trade union*

leaders, without it having obtained the legal authorization that Colombian law requires for trade union immunity to be lifted. The Committee also observes that, on the basis of the liquidation the Ministry of Labour, without conducting visits to the company premises, filed both the company's application to close and the administrative labour complaint concerning the illegality of the dismissals of the company's unionized workers. The Committee observes that it is to be inferred from the above that the Ministry of Labour could not investigate whether the complainant organizations' allegations – according to which the liquidation of the company resulted in it continuing its productive activity under another corporate name, using non-unionized workers – were founded. The Committee also observes that the courts of first and second instance considered that the company's dismissal of the 14 trade union leaders in December 2009 violated the legal provisions relating to trade union immunity, but that they did not order that the workers be reinstated nor that their overdue salaries be paid, owing to the fact that the company had been liquidated.

**297.** *In this connection, the Committee recalls that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest**, op. cit., para. 771]. The Committee considers that the liquidation of a company and the fact that the legal person under which the company operated has ceased to exist should not be used as a pretext for anti-union discrimination nor should they be an obstacle to the competent authorities determining whether or not there were acts of anti-union discrimination and, if such practices are shown to have taken place, to sanctioning such illegal acts and ensuring that the affected workers are duly compensated.*

**298.** *Recalling that where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest**, op. cit., para. 835], the Committee requests the Government to conduct, in a short space of time, an exhaustive investigation into the possibility that the company's dismissal of its unionized workers, concomitant with its liquidation, was an anti-union act; and to establish, inter alia, whether the productive activities that the company engaged in before it was liquidated continue in the Facatativá plant, whether these activities were transferred to other establishments owned by the corporate group under which the company operated and whether non-unionized company workers were maintained in employment by companies forming part of the corporate group. The Committee requests the Government to inform it, soon, of the results of this investigation and, if acts of anti-union discrimination are identified, to punish these effectively and compensate the workers appropriately.*

**299.** *The Committee additionally requests the Government to keep it informed of progress in legal proceedings related to this case.*

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

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

- (a) The Committee requests the Government to take the necessary measures to ensure that, in future, the liquidation of companies involves consultations and negotiations with the relevant trade unions.*

- (b) *The Committee requests the Government to: (i) conduct, in a short space of time, an exhaustive investigation into the possibility that the company's dismissal of its unionized workers, concomitant with its liquidation, was an anti-union act; and (ii) to inform it, soon, of the results of this investigation and, if acts of anti-union discrimination are identified, to punish these effectively and compensate the workers appropriately.*
- (c) *The Committee additionally requests the Government to keep it informed of progress in legal proceedings related to this case.*

CASE No. 3087

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

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

- **the Confederation of Workers of Colombia (CTC) and**
- **the Union of Workers of Financial Entities (SINTRAENFI)**

*Allegations: The complainants allege that the firm Bancolombia SA refuses to bargain collectively with the trade union organization SINTRAENFI and commits acts of anti-union persecution*

- 301.** The complaint is contained in a communication of 13 May 2014 presented by the Confederation of Workers of Colombia (CTC) and the Union of Workers of Financial Entities (SINTRAENFI).
- 302.** The Government sent its observations in communications dated 13 March and 19 June 2015.
- 303.** 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**

- 304.** In a communication of 13 May 2014, the complainants denounce the fact that the firm Bancolombia SA refuses to bargain collectively with the SINTRAENFI. In this respect, the complainants indicate that: (i) after proposing unsuccessfully to the National Union of Bank Employees (UNEB) and the National Union of Workers of the Bancolombia Group (SINTRABANCOL) to move forward joint collective bargaining with the firm, SINTRAENFI was obliged to present its own list of dispute grievances on 21 September 2011, while UNEB and SINTRABANCOL submitted a different list; (ii) the negotiations (direct settlement phase) began on 26 September 2011 and some of the SINTRAENFI proposals were welcomed by the firm and communicated to the other firm negotiating team which was dealing with UNEB and SINTRABANCOL; (iii) on 13 October 2011, the firm requested SINTRAENFI to withdraw from the negotiations since an agreement had

been reached on the previous day with SINTRABANCOL and UNEB; (iv) thus, on 15 October 2011, the direct settlement phase with SINTRAENFI was officially concluded without an agreement; (v) on 22 October 2011, in accordance with the legislation in force, SINTRAENFI chose to request the Ministry of Labour to set up an arbitration tribunal; (vi) finally established on 10 December 2013, the tribunal issued its ruling on 31 January 2014; and (vii) persisting with its discriminatory attitude against SINTRAENFI, the firm lodged an appeal for the ruling to be annulled. The complainants add that as a result of the discriminatory refusal of SINTRAENFI's right to bargain collectively, trade union members had to wait 28 months before obtaining an arbitration ruling and that the annulment appeal will entail many more months' wait before the Supreme Court of Justice takes a decision and a final solution is achieved to this labour dispute.

- 305.** The complainants also denounce the fact that SINTRAENFI is the victim of anti-union persecution on the part of the firm, which is manifested by the requests to annul the union registration of three subsections of the trade union in Itagüí, Chía and Soacha, in violation of trade union autonomy and the legally recognized rights of industry trade unions.
- 306.** The complainants also indicate that various SINTRAENFI leaders are the subject of acts of persecution. They state that Mr John Fredy Giraldo Álvarez was accused, with the aim of dismissing him, of creating an atmosphere of panic among the employees for having exercised his freedom of expression. Similarly, the members of the national board of directors, Mr Jorge Eliécer Ramírez and Mr Carlos Alonso Medina Ramírez, were sanctioned (suspended for two days from work) for having posted on the firm's Intranet communications from SINTRAENFI on various labour-related problems affecting the firm's employees.
- 307.** The complainants state that the above facts are evidence, on the part of the firm, of a violation of the written agreement signed on 2 March 2010 during the ILO preliminary contacts mission and in which the firm undertook to avoid any kind of discriminatory treatment against SINTRAENFI. They add that the Government is not acting independently in this case, owing to the firm's role in financing the campaign of the current President of the Republic, and of particular note is the delay with which the arbitration tribunal was set up.

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

- 308.** In a communication dated 8 July 2014, the Government forwards the replies of the firm Bancolombia SA. The firm states that it participates actively in labour relations with the three trade unions present at the company: the firm trade union, SINTRABANCOL, which brings together 3,962 workers from the firm; the industry trade union, UNEB, which has 2,542 members in the firm, and the industry trade union, SINTRAENFI, with 222 members from the firm. The firm adds that currently, out of a total of 18,867 employees at the national level, 13,849 employees are beneficiaries of the three-year collective agreement signed with SINTRABANCOL and UNEB, which expires on 31 October 2017.
- 309.** As regards the collective bargaining process, the firm states that: (i) for the sole purpose of continuing to build union relations based on social dialogue and harmony, after the three trade unions were unable to agree to discuss the list of dispute grievances jointly, the firm initiated two simultaneous negotiating processes in September 2011, with SINTRAENFI on the one hand, and SINTRABANCOL and UNEB on the other; (ii) after signing the collective agreement with SINTRABANCOL and UNEB on 13 October 2011, the firm proposed that SINTRAENFI accede to the agreement; (iii) faced with SINTRAENFI's refusal and the failure to reach a specific agreement, the direct settlement stage with SINTRAENFI was wrapped up on 15 October 2011; (iv) the firm appealed the Ministry of Labour decision to set up an arbitration tribunal to settle the collective dispute with

SINTRAENFI, since it considered that a signed collective agreement already existed within the firm, the benefits of which also cover the employees who are members of SINTRAENFI by unilateral decision of the firm; (v) the firm lodged an appeal to annul the arbitration ruling, which is still pending a decision by the Supreme Court of Justice; and (vi) pending said decision, the firm recognizes that the collective dispute with SINTRAENFI is still pending a settlement, for which reason, since September 2011, it continues to apply to all the members of this trade union the special temporary protection against unfair dismissals provided for in legislation.

- 310.** In relation to the legal action against the creation of SINTRAENFI subsections, the firm states that it has recognized that the trade unions have such a right, provided that the subsections are created in line with legal requirements. The firm considers, however, that the creation of subsections made up of members who do not have their professional domicile in the municipality where the subsection is created is an abuse of rights and a violation of the legislation in force. According to the firm, these practices, which seek to satisfy interests that go beyond the aims of freedom of association, are the sole justification for the legal action taken by the firm.
- 311.** As regards the process of lifting the trade union's immunity and other disciplinary proceedings launched against various directors of SINTRAENFI, the firm states that: (i) it considered the possibility of lifting the trade union immunity of one leader who had published completely false information relating to the dismissal of 3,000 of the firm's employees, creating a bad labour climate and endangering the firm's reputation; (ii) with a view to guaranteeing good relations with SINTRAENFI, the firm finally decided not to take legal action; and (iii) it sanctioned with two days' suspension two trade union leaders who had used the firm's email system to distribute messages relating to their union activity, which should have been sent using the institutional email address of the trade union organization.
- 312.** After forwarding the firm's response, the Government communicates its own observations, in which it states that: (i) the collective bargaining process between the firm and SINTRAENFI respected the relevant legal provisions and is pending a ruling by the Supreme Court of Justice as regards the appeal for annulment lodged by the firm against the arbitration ruling; and (ii) under Decree No. 089 of 2014, collective bargaining is taking place from now on at a single negotiating table, leaving the different union organizations the possibility to appear jointly with a single list of dispute grievances or to set up a single negotiating commission, with representatives in proportion to the number of members.
- 313.** The Government adds that: (i) on 13 August 2014, a meeting was held of the "Special Committee for the Handling of Conflicts referred to the ILO" (CETCOIT), at which the parties expressed their points of view and it was agreed to hold a joint meeting to find a solution; and (ii) on 1 September 2014, SINTRAENFI presented a claim to the labour inspectorate for an alleged breach of the collective labour law rules, which is currently being investigated.

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

- 314.** *The Committee observes that this case refers firstly to the alleged denial of the right to collective bargaining of the trade union organization SINTRAENFI, by the firm Bancolombia SA, and, secondly, to alleged acts of anti-union persecution against the same organization, including legal cases brought by the firm in response to the creation of subsections of the organization, as well as disciplinary proceedings against its leaders.*

- 315.** *As regards the allegations relating to the refusal of the right to collective bargaining, the Committee notes that the complainant organizations allege that SINTRAENFI is the victim of discriminatory treatment with respect to the other two trade union organizations, SINTRABANCOL and UNEB, present in the firm, as appears to be demonstrated by the successive delays in the collective bargaining process, the attempt, once the collective agreement was signed with SINTRABANCOL and UNEB, to force SINTRAENFI to withdraw its own list of dispute grievances, and also the judicial challenge by the firm against the arbitration ruling intended to bring an end to the collective dispute with said union.*
- 316.** *In this respect, the Committee notes that, according to the firm, owing to the lack of an agreement between SINTRAENFI, the minority trade union, and the two main trade unions present in the bank (SINTRABANCOL and UNEB), the firm was obliged to conduct two parallel negotiations. From the firm's reply, the Committee gathers that the initiatives taken by the firm at the different stages of the two collective bargaining processes had the aim of establishing a single collective agreement applicable to all its staff and, in this regard, the firm proposed to SINTRAENFI (222 members) to accede to the collective agreement signed with SINTRABANCOL (3,962 members) and UNEB (2,542 members) and, in addition, according to the firm, the benefits of this collective agreement apply also to the members of SINTRAENFI. Observing that, according to the Government, collective bargaining will take place from now on at a single negotiating table, owing to the entry into force of Decree No. 089 of 2014, the Committee trusts that the application of the new rules will, in the future, allow negotiations to be conducted with all the trade union organizations present in the firm and will help to overcome the delays that characterized the negotiation and subsequent arbitration proceedings between the firm and SINTRAENFI. The Committee requests the Government to keep it informed of the decision taken on the appeal for annulment lodged by the firm against the arbitration ruling, as well as of the results of the complaint presented by SINTRAENFI to the labour inspectorate for alleged breach of the rules of collective labour law (the complaint was brought after the parties agreed to convene a meeting on the issues pending before CETCOIT).*
- 317.** *In relation to the legal cases brought against the creation of three SINTRAENFI subsections, considered by the complainant organizations to be the expression of anti-union persecution, the Committee notes that the firm states that the subsections must be created in line with legal requirements, which is not the case since the subsections are made up of members who do not have their professional domicile in the municipality where the subsection is set up. With respect to this allegation, the Committee observes that: (i) the Government has not sent specific observations in this regard; and (ii) it does not have concrete information relating to the formation of the three subsections that were subject to legal actions, or information on the content of the legal cases brought in this respect. In these circumstances, the Committee requests the Government to send its full observations regarding this allegation, and the complainant organization and the firm to provide more details on the legal cases brought in response to the creation of the three SINTRAENFI subsections, and, where appropriate, information on the outcome of such cases.*
- 318.** *In relation to the process of lifting the trade union immunity of Mr John Fredy Giraldo Álvarez, allegedly for having exercised the freedom of expression required for the exercise of freedom of association, the Committee duly notes that the firm states that: (i) the process of lifting the immunity was due to the fact that the employee had disseminated completely false information, relating to the dismissal of 3,000 workers, which created great unease among the staff; and (ii) with a view to guaranteeing good relations with SINTRAENFI, the firm finally decided not to follow through. The Committee duly notes this information.*

**319.** *With respect to the two-day suspension of the employment contracts of the union leaders, Mr Jorge Eliécer Ramírez and Mr Carlos Alonso Medina Ramírez, for sending email messages with trade union content from their work accounts, the Committee notes that the firm states that trade union communications must be sent using the institutional email address of the trade union organization. Although the Committee has considered in previous cases that the modalities for the use of email in the workplace by trade unions should be a matter for negotiation between the parties, in the circumstances of this case, since the union organization was able to use its own email account from the workplace to contact its members, the Committee considers that the fact that trade union communications must be sent using the institutional email address of the organization, and not the firm's email address, does not appear to limit the principles of freedom of association.*

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

**320.** *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 keep it informed of the decision taken on the appeal for annulment lodged by the firm against the arbitration ruling issued at the initiative of SINTRAENFI, as well as of the outcome of the complaint brought by SINTRAENFI before the labour inspectorate for alleged breach of the rules of collective labour law.*
- (b) The Committee requests the Government to send full observations concerning the legal cases brought in response to the creation of three subsections of SINTRAENFI. The Committee also requests the complainant organizations and the firm to provide more details in this regard and, where appropriate, information on the outcome of such cases.*

CASE NO. 3088

DEFINITIVE REPORT

### **Complaint against the Government of Colombia presented by the Union of Cali Municipal Enterprises Workers (SINTRAEMCALI)**

*Allegations: The complainant organization denounces the dismissals of three Cali Municipal Enterprises (EMCALI) workers*

- 321.** The complaint is contained in a communication of 30 May 2014 presented by the Union of Cali Municipal Enterprises Workers (SINTRAEMCALI).
- 322.** The Government sent its observations in a communication dated 5 December 2014.
- 323.** 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 organization's allegations

- 324.** In a communication of 30 May 2014, the complainant organization alleges that two of its members, Mr Emir Mezu and Mr Manuel Cortez, were illegally dismissed by EMCALI (hereafter “the company”) during a period of tense relations between the trade union and the company. In this connection, the organization states that: (i) in March 2009, SINTRAEMCALI denounced the company’s privatization policy, while seeking the reinstatement of six union leaders and 45 union activists who had been illegally dismissed in 2004 (Committee on Freedom of Association Case No. 2356); (ii) with a view to weakening SINTRAEMCALI, the company decided to promote the establishment of parallel trade unions that supported its privatization policy, and discredited SINTRAEMCALI; (iii) on 4 March 2009, when SINTRAEMCALI was holding a meeting, Mr Marlon Ferley Torres began to distribute a circular opposing the organization; (iv) Mr Emir Mezu and Mr Manuel Cortez, exercising their right to freedom of association, demanded that Mr Ferley Torres explain the content of his circular to the meeting’s participants; (v) having initially refused, Mr Ferley Torres decided to attend the meeting, following a telephone conversation; (vi) subsequently, Mr Ferley Torres presented a disciplinary complaint and brought criminal charges against Mr Emir Mezu and Mr Manuel Cortez, alleging that they had used force to compel him to attend the meeting; and (vii) although Mr Emir Mezu and Mr Manuel Cortez were absolved of the criminal charges, the company decided to dismiss them, and did not follow the appropriate disciplinary procedure.
- 325.** The complainant organization adds that it was not definitively proven that the two workers committed the acts of which they were accused; that the company did not respect the workers’ right to defence in applying Decree No. 2127 of 1945 instead of Act No. 734 of 2002 (Single Disciplinary Code), which provides for better guarantees for workers in disciplinary matters; and that, in the context of the company’s anti-union assault on SINTRAEMCALI, the dismissal of the two workers constitutes an anti-union act. The complainant organization requests the Committee to recommend that the Government reinstate the two workers, and that in future the Single Disciplinary Code be applied in cases of public sector disciplinary dismissals.
- 326.** In the same communication the organization also refers to the dismissal, on 4 June 2010, of Mr Gilberto Arredondo Castaño, a union member who was employed by EMCALI, whom the organization alleges was another victim of the company’s anti-union policy. The organization attaches a timeline of the events and legal proceedings related to this dismissal.

## B. The Government’s reply

- 327.** In a communication dated 5 December 2014, the Government transmits EMCALI’s observations. The company firstly denies that it is supporting the creation of parallel trade unions to weaken SINTRAEMCALI, and states that freedom of association means that workers’ organizations have the full rights to self-form and to self-regulate, and that this applies to the 11 EMCALI trade unions that currently coexist. Regarding the dismissals of Mr Emir Mezu and Mr Manuel Cortez, the company states that: (i) on 5 March 2009, Mr Ferley Torres presented an internal complaint against Mr Emir Mezu, Mr Manuel Cortez and Mr Edwin Castañeda for having subjected him to physical violence; (ii) disciplinary proceedings against these three workers were instituted, with respect for their right to defence and following due administrative process; (iii) as part of this process, on 9 March 2009, an interview was conducted with the workers in the presence of a lawyer for SINTRAEMCALI; (iv) the administrative process resulted in the termination of Mr Emir Mezu’s and Mr Manuel Cortez’s employment contracts; (v) in both first and second instance rulings, the labour courts upheld the legality of the dismissals of the two



workers; and (vi) the sentence handed down at the second instance is now the subject of a special judicial review, with a Supreme Court of Justice decision on its validity pending.

- 328.** Regarding the allegation according to which EMCALI erroneously applied Decree No. 2127 of 1945 instead of Act No. 734 of 2002, the company states that Act No. 734 of 2002 did not abrogate Decree No. 2127, which remains the legal instrument governing the reasons for termination of public sector employees' employment contracts when there exists a just cause – as the first and second instance labour courts have confirmed there to be in this case.
- 329.** With regard to the dismissal of Mr Gilberto Arredondo Castaño, the company indicates that the due process was followed, that the worker's right to defence was respected, that first and second instance rulings confirmed the dismissal's legality, and that the outcome of a judicial review by the Labour Chamber of the Supreme Court of Justice is currently pending.
- 330.** Furthermore, the Government transmits its own observations, stating that: (i) although between 2012 and 2014, 16 labour-related administrative investigations were pursued as a result of complaints lodged by SINTRAEMCALI against the company (resulting in the imposition of four sanctions), the particular case of Mr Emir Mezu and Mr Manuel Cortez has not given rise to labour-related administrative complaints; and that (ii) the legality of the two workers' dismissals has been upheld by first and second instance decisions and a final ruling by the Supreme Court of Justice is pending.
- 331.** The Government adds that the fact that the workers were dismissed as a result of their disrespectful conduct has been proven, but that the trade union has not furnished any proof to support its allegations of anti-union behaviour.

### C. The Committee's conclusions

- 332.** *The Committee observes that the present case primarily concerns the dismissals of two members of SINTRAEMCALI, Mr Mezu and Mr Cortez, pursuant to an altercation with another EMCALI employee who was apparently opposed to the views of the aforementioned union. The Committee takes note of the complainant organization's allegations that the dismissals constitute anti-union acts and that, in applying Decree No. 2127 of 1945 instead of Act No. 734 of 2002, the company did not respect the workers' right to defence – for which reasons it requests that the Committee recommend that the workers be reinstated and that, in future, Act No. 734 of 2002 be used in case of public sector dismissal cases, as Decree No. 2127 should be abrogated.*
- 333.** *The Committee further notes that the complainant organization also refers to the dismissal of a third SINTRAEMCALI member, Mr Arredondo Castaño, under circumstances different from those surrounding the dismissals of Mr Mezu and Mr Cortez. Although it has attached a timeline detailing the events and legal proceedings relating to this dismissal, the Committee observes that the complainant organization has not brought forward any evidence as to how Mr Arredondo Castaño's dismissal runs counter to the principles of freedom of association and collective bargaining. In these circumstances, the Committee will not pursue the examination of this allegation.*
- 334.** *As regards the possibility that the dismissals of Mr Mezu and Mr Cortez constitute anti-union acts, the Committee notes the complainant organization's allegations: that it was not proven that the workers committed the violent acts of which they were accused and that, accordingly, they were cleared of the criminal charges against them; and that the company's desire to weaken SINTRAEMCALI was the real reason for the dismissals. On the other hand, the Committee notes that the company and the Government affirm that:*

*(i) the court of first instance considered that it had been demonstrated that Mr Mezu and Mr Cortez had restricted the freedom of one of their colleagues, which justified their dismissal; (ii) the second instance court affirmed the legality of the dismissals; and (iii) the complainant organization has not provided any concrete evidence to back its claim that the dismissals constituted anti-union acts.*

**335.** *In view of the above, the Committee observes that the question of the legitimacy of the dismissals of Mr Mezu and Mr Cortez was confirmed by first and second instance judgments and has given rise to a special judicial review by the Labour Chamber of the Supreme Court of Justice, the outcome of which is pending. The Committee also notes that the claim that the dismissals constitute anti-union acts did not form part of the arguments put forward before the national courts. In these circumstances, the Committee will not pursue its examination of this aspect of the case.*

**336.** *Regarding the alleged need to abrogate Decree No. 2127 of 1945, and for public sector disciplinary dismissals to be governed by Act No. 734 of 2002, the Committee observes that the complainant organization does not explain how Decree No. 2127 of 1945 fails to guarantee sufficient protection against anti-union discrimination. The Committee therefore lacks the information necessary for it to adopt a position in relation to this second allegation, and will not pursue its examination of the matter unless it receives further information from the complainant organization.*

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

**337.** *In the light of the foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 2786

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

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

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

**338.** The Committee last examined this case at its May–June 2013 meeting, when it presented an interim report to the Governing Body [see 368th Report, paras 291–299, approved by the Governing Body at its 318th Session (June 2013)].

**339.** Subsequently, the Government sent new observations in a communication dated 20 March 2015.

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

## A. Previous examination of the case

341. At its June 2013 meeting, the Committee made the following recommendations on the matters still pending [see 368th Report, para. 299]:

- (a) The Committee regrets that the Government has not provided the information requested in March 2012 on the matters still pending and requests the Government to be more cooperative in the future.
- (b) The Committee once again urges the Government to indicate without delay whether self-employed workers and contract workers may bargain collectively, and draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.
- (c) As regards the alleged anti-union practices in the enterprises “Frito Lay Dominicana”, “Universal Aloe” and “MERCASID”, the Committee urges the Government to provide additional information, in particular regarding the allegations of inspection flaws (absence of impartiality and failure to carry out inspections).

342. With regard to recommendation (c), the conclusions and recommendations of the Committee from its March 2012 meeting are reproduced below [see 363rd Report, para. 507]:

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

## B. The Government’s reply

343. In its communication of 20 March 2015, the Government states that the case of the MERCASID enterprise has been resolved and that the trade union official – who had obtained a second ruling from the Second Chamber of the Labour Court rejecting the enterprise’s application to lift his trade union immunity so that he could be dismissed – was not the victim of any retaliation by the enterprise. In a communication from the enterprise, attached by the Government, the enterprise explains that its application to the Court was made on account of an email with pornographic content that had been sent to a number of employees in the enterprise, as stated in the ruling. The Government adds that

the complainant states, in a written communication accompanying its reply, that this case was already settled by the courts.

- 344.** As regards the allegation of anti-union practices at the Frito Lay Dominicana enterprise and the request for new mediation by the Ministry of Labour, the Government refers to the multiple instances of mediation aimed at the conclusion of a collective agreement between the trade union and the enterprise but does not send any information concerning the false accusations against the Secretary-General of the trade union, Mr Ramón Mosquera, designed to secure his dismissal, or concerning the anti-union dismissal of 15 union members in 2009–10 [see 359th Report, para. 436].
- 345.** As regards the allegations concerning the Universal Aloe enterprise (threats against union officials), the Government states that in the course of the many inspections conducted in this enterprise no information or complaints relating to violations of freedom of association were received. However, the Government sent a communication from the complainant confederation dated July 2014 stating that the complaint relating to this enterprise is still to be settled.

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

- 346.** *The Committee notes the explanations from the Government and the MERCASID enterprise concerning the judicial proceedings for lifting the trade union immunity of the union's Secretary-General. Observing that the ruling went in favour of the union official and that consequently he was not dismissed, the Committee will not pursue its examination of this allegation.*
- 347.** *As regards the alleged anti-union practices at the Frito Lay Dominicana enterprise, the Committee observes that these relate to the 2009–10 period (allegations of the anti-union dismissal of 15 union members and false accusations against the union's Secretary-General, Mr Ramón Mosquera). The Committee notes that the Government refers to the multiple instances of mediation aimed at the conclusion of a collective agreement between the enterprise and the union but not to the alleged anti-union practices. In view of the time that has elapsed since these allegations were made, the Committee urges the complainant and the Government to indicate whether or not administrative or judicial complaints have been filed and, if so, to keep it informed of their outcome.*
- 348.** *As regards the complainant's allegations in 2010 concerning the Universal Aloe enterprise (threats against union officials), the Committee notes the Government's statement that in the course of the many inspections conducted at the enterprise no information or complaints relating to violations of freedom of association were received. In view of this, the Committee recalls in general terms that the exercise of trade union rights is incompatible with violence or threats of any kind and it is for the authorities to investigate without delay and, if necessary, penalize any act of this kind.*
- 349.** *Lastly, noting with regret that the Government has not responded to recommendation (b) made further to the previous examination of the case, the Committee observes that section 2 of the Labour Code links the concept of worker to the existence of an employment contract and that section 319 recognizes only enterprise, occupational or branch trade unions. The Committee requests the Government: (i) to ensure that "self-employed" workers fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that workers who are self-employed could fully enjoy trade union rights for the purpose of furthering and defending their interest, including by the means of collective bargaining; and (iii) in consultation with the social partners concerned, to identify the particularities*

*of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate [see 363rd Report, Case No. 2602 (Republic of Korea), para. 461]. The Committee again draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

- 350.** *As regards the allegations concerning flaws and a lack of impartiality in the functioning of the inspection system, the Committee, in view of the lack of specific observations from the Government on this matter, requests the Government to keep it informed of any developments in this respect and recalls to the Government the availability of technical assistance from the ILO.*

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

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

- (a) *As regards the alleged anti-union practices at the Frito Lay Dominicana enterprise, the Committee urges the complainant and the Government to indicate whether or not administrative or judicial complaints have been filed and, if so, to keep it informed of their outcome.*
- (b) *The Committee requests the Government: (i) to ensure that “self-employed” workers fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that workers who are self-employed could fully enjoy trade union rights for the purpose of furthering and defending their interest, including by the means of collective bargaining; and (iii) in consultation with the social partners concerned, to identify the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate. The Committee again draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*
- (c) *Observing the allegations concerning flaws and a lack of impartiality in the functioning of the inspection system, the Committee requests the Government to keep it informed of any developments in this respect and recalls to the Government the availability of technical assistance from the ILO.*

CASE NO. 3068

INTERIM REPORT

**Complaint against the Government of the Dominican Republic  
presented by  
the Union of Freight Handling Workers of the firm Terminal Granelera  
del Caribe SA (TEGRA) and the Jarabacoa Poultry and  
Livestock Corporation (Pollo Cibao)**

*Allegations: Pressure to give up trade union membership, suppression of a peaceful trade union march, legal action brought by the firms TEGRA and Pollo Cibao to have the complainant union's registration annulled, refusal of the firms to bargain collectively and other anti-union acts*

- 352.** The complaint is contained in a communication from the Union of Freight Handling Workers of the firm Terminal Granelera del Caribe SA (TEGRA) and the Jarabacoa Poultry and Livestock Corporation (Pollo Cibao), dated 24 March 2014.
- 353.** The Government sent its observations in a communication dated 20 March 2015.
- 354.** The Dominican Republic has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 355.** In their communication of 24 March 2014, the Union of Freight Handling Workers of the firm Terminal Granelera del Caribe SA (TEGRA) and the Jarabacoa Poultry and Livestock Corporation (Pollo Cibao), affiliated to the General Confederation of Workers of the Dominican Republic (CGTRD), allege that the workers of both firms have been the victims of very serious violations of labour laws (failure to pay wages and to enrol such workers in the social security scheme, inhuman transport, refusal of means to guarantee occupational health and safety with large numbers of accidents, etc.) and that since they set up the trade union in 2012, the security forces have not allowed trade union leaders or members – the majority of whom are Haitians – to enter the premises where ships are unloaded, nor do they receive their wages, etc. The complainant union explains that the lists of workers are communicated by the firm to the Directorate General of Customs, the Dominican Port Authority and the Haina International Terminals company which are, after all, those which allow (or do not allow) workers to enter ships to unload goods. According to the allegations, the mediation meetings requested by the union with the Ministry of Labour in 2012 were not attended by the representatives of the firms.
- 356.** The complainant union states that a peaceful march protesting against the alleged facts by members of the trade union in the Port of Río Haina was put down with tear gas and gun cartridges.
- 357.** Furthermore, according to the allegations, the firms in question have refused to negotiate the preliminary draft collective agreement presented by the trade union since 2012, as is

made clear from the documents sent by the complainant union. The mediation undertaken by the representatives of the Ministry of Labour has not produced any results either.

- 358.** The complainant union states that it has reminded the firms in writing that the workers protected by trade union immunity must be paid their wages and allowed to continue performing their regular duties; an official request for such payment has been made by the trade union (which sent the corresponding document).
- 359.** Finally, the complaint states that the firms have submitted to the courts a request to annul the registration of the complainant union.

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

- 360.** In its communication of 20 March 2015, the Government states that the case submitted by the complainant has been settled and refers to a communication dated 24 October 2014, which, according to the Government, was sent to the International Labour Standards Department. The Government adds that the National Confederation of Trade Union Unity indicated, in a written submission of 25 July 2014 (the Government encloses the submission), that the case in question was settled by the national courts in relation to the firm Pollo Cibao.

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

- 361.** *The Committee notes the seriousness of the allegations presented by the claimant union, which refer to pressure placed on union members to give up their union membership, or lose their jobs, the refusal to allow them to enter or work in the ship unloading facilities (controlled by security guards), failure to pay wages to the union activists (protected by trade union immunity), refusal by the firms to bargain collectively and to attend the mediation hearings of the Ministry of Labour, violent suppression of a peaceful march on 5 March 2014 and the bringing of legal action by the firms to have the trade union's registration annulled.*
- 362.** *The Committee observes that the Government and a national trade union confederation state that this case has been settled by the national courts in relation to the firm Pollo Cibao. The Committee observes that the Government refers to a communication dated 24 October 2014, not received by the Office; the Committee is not therefore in possession of specific and detailed information on the different allegations or of proof of the Government's statement that this case has been settled by the courts (this refers to a ruling or a possible agreed settlement between the parties before the judge). The Committee urges the Government to send said information and the communication of 24 October 2014, to which the Government refers in its reply. The Committee urges the Government to obtain the observations of the firms TEGRA and Pollo Cibao on the allegations through the national employers' organization concerned and to communicate them without delay so that the Committee may examine the case on the basis of sufficient information.*
- 363.** *Pending receipt of the information from the Government, the Committee urges it to ensure the full exercise of trade union rights in both firms.*

## **The Committee's recommendations**

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

- (a) *While emphasizing the seriousness of the alleged facts, the Committee does not as yet have specific and detailed information concerning the different allegations or the proof that the present case – as indicated by the Government – has been settled by the courts. The Committee urges the Government to resend the communication dated 24 October 2014, referred to in the Government’s reply but not received by the Office.*
- (b) *The Committee urges the Government to obtain, through the national employers’ organization concerned, the observations of the firms TEGRA and Pollo Cibao on the allegations and to communicate those observations without delay.*
- (c) *Pending receipt of said information, the Committee urges the Government to ensure the full exercise of trade union rights in the above firms.*

CASE NO. 3079

DEFINITIVE REPORT

**Complaint against the Government of the Dominican Republic  
presented by**

- **the National Confederation of Dominican Workers (CNTD) and**
- **the Dominican Association of Air Traffic Controllers Inc. (ADCA)**

*Allegations: Reprisals against trade union leaders and members in the air traffic sector in the context of a collective dispute: suspensions and dismissals, suspension of the deduction of trade union dues, restrictions on trade union leaders’ access to workplaces, etc.*

- 365.** The complaint is contained in a communication dated 28 May 2014 presented by the National Confederation of Dominican Workers (CNTD) and the Dominican Association of Air Traffic Controllers Inc. (ADCA). These organizations sent additional information and new allegations in communications dated 15 December 2014 and 8 June 2015.
- 366.** The Government sent its observations in communications dated 30 September 2014 and 24 March 2015.
- 367.** The Dominican Republic has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants’ allegations**

- 368.** In their joint communication dated 28 May 2014, the CNTD and ADCA allege that the leaders of the ADCA have been promoting, and participating in, a range of activities with a view to guaranteeing respect for its members’ rights and improving their working and living conditions.



**369.** Following up on the agreement (“Memorandum of Understanding”) signed with the employer on 11 May 2007, the ADCA developed a plan to implement the agreement and thereby improve its members’ living and working conditions. This plan led to an inter-institutional agreement to increase salaries by 35 per cent, in two stages: a 15 per cent increase in June 2013, and a 20 per cent increase which should have come into effect in January 2014. At the same time, the ADCA sought to resolve the technical problems existing in all the national air traffic control centres, problems which resulted from the state of disrepair of these installations. It requested basic equipment that is essential for the provision of air traffic control services, as well as maintenance and urgently needed repairs for the tools and technological infrastructure that are vital for the provision of service and the guaranteed safety of aerial operations – such as communication systems, radio navigation aids and radars, which were about to fall to pieces. The ADCA had reported these technical problems in a written submission and a PowerPoint presentation, both addressed to the director of the Dominican Civil Aviation Institute (IDAC), following an exhaustive technical inventory of all air navigation centres nationwide which was delivered to the IDAC authorities on 31 July 2011, and to the Air Navigation Directorate (DINA) on 16 September 2011.

**370.** According to the allegations, up until 2013, the differences that existed between the ADCA and IDAC had been resolved by means of dialogue, without this causing any particular issues.

**371.** The complainant organizations state that, along with the activities planned and executed under the ADCA’s action plan, they opposed a proposal to amend article 37 of Civil Aviation Act No. 491-06, which provides that:

The Director General will establish the regulations governing employment conditions, social security and economic benefits, in accordance with the labour laws of the Dominican Republic and the recommendations and resolutions of the International Labour Organization (ILO), to ensure that the directors, employees, consultants and agents in the IDAC’s service have the protection and support which is guaranteed them by the international legal instruments to which the Dominican State is a signatory.

**372.** The amendment proposed in turn by the Director of the IDAC was as follows:

Article 37. IDAC civil servants shall be subject to the Public Service Regulations, and to the regulations which govern the Dominican Social Security System.

**373.** This proposal not only infringed workers’ acquired labour rights, it also contravened the recommendations of the International Civil Aviation Organization (ICAO) contained in document No. 9426-AN924, which, for instance, advocates mixed committees comprising managerial staff and workers for the rapid settlement of disputes.

**374.** Opposition to amending article 37 of Civil Aviation Act No. 491-06 is a just and legitimate cause for a workers’ organization in view of the support that this article provides, by tying working conditions, social security and economic benefits to ILO Conventions. The director of IDAC’s attempt to amend this article was covert, and he denied any such intention on numerous occasions. This plan to change the law was, however, moving forward – without the knowledge or involvement of the parties whom it would affect – and the proposed amendment was placed on the agenda of the meeting of the Senate of the Republic of 5 February 2013. Fortunately, the ADCA’s proposal was well received and understood by the Congress of the Republic, and the ADCA managed to retain the benefits provided for by article 37 of the abovementioned Act.

**375.** The ADCA’s battle also focused, and continues to focus, on trying to deflect efforts to privatize the essential air navigation services that the IDAC offers. The ADCA adds that

on 4 February 2013, along with the other technical workers' associations in the aeronautical sector, it sent to the director-general of the IDAC a number of defects and faults that affected, and still affect, air navigation services. There was no response, so the ADCA found itself obliged to resort to using the media to appeal to the highest national authorities to voice its concerns about the defects which it had reported, but which the IDAC authorities had not addressed. The association paid to publish its grievance in the 4 February 2013 edition of the newspaper *Listín Diario*, along with the National Pilots' Association (ANP), the Dominican Association of Operations Inspectors (ADIO) and the Dominican Association for Aeronautical Maintenance (ADTEMA). That act, and the fact that the association had not approved the director of IDAC's abovementioned proposal to amend article 37, caused the IDAC authorities to distance themselves. Thereafter, the organization's authorities refused to receive ADCA representatives in their offices and, moreover, embarked on a series of actions that flagrantly violated freedom of association and other concomitant rights.

**376.** From June 2013 onwards, the hostile actions directed at the ADCA intensified: unilaterally and suddenly, the IDAC suspended the deduction of ADCA trade union dues. It had been deducting dues for 30 years. With this act, the IDAC not only denied the trade union organization's status, but also punished the union financially, and consequently weakened it. Without resources, the ADCA cannot implement its activities, plans or programmes; nor can it cover its necessary expenditures such as rent, electricity, communication and secretarial support.

**377.** Among the actions taken against the air traffic controllers, the use of direct threats and intimidation to make them renounce the association stands out. They are threatened with: (a) not receiving due promotion; and (b) not being considered for new training. If they do not yield to the pressure to renounce, they risk the IDAC downgrading the positions that they occupy, arbitrarily transferring them or forcing them into involuntary retirement and making them accept a premature pension.

**378.** In a new attempt to resolve the problems by means of dialogue, on 4 December 2013, the ADCA sent an extensive communication to IDAC's Director, detailing each and every violation of and action contrary to good faith, and the law that it had committed. In this communication the ADCA also expressed to the authorities its intention to solve the disputes by means of dialogue, re-establishing the normal inter-institutional channels of communication; and its commitment to maintaining the highest standards of efficiency and safety in the delicate and strategic service that it offers. Additionally, it requested that:

- the IDAC give due consideration, and responses, to the multiple communications sent to it by the ADCA, particularly the association's request to participate in the technical process of installing and making operational the new control centres which are currently being installed; and that the agreement reached in connection with the joint IDAC/ADCA technical report be implemented, in order to improve technical infrastructure at the national level;
- the IDAC ensure, without delay, that its technical positions be filled on the basis of competitions, as Decree No. 525-09, Regulation on Performance Evaluation and Promotion for Civil Servants, provides;
- illegal and unfair sanctions against air traffic controllers be annulled, due to their retaliatory nature (such as unpaid suspensions of up to two months, and unilateral orders to take involuntary retirement – which do not take into consideration the scarcity of specialized technical personnel – given to air controllers who are fully capable of performing their duties); and

- payments of wages to air traffic controllers be made regular and adequate, performance-based bonuses be paid, the 15 per cent salary increase be implemented, Bonus No. 4 be paid to control staff who are on medical leave or retired for pension purposes; as well as the regularization of payment of the school bonus that is referred to in the reference documents attached to the present communication, etc.
- 379.** As a result of the IDAC's failure to respond to its approaches, the ADCA decided to use peaceful protests and to organize, in conjunction with the CNTD, marches, pickets and sit-ins, hoping that the application of pressure would lead to a solution.
- 380.** After a call on 29 January 2014 to take part in a peaceful march organized by the ADCA and CNTD, the director of human resources published a circular, on 31 January, addressed to all the organization's staff, warning that participation in the scheduled activities would be punishable by the second and third degree sanctions set out in Public Service Act No. 41-08, and possibly dismissal.
- 381.** In response to the protests, the IDAC followed through on its threat and dismissed trade union leaders from their positions in retaliation for their activities. On 19 February 2014, it suspended the leaders and most active members of the association, whom it subsequently dismissed: Mr Wellington F. Almonte Gómez, Ms Cristina Arelis Mateo Guerrero, Mr Josué Joel Pérez Encarnación, Mr Edwin A. Montero Luciano, Mr Leonardo Rivera, Ms Shelby Darío Ng Ruiz, Mr Carlos Alberto Carvajal Ureña, Mr Ramón Armora Santos, Mr Rainier Pavel Ulerio Santos, Mr Arturo Napoleón Rodríguez Cedano and Mr Erik Yohairy Echevarría P. The dismissal of Mr Breydys Laurel Tapia Disla was annulled when he gave in to pressure and renounced his ADCA membership (in a letter dated 13 March 2014); the resolution that establishes his reinstatement includes the fact:
- ... that in his appeal for reconsideration, air traffic controller Tapia Disla went on to say: 'I let myself get involved in a fight that is not my own; I wanted to intervene and change things and I ended up wronged in the worst possible way: I believe that the Dominican Association of Air Traffic Controllers was, and is, on course for disaster and I cannot be a part of this ...'
- 382.** According to the ADCA, none of the sanctioned employees committed any act in violation of the provisions of the law serious enough to warrant dismissal from his or her post; on the contrary, the employees exercised the rights that the Constitution of the Republic, Public Service Act No. 41-08 and the regulations governing its application, Civil Aviation Act No. 491-06 and ILO Convention No. 87 confer upon them.
- 383.** The sanctioned trade unionists filed administrative and judicial appeals for *amparo* (remedy for the protection of constitutional rights) and requests for protective measures, with a view to obtaining the reinstatement of the suspended controllers.
- 384.** On 26 April 2014, the ADCA and CNTD submitted a formal request for mediation to the Minister of Labour, which resulted in a mediation session being held between the parties on 13 May 2014. However, up to the present the mediation has not yielded any tangible outcome that facilitates the resolution of the dispute between the parties nor, in particular, an end to the arbitrary sanctions. During the mediation session, by contrast, the IDAC representative merely posited the non-existence of the ADCA as a legal person, brandishing a certificate awarded by the Ministry of Public Administration which showed that the ADCA was not registered with that Ministry.
- 385.** The complainant organizations also allege that the employer is promoting the establishment of a parallel trade union to compete with the ADCA.

- 386.** The complainant organizations state that, on 21 February 2014, the Trade Union Confederation of the Americas (TUCA) sent a communication requesting the IDAC to cease its anti-union activities and demonstrate full respect for the fundamental rights of the air traffic controllers and their organization; the International Federation of Air Traffic Controllers' Associations (IFATCA) sent a communication along similar lines to the director of the IDAC on 26 February 2014. On 24 February 2014 Public Services International (PSI) also addressed a letter to the Director of the IDAC advocating dialogue, to no avail.
- 387.** Among the arguments it put forward at the mediation session at the Ministry of Labour on 13 May 2014, the IDAC especially focussed on the ADCA's non-existence as a legal entity. On this point, it is necessary to clarify that the ADCA is a trade union organization under private law, duly registered and, as such, having legal personality by virtue of the provisions of the then Act No. 520 of 26 June 1920 on non-profit associations. It was registered by Executive Decree No. 212-98 of 3 June 1998, and subsequently re-registered in accordance with Act No. 122-05 of 3 May 2005, on regulation and promotion of non-profit associations in the Dominican Republic.
- 388.** In their communication of 15 December 2014, the complainant organizations indicate that among the legal proceedings is the request for *amparo* submitted by the ADCA and the air traffic controllers who were victims of retaliatory measures. In response to said claim, the First Chamber of the Higher Administrative Court handed down Ruling No. 00230-2014 on 24 June 2014, which recognized the truth of the events as reported by the claimants and the arbitrariness of the conduct of the Director of the IDAC, and ordered the immediate reinstatement of the air traffic controllers.
- 389.** The IDAC authorities ignored this ruling. It is important to emphasize that Ruling No. 00230-2014 recognizes the existence of the ADCA, even though it could not register its status under Public Service Act No. 41-08 – because this Act, as the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has expressed, contravenes the provisions of Convention No. 87 by requiring organizations of civil servants to affiliate at least 40 per cent of the employees of the institution concerned at the national level, and does not provide for the establishment of professional associations such as the ADCA (which affiliates workers in the air traffic control profession).
- 390.** Confronted with the IDAC's unjustified refusal to comply with Ruling No. 00230-2014, the ADCA lodged a formal claim for financial liability against the director of the IDAC.
- 391.** In a communication dated 8 June 2015, the complainant organizations list the various rulings handed down in relation to the present case. They add that the airport authorities, who maintain a blacklist of ADCA leaders with names and photographs, bar these leaders' access to workplaces in order to prevent them from communicating with their members. In this connection, the complainant organizations also send photographs of the arrest or temporary detention of union leaders, including that of Mr Antonio Rodríguez Fritz, general secretary of the International Transport Workers' Federation (ITF).

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

- 392.** In its communication of 30 September 2014, the Government transmits the IDAC's position and the comments it made on 26 August 2014 in relation to the complaint presented by the ADCA, which are transcribed in the following paragraphs.
- 393.** The IDAC is the autonomous, specialized and technical body established by Civil Aviation Act No. 491-06 of the Dominican Republic as the national aeronautical authority with

responsibility for reporting to the International Civil Aviation Organization (ICAO) (which IDAC is governed by) and the international aeronautical community. It is responsible for ensuring compliance with international regulations and standards designed to guarantee the safety of civil aviation at the global level, and, in the national context, it is charged with the supervision, control and surveillance of civil aviation activities that take place across the territory and within national air space.

- 394.** As regards the complaint presented by the CNTD and ADCA to the ILO, it is important to emphasize that, far from intervening to ensure respect for workers' legitimate and constitutional right to strike in accordance with the legally established parameters, the complainant organizations are seeking to distort the reality of events and cover up the disciplinary offences committed by various air traffic controllers in the IDAC's employ.
- 395.** The complainants, reprehensibly, seek the ILO's intervention in order to apply international pressure and spread misinformation. The IDAC would thus like to present the following clarifications.
- 396.** At present, the events that have occurred, and the disciplinary proceedings that have been carried out, are being examined by the Higher Administrative Court and the Constitutional Court, and the IDAC will abide by the final decisions of these bodies. Up to now, there are four judicial proceedings the results of which are pending, these being:
- (a) a request for protective measures initiated on 7 April 2014, which is being examined by the President of the Higher Administrative Court;
  - (b) a request for protective measures initiated on 14 April 2014, which is being examined by the President of the Higher Administrative Court;
  - (c) a contentious administrative appeal made on 30 June 2014, which is being examined by the Higher Administrative Court; and
  - (d) a request for review made on 14 August 2014, which is being examined by the Constitutional Court.
- 397.** The existence of these judicial proceedings demonstrates that the request for intervention made by the CNTD and ADCA to the ILO is inadmissible, as the Dominican courts are already protecting the interested parties' fundamental rights.
- 398.** Air traffic control is an essential public service: it prevents aircraft colliding and ensures the safety of air navigation. It is vital in safeguarding the lives of passengers and ensuring the safety of people on the ground, and the health of the whole or part of the population. It is the IDAC's exclusive responsibility to offer this service, which is regulated by Civil Aviation Act No. 491-06 and the Dominican Aeronautical Regulations on Air Traffic Services (RAD 11), in accordance with the Convention on International Civil Aviation or "Chicago Convention" of 1944, which the Dominican Republic has signed and ratified. Article 38 of Act No. 188-11 on Airport and Civil Aviation Security establishes that in extraordinary situations this service may be provided by the Air Force of the Dominican Republic (FARD).
- 399.** Notwithstanding, even though this case does not concern the right of unions to strike or to suspend services, but relates to disciplinary proceedings initiated individually for violations of Public Service Act No. 41-08 of the Dominican Republic, it should be recalled that the ILO itself, through the Committee on Freedom of Association, has declared whether, generally speaking, a list of specific services are essential or non-essential, as follows:

... the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electricity services; water supply services; the telephone service; air traffic control.

- 400.** As air traffic controllers are civil servants, their employment relationship with the IDAC is governed by the aforementioned Public Service Act No. 41-08 and its regulations, the provisions of which are aligned with article 142 of the Dominican Constitution of 2010, which establishes the Public Service Regulations:

Article 142. Public Service. The Public Service Regulations comprise a system of public law based on merit and professionalization with a view to efficient management and ensuring that the State fulfils its essential functions. These Regulations will govern civil servants' payment, promotion, performance evaluation, term of service and dismissal (Dominican Constitution).

- 401.** In addition to regulating the pay, career progression, promotion and dismissal of civil servants, the aforementioned Public Service Act clearly establishes that associations of civil servants only acquire legal personality when they register with the Ministry of Public Administration, specifically stating that any action by an unregistered civil servants' organization is considered automatically void:

Article 68 of Act No. 41-08. Associations, federations and confederations of civil servants acquire legal personality by virtue of their registration with the Secretariat of State for Public Administration, which will issue the appropriate certificate. Actions taken by organizations of civil servants which have not registered with the Secretariat of State for Public Administration are considered void.

- 402.** This requirement to register with the Ministry of Public Administration is also contained in paragraph VI of article 84 of Regulation No. 523-09 on Labour Relations in Public Administration.

- 403.** On 9 April 2014, the Ministry of Public Administration issued a certificate which indicates that the ADCA:

... in accordance with Public Service Act No. 41-08 and its accompanying Regulation No. 523-09 on Labour Relations in Public Administration, it is not registered with this Ministry as an established association, protected by these regulations. This document proves that all actions by the ADCA, in its alleged capacity as an association of civil servants, are automatically void by virtue of article 68 of Public Service Act No. 41-08.

- 404.** The IDAC adds that the ADCA members who were dismissed from the IDAC, committed acts classified as third-degree offences by Public Service Act No. 41-08, and were then subject to disciplinary proceedings in which their right to defence was respected.

- 405.** Since the beginning of 2013, and following an increase in hostilities at the beginning of 2014, a group of air traffic controllers (Mr Wellington Almonte and others), individually and/or on behalf of and/or representing the ADCA, carried out a series of activities which constitute third-degree disciplinary offences under Public Service Act No. 41-08, and which are punishable by dismissal. Among these activities, the following were carried out repeatedly, in an arrogant manner and with a deliberate lack of discipline:

- (a) the dissemination of false information to the national and international media, claiming that the communication equipment and radars used in air traffic control centres were in poor condition, and predicting an "imminent collapse" of the air navigation system;

- (b) the use of the ADCA as a lobbying platform to influence the public opinion and within the IDAC, despite the fact that the association is not registered with the Ministry of Public Administration, meaning that it has no legal status as a civil servants' association and that its actions are void in law, as is expressly established in article 68 of Public Service Act No. 41-08;
- (c) the call to strike and picket, which were likely to interrupt the delivery of the essential public service of air traffic control, and which could have endangered the lives, health and safety of citizens. This action is also defined in the prohibition from: (i) encouraging their members to abandon their positions and duties; (ii) persuading their members to refuse to cooperate in the provision of efficient public services; and (iii) carrying out actions that violate the principles and regulations governing the development of the IDAC;
- (d) the incitement of the ADCA members to refuse to comply with the administrative policies of the IDAC, which is an act included in the prohibitions listed in the previous paragraph; and
- (e) disrespectful treatment and the dissemination of false information aimed at damaging the reputation of the IDAC as a public entity, and of its managers as senior officials.
- 406.** In response to a call to picket on the premises of the IDAC made by Mr Wellington Almonte and other individuals, in collusion with the CNTD (despite the fact that the IDAC effectively implemented a 35 per cent salary increase for air traffic controllers in January 2014), the Director of human resources at the IDAC sent a circular to all staff, requesting them to refrain from conducting any activities that may constitute disciplinary offences.
- 407.** Mr Wellington Almonte and other individuals ignored the aforementioned institutional warning and continued with their plan to lobby against and discredit the IDAC and its managers through the media, and consequently, the IDAC initiated an investigation and disciplinary proceedings which resulted in their dismissal. During this administrative process, the right to defence of Mr Wellington Almonte and other individuals was fully respected, as demonstrated by the proof presented by the IDAC before the Higher Administrative Court and/or the Constitutional Court.

---

**Timeline of the disciplinary procedure followed by the IDAC and the legal proceedings initiated by the appellants and the ADCA**

---

<b>Actions and/or events</b>	<b>Dates</b>
1. Circular issued by the IDAC with a warning of possible disciplinary offences, in response to a picket organized by the appellants and the CNTD.	31 January 2014
2. Personnel actions ordering the suspension with pay of the appellants, in accordance with article 88 of Act No. 41-08.	19 February 2014
3. Actions to establish a commission of inquiry, in order to investigate the disciplinary offences committed by the appellants.	20 February 2014
4. Letters sent to Mr Wellington Almonte and other individuals requesting them to produce written evidence in their defence, which demonstrates the protection of their right to defence.	25 February 2014
5. Decisions by the commission of enquiry on the disciplinary offences committed by the appellants.	19 March 2014

- |   |                |
|---|----------------|
| 6. Filing of an <i>amparo</i> appeal before the Higher Administrative Court.  | 19 March 2014  |
| 7. Comments by the legal director of the IDAC, relating to the disciplinary offences committed by the appellants.                             | 31 March 2014  |
| 8. Decisions to carry out dismissals, issued by the Director of the IDAC.   | 3 April 2014   |
| 9. Submission of a first request for an advance precautionary measure to the President of the Higher Administrative Court, by the appellants. | 7 April 2014   |
| 10. Notification of the decisions to carry out dismissals.  | 9 April 2014   |
| 11. Filing of appeals for review against the IDAC.  | 10 April 2014  |
| 12. Submission of a second request for an advance precautionary measure to the President of the Higher Administrative Court.                  | 14 April 2014  |
| 13. Filing of an administrative dispute appeal before the Higher Administrative Court.  | 30 June 2014   |
| 14. Lodging of an appeal for review before the Constitutional Court.  | 14 August 2014 |
- 

**408.** It appears that the opposition to the amendment of article 37 of Act No. 491-06, which the CNTD and the ADCA also expressed in the complaint, had no effect on the factual aspect of the disciplinary proceedings conducted, given that: (i) the legal provision was not changed and Act No. 67-13, which amended Act No. 491-06, was published in Official Gazette No. 10713 of 25 April 2013; and (ii) following the publication of Act No. 67-13, in June 2013 and January 2014, the IDAC implemented a progressive salary increase of 35 per cent for air traffic controllers.

**409.** Despite its lack of legal status and the legal nullity of its actions, the ADCA has carried out acts that are expressly prohibited for civil servants' organizations registered with the Ministry of Public Administration. These acts are defined in the provisions of article 88 of Regulation No. 523-09 on Labour Relations in Public Administration:

Article 88. Organizations of civil servants are prohibited from:

...

2. Encouraging, initiating and supporting strikes in public services whose interruption could endanger the lives, health and safety of citizens.

...

4. Inciting or forcing their members to abandon their positions and duties, in violation of the official regulations in force.

...

6. Persuading their members to refuse to cooperate in the provision of efficient public services.

7. Carrying out actions that violate the principles and regulations governing the development of the state administration, at any level or in any sectors or places where it is required to act.



**410.** In this regard, Mr Wellington Almonte and other individuals committed the offences set out in paragraphs 2, 4, 18 and 21 of article 84 of Act No. 41-08:

Article 84. The following actions committed by any civil servant in the public administration constitute third-degree offences that will lead to dismissal:

...

2. Carrying out, concealing, justifying or allowing, in any form, acts which undermine the interests of the State, or which cause, whether intentionally or by manifest negligence, serious financial damage to State assets.

...

4. Demonstrating a lack of integrity or committing acts of violence, insult, defamation or immoral conduct at work, or carrying out an act detrimental to the reputation of the State or any State body or entity.

...

18. Hosting or holding meetings that may disrupt the work of the institution.

...

21. Repeating any of the offences defined as second degree.

**411.** Furthermore, Mr Wellington Almonte and other individuals repeatedly committed the offences established in paragraphs 3, 7 and 10 of article 83 of Act No. 41-08:

Article 83. The following acts constitute second-degree offences that will lead to suspension from work for up to ninety (90) days without pay:

...

3. Repeatedly treating colleagues, junior staff, superiors and the public in a disrespectful, aggressive, rude and offensive manner.

...

7. Disseminating, circulating, removing or reproducing from office archives, documents or information of a confidential or any other nature, of which civil servants have knowledge as part of their work, without prejudice to the provisions contained in legislation.

...

10. Supporting or participating in illegal strikes.

...

**412.** The IDAC applies internal policies that encourage and promote the right to freedom of association. For this reason, the IDAC has six employees' organizations which, despite not having been established as civil servants' associations under Public Service Act No. 41-08, but instead under Act No. 122-05 on Non-Profit Associations, have enjoyed and continue to enjoy the treatment and recognition received as part of the institutional role that they play. This demonstrates that the IDAC has respected and respects the rights of ADCA members at all times, and that there has been no violation of freedom of association.

**413.** With regard to the employee members of the ADCA, the IDAC has promoted the right to freedom of association, as, far from creating obstacles to the exercise of this right, it has recognized the ADCA as a de facto association, supported its operation, addressed its claims and interacted with its leaders, even though the ADCA has no legal status and no status as a trade union or a civil servants' association.

**414.** Likewise, in the disciplinary proceedings against several members of the ADCA for having committed third-degree offences established in Public Service Act No. 41-08, the constitutional principle of due process was also ensured, and no threat or arbitrary act to

the detriment of the members was carried out. Therefore, there has been and is no violation whatsoever of freedom of association by the IDAC.

**415.** In its communication dated 24 March 2015, the Government forwards the mediation agreement drafted by the Ministry of Labour on 10 June 2014 in relation to this case, and Ruling No. 030-14-00362 of the Higher Administrative Court dated 24 June 2014, Ruling No. TC/0006/15 of the Constitutional Court of the Dominican Republic of 3 February 2015, and Ruling No. 0048-2015 of the Higher Administrative Court.

**416.** The Government adds that, in the Dominican Republic, freedom of association is a constitutional right, and therefore all necessary measures are taken to ensure that it is protected and observed.

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

**417.** *The Committee observes that, in the present case, the complainants allege that, in response to the trade union claims and activities of the ADCA in 2013 and 2014 (opposition to changes in the legislation applicable to the association; privatization attempts; a public trade union complaint in the press regarding the safety of air service operations in terms of equipment and repairs; delays in the organization of competitions; payment of salary increases and other entitlements, etc.), the IDAC suspended the deduction of trade union dues as from June 2013, pressurized or threatened controllers to make them give up their membership or be excluded from training courses and promotions, did not accept the calls for dialogue made by the ADCA (and by other international trade union organizations), and its management refused to meet with ADCA representatives. They also allege that the IDAC sent a circular to all staff on 29 January 2014, requesting them to refrain from participating in trade union activities (marches, pickets, sit-ins) or risk incurring the penalties provided for by law, including dismissal. The complainants underscore that the trade union activities carried out led, as an anti-union reprisal, to the suspension of 12 of the most active leaders and members on 19 February 2014 and their subsequent dismissal, despite the fact that not one of them committed any offence established by law, which would justify their removal. The complainants add that the IDAC ignored the ruling dated 24 June 2014 of the First Chamber of the Higher Administrative Court, which ordered, as part of an amparo appeal, the immediate reinstatement of the dismissed trade union leaders and members, and that the ADCA therefore initiated legal proceedings against the Director of the IDAC for financial liability, in contempt of the aforementioned ruling. The Committee also takes note of the complainants' allegations that the IDAC does not recognize the ADCA as a civil servants' association and claims that it has no legal status and that its acts are void. However, it observes that the legal rulings issued on the case rejected the IDAC's claims.*

**418.** *The Committee notes that, in its reply, the Government recalls that freedom of association is a constitutional right in the country and that it includes the legal rulings issued in relation to the complaint by the complainant organizations, as well as the IDAC's comments on the case, which are summarized below:*

- *the complaint by the ADCA distorts the facts, and their actions fall outside the parameters established by law; the ADCA has initiated legal proceedings in response to the events that have taken place and the disciplinary procedures carried out, and the IDAC will observe the definitive court decisions. The IDAC is therefore calling into question the origin of the complaint before the Committee on Freedom of Association;*
- *air traffic control is an indispensable service whose interruption could endanger the lives of passengers and the public, and the Committee on Freedom of Association has included it in the list of essential services where the right to strike may be subject to*

major restrictions or even prohibitions. The IDAC has recognized the ADCA as a *de facto* association and addressed its claims, despite the fact that it does not have legal status as a trade union. The members of the ADCA who were dismissed had committed acts defined under Public Service Act No. 41-08 as third-degree offences punishable by dismissal. These penalties were imposed following disciplinary proceedings which respected their right to defence (the IDAC gives a general outline of the different stages of the procedure followed). The offences included: (1) the dissemination of false information to the media, claiming that the communication equipment and radars were in poor condition and predicting an “imminent collapse” of the air navigation system, in addition to disrespectful treatment and the circulation of false information aimed at damaging the reputation of the IDAC and its managers; and (2) a call to strike and picket encouraging members to abandon their positions and duties, and refuse to cooperate in the provision of efficient public services and to comply with the administrative policies of the IDAC;

- organization of a picket by the ADCA, despite the fact that the IDAC had effectively implemented a 35 per cent salary increase for air traffic controllers in January 2014, and that the amendment of article 37 of Act No. 491-06 (queried by the ADCA in 2013) was not pursued;
- the offences committed by the dismissed employees are defined in: (1) article 88 of Regulation No. 523-09 on Labour Relations in the Public Service which prohibits trade union organizations from encouraging strikes in essential services, persuading workers to abandon their positions and duties, refusing to cooperate and from carrying out actions that violate the principles and rules of the State administration; and (2) article 84 of Public Service Act 41-08 which establishes the following as third-degree offences that lead to dismissal: engaging in acts that seriously undermine the interests of the State or damage its reputation or that of its institutions; holding meetings that disrupt work; treating superiors in a disrespectful, aggressive, rude or offensive manner; and supporting or participating in illegal strikes;
- no threat or arbitrary act has been carried out to the detriment of ADCA members, nor any violation of freedom of association. The IDAC has six employees’ associations.

**419.** *The Committee takes note of the three legal rulings issued in relation to the present case, which have been forwarded by the complainant organizations and by the Government. The Committee observes that the first ruling (No. 00230-2014 of 24 June 2014) was handed down by the Higher Administrative Court (First Chamber) in response to an amparo appeal lodged on 19 March 2014 by the ADCA, which was declared admissible and well founded. The ruling ordered the revocation of the suspension of the trade unionists referred to in the complaint and the disciplinary proceedings against them to be reversed, in order to protect their fundamental right to freedom of association, and called for the immediate reinstatement of the plaintiffs to their positions in the IDAC. The second ruling (No. TC/0006/15) was issued by the Constitutional Court on 3 February 2015 in response to an appeal for review lodged by the IDAC on 14 August 2014 against Ruling No. 00230-2014 of the First Chamber of the Higher Labour Court. The ruling by the Constitutional Court revoked Ruling No. 00230-2014 of the Higher Administrative Court and declared the appeal lodged by the ADCA to be unjustified, on the specific grounds that: (1) “in this case, there is a specialized court that is entitled by law to guarantee the rights that may be affected by the actions of the administration, in particular disciplinary actions, as an administrative dispute court”; and (2) the Higher Administrative Court (First Chamber) concluded that freedom of association had been violated but did not ascertain “the reasoning or evidence reviewed which would allow it to determine what constitutes, in the case, the violation of the rights mentioned”. The third ruling (No. 0048-2015) of the Higher Administrative Court (First Chamber) was handed down on 26 February 2015 in response to an appeal, dated 30 June 2014, lodged by 12 air traffic*

*controllers suspended by the IDAC and subsequently dismissed for, according to the appeal, having carried out legitimate protests. In its ruling, the Higher Administrative Court dismissed the appeal as the aforementioned controllers had failed to file it within the time frame prescribed by law.*

- 420.** *The Committee concludes that the only one of the three aforementioned rulings which examined the issue in depth, and which ordered, through an amparo appeal, the immediate reinstatement of the air traffic controllers dismissed on the grounds that the IDAC had violated their freedom of association, was revoked by a Constitutional Court ruling (on the grounds of flawed reasoning and evaluation of evidence by the Higher Labour Court, and the existence of an administrative dispute court to which the case should have been referred). The Committee also observes that the IDAC did not respond to the allegations that it had ignored the calls for dialogue by the ADCA and other international trade union organizations (including Public Services International (PSI)), and that it refused to meet representatives from the ADCA.*
- 421.** *In response to the proceedings described above, in which the legality of the dismissals carried out by the IDAC was not examined in depth by any authority independent of the parties to the dispute, the Committee does not have sufficient information to pursue its examination of the specific allegations made and issues raised in this case, which go beyond the allegations relating to the right to strike. The Committee recognizes that air traffic control can be considered as an essential service [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 585] where the right to strike may be subject to major restrictions or even prohibitions. The Committee observes however that there appears not to have been a specific determination of the extent of alleged violations regarding the exercise of freedom of association invoked by the employer, the type of action undertaken, and the legitimacy of concerns raised by the complainants about passenger safety. In this regard, the Committee also takes note of the allegations by the complainants regarding serious violations during the administrative process.*
- 422.** *The Committee furthermore highlights that the IDAC has not provided information or explanations on why, in June 2013, it unilaterally suspended the deduction of trade union dues for the ADCA (which had benefited from this deduction for 30 years), or why it did not comply with the order to reinstate immediately the dismissed leaders, issued by the Supreme Labour Court on 24 June 2014 (which was only revoked by the Constitutional Court on 3 February 2015), and has not referred to the allegations that the complaints regarding poor safety were supported by three other employees' associations (which apparently were not punished). The Committee also observes that the IDAC did not reply in sufficient detail to the allegations by the ADCA regarding the alleged coercion and intimidation of ADCA members to make them give up their membership, nor to the alleged actions of the employer to promote the creation of an organization parallel to the ADCA. Moreover, the Committee observes that the IDAC has not responded to the new allegations by the complainants, according to which the leaders of ADCA were denied access to their workplaces to prevent them from making contact with the ADCA members (by retaining them or detaining them for several hours when they attempted to enter the premises). Lastly, the Committee also observes that the IDAC has not responded to the allegation that it ignored the calls to dialogue made by the ADCA and other international trade union organizations (including the PSI), and that it refused to meet with ADCA representatives.*
- 423.** *Observing that it has not been possible to establish the substance of this case and emphasizing the fundamental importance of tripartite dialogue, the Committee invites the Government to refer the different issues raised in this complaint to tripartite dialogue, bearing in mind the elements noted above.*

## The Committee's recommendation

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

*Observing that it has not been possible to establish the substance of this case and emphasizing the fundamental importance of tripartite dialogue, the Committee invites the Government to refer the different issues raised in this complaint to tripartite dialogue, bearing in mind the elements noted in its conclusions.*

CASE NO. 2957

INTERIM REPORT

### **Complaint against the Government of El Salvador presented by the Union of Workers of the Ministry of Finance (SITRAMHA)**

*Allegations: The complainant organization alleges threats and the detention of trade unionists in the context of a dispute relating to collective bargaining in the Ministry of Finance and excessive delays in collective bargaining*

**425.** The Committee examined the case at its meeting in October 2014 and presented, on that occasion, an interim report to the Governing Body [see 373rd Report, paras 283–293, approved by the Governing Body at its 322nd Session (October –November 2014)].

**426.** The Government sent its observations in a communication dated 28 May 2015.

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

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

**428.** At its October 2014 meeting, the Committee made the following recommendations on the matters still pending [see 373rd Report, para. 293].

- (a) As the versions of the complainant organization and the Government relating to the alleged detention of two trade unionists are contradictory, the Committee invites the complainant union to provide additional information.
- (b) The Committee requests the complainant organization to provide additional information to the Government and the Committee, and to indicate whether it has lodged a criminal complaint with the Office of the Public Prosecutor in respect of the alleged threats made by road transport workers to kill three trade unionists, who were denied police protection, and to indicate the full names of the trade unionists in question (only the name of Mr Jorge Augusto Hernández Velásquez was mentioned in the allegations). The Committee requests the Government to provide detailed information on these allegations

and, if the allegations are confirmed, to provide protection to the trade unionists in question.

- (c) The Committee requests the Government to keep it informed about the result of the arbitration procedures initiated by the Civil Service Tribunal regarding collective bargaining between the complainant trade union and the Ministry of Finance.

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

**429.** In its communication of 28 May 2015 the Government provides information on the collective bargaining process which was initiated in November 2010. With regard to the outcome of the arbitration process mandated by the Civil Service Tribunal on collective bargaining between the complainant trade union and the Ministry of Finance, the Government states that through a Tribunal resolution of 1 December 2011, the clauses agreed at the arbitration were added to the clauses which the parties had already agreed upon in the earlier stages of the collective bargaining, and that these clauses together constituted the arbitration decision. In this way, the collective labour agreement between SITRAMHA and the Ministry of Finance for the period 2012–14 was drawn up. On 8 December 2011 the Civil Service Tribunal, through a resolution, authorized the certification of this final document, so that the collective labour agreement could be registered with the Ministry of Labour. On 21 December 2011 the General Secretary of SITRAMHA submitted the copies of the arbitration decision for registration and through a Ministry of Labour resolution of 22 December 2011 the decision was registered as a collective labour agreement with a term of three years, expiring on 21 December 2014.

**430.** The Government also indicates that SITRAMHA has initiated a new collective bargaining process with a view to promoting the revision of the collective labour agreement for the period 2015–17, and that discussions are at the direct negotiation stage.

**431.** With regard to the allegations of death threats made to three trade unionists by transport workers and the police's refusal to provide protection, the Government requests the Committee to reiterate to the complainant trade union that it must give the full names of the trade unionists who allege that they were being threatened. It recalls that without this information it cannot conduct a thorough search of the registers of the National Civil Police, which it must do in order to be able to respond comprehensively to the allegations of denial of police protection.

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

**432.** *The Committee duly notes that the collective bargaining process that was initiated in November 2010 concluded in December 2012 with the registration of a new collective bargaining agreement for the period 2012–14, which incorporated clauses agreed upon by the parties in the direct negotiation and conciliation stages and other clauses that were agreed at the arbitration stage. The Committee also notes that a new collective bargaining process initiated by the complainant trade union, with a view to promoting the revision of the collective labour agreement for the period 2015–17, is currently under way.*

**433.** *As regards the alleged detention of two trade union leaders the Committee recalls that, on the one hand, the complainant alleged that the leaders were handcuffed and detained temporarily in police custody without being informed of the charges against them; and on the other hand, that the Government responded that the alleged arrest and detention never happened and that the police had provided protection to these individuals when a mob of transport workers attempted to assault them [see 370th Report, para. 405, and 373rd Report, para. 287]. Presented with these contradictory versions of events at its previous examination of the case, the Committee requested the complainant trade union to*

*provide additional information. The Committee regrets not having received any such information and, given the time that has elapsed without any attempt by the complainant trade union to supply more details, it will not pursue an investigation of these allegations.*

- 434.** *With regard to the allegation of death threats made to three trade unionists the Committee regrets that the Government has not provided the full information that was requested, stating that it needs the names of the three trade unionists while disregarding the fact that the complainant trade union provided the name of one of them (Mr Jorge Augusto Hernández Velásquez) in its communication of 23 May 2012, which was reproduced in the Committee's previous reports related to this case [see 370th Report, para. 406, and 373rd Report, para. 293]. The Committee firmly expects that the Government will follow up, with the complainant trade union, the allegation of death threats made against Mr Jorge Augusto Hernández Velásquez. The Committee also notes with regret that the complainant trade union has not provided the requested information relating to the identities of the two other trade unionists concerned. The Committee again requests the complainant trade union to furnish the Government with the full names of the other trade unionists mentioned in its complaint so that the Government can pursue the matter and inform the Committee of the outcome.*

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

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

*With regard to the alleged death threats, regretting that the Government has not provided information about the trade unionist whose full name it already knows, and that the complainant trade union has not provided the additional information requested concerning the identities of the two other trade unionists concerned, the Committee: (i) firmly expects that the Government will follow up, with the trade union, the allegation of death threats against Mr Jorge Augusto Hernández Velásquez; and (ii) again requests the complainant trade union to furnish the Government with the full names of the other trade unionists mentioned in its complaint so that the Government can pursue the matter and inform the Committee of the outcome.*

CASE No. 3099

DEFINITIVE REPORT

### **Complaint against the Government of El Salvador presented by the Salvadorian Social and Trade Union Front (FSS)**

*Allegations: The complainant organization alleges that the posts of two trade union leaders in the public sector have been abolished*

- 436.** The complaint is contained in a communication from the Salvadorian Social and Trade Union Front (FSS), dated 31 July 2014.

437. The Government sent its observations in a communication dated 16 June and 20 October 2015.
438. El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

#### **A. The complainant's allegations**

439. In its communication dated 31 July 2014, the complainant organization alleges that the posts occupied at the Ministry of Finance by trade union leaders and members of the General Association of Employees of the Ministry of Finance (AGEMHA), Mr Marcos Obdulio Alas Alas (who held the position of technical officer at the Directorate of Customs Revenue) and Mr Miguel Ángel Alfaro Sánchez (who held the position of administrative assistant at the General-Directorate of the Treasury), were abolished under Legislative Decrees Nos 679 (Budget Act) and 680 (Wages Act) of the Legislative Assembly, of 19 December 2001, which retrenched thousands of workers in the public sector (Legislative Decree No. 680 retrenched 8,322 public sector employees, 3,977 contractual employees and 130 daily-hire employees). As a result of these measures, on 20 December 2001, both trade union leaders received a communication informing them that their posts had been abolished and that they would be compensated in accordance with the Civil Service Act. However, no valid reason for this action had been previously authorized by the competent authority. The complainant organization considers that its constitutional right to work, to job security and to a hearing was violated, and, in particular its right, as a body of trade union members, not to be dismissed without a valid reason previously authorized by the competent authority, as established in section 248 of the Labour Code.
440. The complainant organization reports that a large number of employees from the state institutions concerned filed several complaints regarding the abolishment of their posts with the Office of the Ombudsman for Human Rights, which supported the dismissed workers, including the trade unionists. The complainant organization adds that a group of workers affected by the retrenchment initiated *amparo* (remedy for the protection of constitutional rights) proceedings, claiming that their right to job security and to a hearing had been violated. This appeal was rejected by the decision of the Supreme Court of Justice of 8 August 2002.

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

441. In its communication of 16 June 2015, the Government states that the posts occupied by Mr Marcos Obdulio Alas Alas and Mr Miguel Ángel Alfaro Sánchez were abolished in accordance with the Budget Act, which was adopted through Legislative Decree No. 679, and that pursuant to the Civil Service Act, the two individuals received the appropriate compensation. The Government considers that, as the compensation was granted in 2002 and was accepted by both individuals, due process was observed.
442. Accordingly, the Government believes that there was no violation of the constitutional rights protected by trade union status and that compliance had been demonstrated with the provisions of Conventions Nos 87, 98 and 135. The Government adds that, since 2012, two collective labour agreements have been concluded with the Union of Workers of the Ministry of Finance (SITRAMHA), which guarantee the right to job security, trade union immunity and other benefits for trade unions, their leaders and all employees.



### C. The Committee's conclusions

443. *The Committee takes note of the complainant's allegations that the abolishment of the posts of two trade union leaders, which was part of the retrenchment of thousands of public sector workers, went against the principles of freedom of association, and that a valid reason with prior authorization by the competent authority, as required by law, was not provided. According to the allegations, the Office of the Ombudsman for Human Rights spoke out against this abolishment of posts but the Supreme Court of Justice issued a decision dismissing the claim.*
444. *The Committee wishes to recall that: "The Committee 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" [See **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revise) edition, 2006, para. 1079].*
445. *The Committee observes from the allegations that the dismissal of the two trade union leaders was part of a staff reduction process which affected thousands of civil servants, and that the complainant organization provides no evidence that the abolishment of the posts of the two trade union leaders was related to a collective dispute or the exercise of trade union rights and activities. The Committee also observes the Government's denial that Conventions Nos 87, 98 and 135 were violated, and notes that the measure in question was established in the Budget Act for 2002, and that the two leaders accepted the corresponding statutory compensation.*
446. *The Committee observes that the appeal before the Supreme Court of Justice referred to in the allegations, which was lodged by dismissed workers with a view to calling into question in general the abolishment of posts imposed by the Budget Act, and which alleged that the right "to work, to job security and to a hearing" had been violated, was rejected in 2002.*
447. *Bearing in mind the different elements mentioned above and the lengthy period of time between the dismissals in 2001 and the submission of the complaint in 2014 and that the complainant did not provide sufficient information to support its claim that their dismissals were due to their trade union status or activities, the Committee will not pursue its examination of the case.*

### The Committee's recommendation

448. *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. 2970

DEFINITIVE REPORT

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

- **Public Services International (PSI)–Ecuador**
- **the National Federation of Education Workers (UNE)**
- **the Standing Inter-union and**
- **the Ecuadorian Medical Federation (FME)**

**supported by**

**the International Trade Union Confederation (ITUC)**

*Allegations: the complainant organizations allege that the Organic Act on the Civil Service (LOSEP) violates the international labour Conventions on freedom of association and collective bargaining ratified by Ecuador, and that, if adopted, draft amendments to the Constitution would aggravate the situation by bringing public sector workers under the scope of the LOSEP and of other administrative laws which are contrary to the principles of freedom of association and collective bargaining*

**449.** The complaints are contained in a communication dated 27 June 2012 from the Ecuadorian Medical Federation (FME), and in communications dated 22 September and 20 November 2014, submitted jointly by Public Services International (PSI)–Ecuador, the National Federation of Education Workers (UNE) and the Standing Inter-union. The complaints were supported by the International Trade Union Confederation (ITUC) in a communication dated 24 September 2014.

**450.** The Government sent its observations in communications dated 25 January 2013 and 20 January 2015.

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

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

**452.** In its communication dated 27 June 2012, the Ecuadorian Medical Federation (FME) alleges that the Organic Act on the Civil Service (LOSEP), adopted on 29 September 2010, and its general regulations (Executive Decree No. 710 of 24 March 2011) do not recognize the freedom of association and collective bargaining rights of State employees, referred to as public servants by the LOSEP. In this regard, the complaint organization firstly states that, although article 23 of the LOSEP recognizes the right to freedom of association of public servants, the organizations that they can form do not have trade union status, the public agencies responsible for registering these organizations are not specified, and the protective provisions contained in the Labour Code do not apply to them. Secondly, it claims that the LOSEP does not recognize the right of public servants' organizations to

negotiate the working conditions and labour relations of their members, and thus violates Article 4 of Convention No. 98 and Article 5(2) of the Nursing Personnel Convention, 1977 (No. 149), according to which, the determination of conditions of employment and work should preferably be made by negotiation between employers' and workers' organizations concerned. The complainant organization furthermore indicates that article 24 of the LOSEP excludes the right to strike and the exercise thereof. Lastly, the complainant organization adds that the unilateralism demonstrated by the Government in the reforms that it has been implementing excludes any dialogue or consultations with trade union organizations, and that the use of legal and constitutional authorities has been rendered pointless by the control exercised by the Government over the judiciary and the Constitutional Court.

- 453.** In the communications dated 22 September and 20 November 2014, submitted jointly by PSI, UNE and the Standing Inter-union, the complainant organizations allege that the draft amendments to the Constitution of the Republic of Ecuador submitted to the Constitutional Court on 26 June 2014 seek to eliminate completely the exercise of freedom of association and collective bargaining in the public sector, therefore violating ILO Conventions Nos 87 and 98. They state that articles 10 and 13 of the draft amendments provide for the removal of article 229, paragraph 3 and the amendment of article 326, paragraph 16 of the Constitution, which establish that public sector workers are currently covered by the Labour Code. The amendments would therefore bring all public sector employees under the scope of the LOSEP system and other administrative laws. They add that the detrimental and destructive nature of the amendments with regard to rights can be seen in their sole transitional provision which sets out that public sector employees who are currently governed by the Labour Code will retain the rights guaranteed by this legal instrument.
- 454.** According to the allegations, the aforementioned amendments would complete the process to dismantle gradually the collective rights of public sector workers, which was initiated in 2007. In this regard, the complainant organizations state that: (i) the adoption of a new Ecuadorian Constitution in 2008 resulted in the exclusion of public servants, who make up 78 per cent of public sector workers, from the application of the Labour Code, as it brought them under the scope of special top-down administrative laws; (ii) since then, only public sector workers have been governed by the Labour Code and have enjoyed, albeit to a very limited extent, collective bargaining rights; (iii) the LOSEP and other laws governing working conditions in the public sector, adopted after 2008 (Organic Act on Public Enterprises (LOEP), Organic Act on Intercultural Education (LOEI) and Organic Act on Higher Education (LOES)), violate freedom of association, the right to collective bargaining, and the right to strike, as underscored by the ILO supervisory bodies, thus excluding public servants from the guarantees provided for in Conventions Nos 87 and 98; and (iv) extending the exclusion from the Labour Code to public sector employees, and consequently bringing them under the scope of the LOSEP and other administrative laws, as laid down in the draft constitutional amendments, would exacerbate the violation of Conventions Nos 87 and 98 previously indicated by the ILO supervisory bodies, and would lead to the inevitable disappearance of the trade union movement in the Ecuadorian public sector.
- 455.** Lastly, the complainant organizations claim workers' representative organizations were not consulted previously on the draft constitutional amendments, which were supported by the judiciary.

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

- 456.** In its communication of 25 January 2013, the Government of Ecuador forwards the observations of the Ministry of Public Health, which states that the allegations made by the

FME, according to which the LOSEP does not recognize the principles of freedom of association and collective bargaining, and violates ILO Conventions Nos 87, 98 and 149, are completely unfounded. It indicates that the support provided by the Ecuadorian Government for the trade union movement can be seen in the significant increase in the number of registered trade unions in recent years, and that full effect is given to Conventions Nos 87, 98 and 149, in particular Article 6 of Convention No. 149 which establishes that nursing personnel should enjoy conditions at least equivalent to those of other workers in the country concerned.

**457.** In its communication of 20 January 2015, the Government provides its observations on the complainant organizations' allegations regarding the draft amendments to the Constitution. The Government states that: (i) the draft constitutional amendments are currently being debated before the National Assembly and therefore it is not completely certain that they will be incorporated in Ecuadorian legislation; (ii) the removal of article 229, paragraph (3) of the Constitution and the amendment of article 326, paragraph (16) seek to apply and extend the principle of equality and non-discrimination in labour relations in the public service, by harmonizing the legislation governing labour relations in the public sector; (iii) Article 6 of Convention No. 98 establishes that the Convention does not deal with the position of public servants engaged in the administration of the State; (iv) the LOSEP recognizes the freedom of association and the right to organize of public servants, as demonstrated in article 24 which prohibits public servants from abusing their authority in order to restrict the freedom to vote, freedom of association or other constitutional guarantees, and, in article 33, which provides for the granting of paid leave to public servant associations, therefore demonstrating that the harmonization of the labour regimes of public bodies will not diminish the rights of their employees; and (v) lastly, given that the Labour Code, due to its age, contains better-developed provisions in this regard, the Ministry of Labour will issue, once the constitutional amendments have been adopted, the relevant regulations in order to ensure the observance of the trade union rights contained in the Constitution of the Republic and the international Conventions, and to guarantee the rights of all workers in the public sector.

**458.** The Government also indicates that, prior to being submitted to the National Assembly for approval, the draft constitutional amendments were brought to the attention of the Constitutional Court, which considered that the removal of labour regime differences for public servants and public sector workers, far from undermining constitutional rights, guarantees equal treatment for state employees. As regards the transitional provision contained in the amendments, which establishes that public sector workers hired before the entry into force of the amendments will retain the rights guaranteed by the Labour Code, the Court observed that the proposal seeks to ensure the principle that the law may not be backdated.

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

**459.** *The Committee notes that this case concerns, first of all, the alleged violation by the LOSEP of the international labour Conventions on freedom of association and collective bargaining ratified by Ecuador, and secondly, the alleged exacerbation of this situation in the event of the adoption of the draft constitutional amendments, which were submitted in 2014 and are currently being considered by the National Assembly. These draft amendments provide for the exclusion of public sector workers from the application of the Labour Code and bring them under the scope of administrative laws governing the employment conditions of other public sector workers, among which the LOSEP is the most important legal instrument.*

**460.** *The Committee notes that the Government denies having violated the principles of freedom of association and collective bargaining by stating that the LOSEP recognizes freedom of*

*association and that the constitutional amendments criticized by the complainant organizations are not only necessary to ensure compliance with the principle of equality among public sector employees, but also are respectful of the acquired rights of workers in this sector, and that it furthermore recognizes that the provisions on freedom of association contained in the administrative laws should, in due course, be further developed.*

- 461.** *The Committee observes that the issue of the LOSEP's conformity with Conventions Nos 87 and 98, raised in the first allegation in this case, has already given rise to: various comments by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) which requested a reform of the law; a discussion before the Conference Committee on the Application of Standards in 2014 on ILO Convention No. 98; and, as a result of this discussion, an Office mission headed by the Director of the International Labour Standards Department, which visited the country from 26 to 30 January 2015 and whose mandate addressed the application of Conventions Nos 87 and 98, in addition to the cases pending before the Committee. The Committee notes that the CEACR particularly regretted the absence in the LOSEP of protective provisions against anti-trade union discrimination and interference by employers, in addition to the exclusion of the collective bargaining rights of all public servants, which therefore also applies to public servants who are not engaged in the administration of the State.*
- 462.** *While noting the Government's recognition that, with regard to freedom of association, the legislation pertaining to the public sector should be further developed, the Committee observes that the Government's reply does not contain any specific details on the measures taken to reform the LOSEP. In these circumstances, the Committee considers it necessary for the Government to initiate, without delay, consultations with workers' organizations in the public sector, in order to implement reforms that would ensure that the LOSEP fully complies with the principles of freedom of association and collective bargaining. Since Ecuador has ratified Conventions Nos 87 and 98, the Committee hopes that the Government will provide the CEACR with detailed information on the measures taken to reform the LOSEP in this respect, and on the legislative aspects of this case.*
- 463.** *With regard to the alleged violation of Conventions Nos 87 and 98 by the draft constitutional amendments which were submitted in June 2014 and which are currently under consideration by the National Assembly, the Committee notes the following issues raised in the complainant organizations' allegations and in the Government's reply: (i) under article 229 and article 326, paragraph (16) of the 2008 Constitution, which is currently in force, a distinction is drawn between public servants whose employment and working conditions are governed by special administrative laws (including the LOSEP) and public sector workers who are governed by the Labour Code; (ii) the draft constitutional amendments that are the subject of the complaint provide for the removal of article 229, paragraph (3) of the Constitution and the amendment of article 326, paragraph (16) in such a way that public sector employees would no longer be governed by the Labour Code and would therefore be entirely subject to the administrative laws governing working conditions in the public sector; (iii) the rules applicable to public sector employees (including public enterprises) would therefore be harmonized, with the exception of the sole transitional provision contained in the draft amendments; (iv) under this transitional provision, public sector workers hired before the entry into force of the amendments would retain the rights guaranteed by the Labour Code, and therefore the amendments would only affect workers hired after their entry into force; (v) the draft amendments were examined by the Constitutional Court, which considered that they did not restrict the rights insofar as they helped ensure compliance with the principle of equality; and (vi) in accordance with the National Constitution, the draft amendments were submitted to the National Assembly for initial consideration, and a second reading by the Assembly is pending.*

464. *The Committee notes the complainant organizations' allegations that the draft amendments, on which the trade union organizations had not been consulted, would complete the process to dismantle gradually the collective rights of public sector workers which was initiated in 2007 and accelerated by the adoption of the LOSEP and other organic laws governing the public sector (LOEP, LOEI and LOES). The Committee notes the Government's statements that: (i) the draft amendments ensure full respect for the principle of equality and non-discrimination in the public sector by harmonizing the legal systems applicable to public sector employees; (ii) the transitional provision ensures the observance of acquired rights; (iii) the provisions of the LOSEP which will apply to all public servants are not contrary to the right to organize; and (iv) as the Labour Code contains better-developed provisions in this regard, the Ministry of Labour will issue, once the constitutional amendments have been adopted, the relevant regulations in order to ensure the observance of the trade union rights contained in the Constitution of the Republic and the international Conventions so as to guarantee the rights of all public sector workers.*
465. *As this case deals with draft amendments that have not yet been adopted, the Committee wishes, firstly, to recall that, when it has had to deal with precise and detailed allegations regarding draft legislation, the Committee has taken the view that the fact that such allegations relate to a text that does not have the force of law should not in itself prevent it from expressing its opinion on the merits of the allegations made. It has considered it desirable that, in such cases, the Government and the complainant should be made aware of the Committee's point of view with regard to the proposed bill before it is enacted, since it is open to the Government, on whose initiative such a matter depends, to make any amendments thereto (see paragraph 27 of the Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association).*
466. *The Committee also indicates that the transfer from a private law system to a public law system is not problematic per se, as long as it respects the principles of freedom of association and collective bargaining. In this regard, the Committee recalls that it is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment be preceded by detailed consultations with the relevant organizations of workers and employers [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 1075], and observes the Government's lack of response to the allegations, according to which the public sector workers' organizations were not previously consulted on the draft constitutional amendments.*
467. *As regards the content of the draft constitutional amendments and their potential consequences in terms of freedom of association and collective bargaining, the Committee takes note of the following extracts from the report of the ILO mission, which visited Ecuador between 26 and 30 January 2015, and which forwarded a copy of the report to the Ecuadorian tripartite constituents:*

Given that the ILO supervisory bodies have already made repeated comments highlighting serious limitations on the right to collective bargaining in the public sector, which are contrary to Convention No. 98, the Mission draws the Government's attention to the sensitive nature of the amendments in question, which are currently the subject of a complaint before the Committee on Freedom of Association (Case No. 2970). In light of the above, the Mission considers it appropriate for the Government to initiate, without delay, substantial dialogue with the trade union organizations on the proposed amendments, in order to ensure that the possible transfer of public sector employees from the public system under the Labour Code to the LOSEP system does not cause a further restriction of the collective bargaining rights of public sector employees who are not engaged in the administration of the State. Accordingly, the Mission recalls once

again that the ILO is fully prepared to provide technical assistance for the aforementioned dialogue and for the discussions on the amendments within the National Assembly.

- 468.** *In light of the above, the Committee observes that the possible adoption of the draft constitutional amendments would extend the scope of application of the LOSEP and other related administrative laws (LOEP, LOEI, LOES) to all State employees (except public sector workers hired before the entry into force of the amendments). The Committee observes in particular that the aforementioned laws do not recognize the right of public servants to collective bargaining, regardless of whether they are engaged in the administration of the State, and notes that, if the current legislation were maintained, the adoption of the constitutional amendments would increase the restrictions on the collective bargaining rights of public sector employees who are not engaged in the administration of the State.*
- 469.** *In this respect, the Committee recalls that a distinction must be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in government ministries and other comparable bodies) as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the government, by public undertakings or by autonomous public institutions; only the former category can be excluded from the scope of Convention No. 98 [see **Digest**, op. cit., para. 887]. The Committee therefore considers that, in light of the draft constitutional amendments, which, if adopted, would extend the application of the LOSEP, it is even more imperative to reform this law, as underscored earlier in these conclusions. While noting the Government's statement that the Ministry of Labour would adopt rules to govern the trade union rights of public servants more expressly once the constitutional amendments had been adopted, the Committee observes that it has not received any information on specific initiatives to reform the LOSEP accordingly.*
- 470.** *Under these circumstances, the Committee urges the Government to initiate immediately consultations with workers' organizations in the public sector, with a view to taking the measures necessary to ensure that the draft constitutional amendments are in line with the principles of freedom of association and collective bargaining and the legislation applicable to the public sector, fully complies with these principles. The Committee expects that the Government, in light of its ratification of Conventions Nos 87 and 98, will send detailed information to the CEACR on the measures taken in this regard, and on the legislative aspects of this case. The Committee also recalls that the Government may draw upon the technical assistance of the Office.*

## **The Committee's recommendation**

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

*With reference to the principles set out in its conclusions, the Committee urges the Government to initiate consultations immediately with workers' organizations in the public sector, with a view to taking the measures necessary to ensure that the draft constitutional amendments are in line with the principles of freedom of association and collective bargaining and the legislation applicable to the public sector fully complies with these principles. The Committee expects that the Government, in light of its ratification of Conventions Nos 87 and 98, will send detailed information to the CEACR on the measures taken in this regard, and on the legislative aspects of this case.*

*The Committee also recalls that the Government may draw upon the technical assistance of the Office.*

CASE NO. 3040

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

**Complaint against the Government of Guatemala  
presented by  
the National Federation of Workers (FENATRA)**

*Allegations: The complainant organization alleges that, in the context of a collective dispute, the Koa Modas Union of Workers was denied its right to normal judicial proceedings, leaving its members defenceless against potential anti-union reprisals*

472. The complaint is contained in a communication dated 24 June 2013 from the National Federation of Workers (FENATRA).
473. The Government sent its observations in communications dated 20 May, 22 June and 27 July 2015.
474. Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

**A. The complainant's allegations**

475. In its communication dated 24 June 2013, FENATRA alleges that, in the context of a collective dispute, the Koa Modas Union of Workers was denied access to normal judicial proceedings, leaving its members defenceless against possible anti-union reprisals. In this connection, the complainant organization states that: (i) on 12 June 2013, in response to the refusal of clothing company Koa Modas SA to negotiate a collective agreement on working conditions, the legal representatives of the Koa Modas Union of Workers (hereafter "the union") lodged a "collective dispute of a social and economic nature" against the company with the Second Labour and Social Welfare Court of Guatemala – the initiation of this process having the effect under Guatemalan law of prohibiting the parties to the conflict from retaliating against each other and guaranteeing that, for the duration of the dispute, any termination of employment contracts must be authorized by the court (involving a summons, and preventive measures); (ii) on Friday, 14 June 2013, the abovementioned court issued a resolution ordering the union to comply, within 48 hours, with four requirements – failing which the summons and the preventive measures would not be granted and the legal proceedings would be closed; (iii) on Saturday, 15 June 2013, the union members returned to the labour court in order to submit an application containing the information necessary to comply with the requirements, but found that, it being a Saturday, the court was closed; (iv) the Criminal Court of First Instance, which is open every day of the year, refused to receive the application, claiming that it had orders to receive only requests for constitutional protection (*acciones de amparo*); (v) that same day,



15 June, the union's lawyer presented a complaint against the court to the Office of the Human Rights Ombudsman, for denying the unionized workers their right to defence and due process; (vi) on Monday, 17 June 2013, at 8 a.m., union representatives returned to the labour court to present the application, and explained their various attempts to submit it over the course of the weekend; (vii) that same day, the union's lawyer presented a complaint against the Criminal Court of First Instance to the Supreme Court of Justice, for having refused to accept the application; and (viii) on 20 June 2013, the union was notified that the Second Labour and Social Welfare Court had issued a resolution on 17 June 2013, closing the lawsuit – and lifting the abovementioned preventive measures and nullifying the need for a summons – as a result of the union's late compliance with its requirements.

- 476.** The complainant organization indicates that the decision of the Second Labour and Social Welfare Court to close the union's lawsuit effectively left union-affiliated workers in a defenceless, vulnerable position in the dispute with their employer, thereby violating the guarantees contained in ILO Conventions Nos 87 and 98.

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

- 477.** In its various communications, the Government indicates that, the dispute between the company Koa Modas SA and the union having led to the dismissals of dozens of unionized workers, the case is currently being examined by the Committee for the Settlement of Disputes before the ILO in the area of freedom of association and collective bargaining. The Government states that this Committee has led five mediation sessions, which have resulted in the effective reinstatement of 37 union members whose reinstatement had been ordered by judicial authorities.
- 478.** In its most recent communication, the Government also transmits the observations of the chief judge of the Second Labour and Social Welfare Court of Guatemala, who states that: (i) on Friday, 14 June 2013, the abovementioned court adopted a resolution ordering the union to comply, within a period of 48 hours, with four requirements that were essential for the processing of its claim; (ii) on Monday, 17 June 2013, the stipulated period having elapsed (under the law, all days and hours are considered viable "working days" in relation to "disputes of an economic and social nature"), the court ordered that the union's lawsuit be closed and that the need for a summons to be nullified and the preventive measures applicable to the parties to the dispute be lifted; (iii) on 18 June 2013, the court granted a hearing to the union representatives and confirmed that the resolution of the previous day was valid; (iv) the case file does not contain any documentation from the Criminal Court of First Instance nor any statements by the union representatives that refer to that court's refusal to receive the union's application; (v) on 5 July 2013, the appeals court declared without foundation the appeal made by the union against the decision to close its lawsuit; and (vi) independently of all of the above, the resolutions of 14 and 17 June 2013 of the Second Labour and Social Welfare Court were not adopted by the normal judge, who was on sick leave on those days.
- 479.** On the basis of these facts, the Government states that a clear violation of Conventions Nos 87 and 98 cannot be determined, as: (i) the application through which the union lodged the collective dispute of a social and economic nature did not comply with the mandatory validity requirements; and (ii) the union failed to present the Second Labour and Social Welfare Court with documentation from the Criminal Court of First Instance proving its refusal to accept the application in which the union complied with the requirements by the labour court's deadline.

### C. The Committee's conclusions

- 480.** *The Committee observes that the present case concerns the closure of a lawsuit filed by the union, and the alleged resulting defencelessness of its members. The Committee notes that the complainant organization alleges that it was denied the guarantee of normal judicial proceedings, in that: (i) on Wednesday, 12 June 2013, the union applied to initiate a “dispute of an economic and social nature” process against the company Koa Modas SA, which would have meant that the parties to the dispute would not have been able to retaliate against each other and that, for the duration of the dispute, any termination of an employment contract would require the authorization of the court; (ii) on Friday, 14 June 2013, the labour court gave the union a period of 48 hours within which to comply with a set of requirements; and (iii) on Monday, 17 June 2013, the union lawsuit was closed due to the late submission of the necessary documents, after the Criminal Court of First Instance, the only judicial body that is open all seven days of the week, refused to accept them over the course of the weekend.*
- 481.** *The Committee takes note of the Government's observations, which corroborate the complainant organization's statement concerning the 48-hour window within which to meet a set of requirements that the labour court imposed on Friday, 14 June 2013, and the closure of the lawsuit on Monday, 17 June 2013, due to the above 48-hour period having elapsed. The Committee notes that the Government states, however, that the case file does not contain any documentation from the Criminal Court of First Instance, nor any statement by the union representatives that refers to that court's refusal to receive the union's application over the course of the weekend, and that on 5 July 2013 the appeals court declared the union's appeal against the decision to close its lawsuit without foundation.*
- 482.** *Further, the Committee notes that the information provided by the Government indicates that, following the submission of the present complaint, numerous unionized company employees (it does not specify the exact number) were dismissed, as a result of which the Committee for the Settlement of Disputes before the ILO in the area of freedom of association and collective bargaining ran mediation sessions, achieving the effective reinstatement of 37 unionized workers whose reinstatement had been previously ordered by the courts.*
- 483.** *As concerns the existence of a document that proves that the Criminal Court of First Instance refused to receive the union's application over the weekend of 15–16 June 2013, the Committee observes that in the annexes to the complaint submitted by the complainant organization there are copies of the official complaints presented by the union on 15 and 17 June 2013 to the Office of the Human Rights Ombudsman and to the labour court, respectively, which report the refusal of the Criminal Court of First Instance to receive the union's application on 15 June 2013. The Committee also observes that in the report submitted by the Government on 1 October 2015 in the context of the examination by the Governing Body of the complaint concerning the non-observance by Guatemala of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made under article 26 of the ILO Constitution, it indicates that: (i) as part of the follow-up to the examination of the dispute between the union and the company, in August 2015 the Committee for the Settlement of Disputes before the ILO in the area of freedom of association and collective bargaining met with the Amparo and Preliminary Proceedings Chamber of the Supreme Court of Justice with a view to guaranteeing that court officials from criminal courts and the Justice of the Peace receive applications concerning collective labour rights on weekends and public holidays; and (ii) on 7 September 2015, the full body of justices of the Supreme Court of Justice approved an agreement which provides that criminal courts and the Justice of the Peace will receive applications concerning collective labour rights on weekends and public holidays.*

484. *From the preceding information, the Committee therefore observes that: (i) the labour court's imposition of a 48-hour period within which its demands must be met by the union in conjunction with the fact that it was impossible for the union to submit its application over the weekend led to the closure of its lawsuit and the lifting of the protection regulations that apply to "disputes of an economic and social nature"; (ii) subsequent to the closure of the lawsuit and the presentation of the present complaint to this Committee, numerous unionized company workers were dismissed, 37 of whom were then reinstated as a result of the intervention of the judiciary and mediation sessions run by the Committee for the Settlement of Disputes before the ILO in the area of freedom of association and collective bargaining; and (iii) following the contacts initiated by the aforementioned Committee, the Supreme Court of Justice approved an agreement that guarantees that the criminal courts and the Justice of the Peace receive applications relating to collective labour rights on weekends and public holidays.*
485. *Recalling that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see **Digest of decisions and principles of the Freedom of Association Committee of the Governing Body**, fifth (revised) edition, 2006, para. 818], the Committee notes with satisfaction that following the intervention of the Committee for the Settlement of Disputes before the ILO in the area of freedom of association and collective bargaining, the Supreme Court of Justice approved an agreement that guarantees that the criminal courts and the Justice of the Peace receive applications concerning collective labour rights on weekends and public holidays. The Committee requests the Government to provide a copy of the said agreement.*
486. *The Committee additionally requests the complainant to indicate whether all the union-affiliated workers whose reinstatement had been ordered by the courts were in fact reinstated.*

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

487. *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 provide a copy of the agreement of the Supreme Court of Justice that guarantees that the criminal courts and the Justice of the Peace receive applications regarding collective labour rights on weekends and public holidays.*
  - (b) *The Committee additionally requests the complainant to indicate whether all the union-affiliated workers whose reinstatement had been ordered by the courts were in fact reinstated.*

CASE NO. 3042

INTERIM REPORT

**Complaint against the Government of Guatemala  
presented by  
the Trade Union, Indigenous and Campesino Movement  
of Guatemala (MSICG)**

*Allegations: The complainant organization denounces numerous cases of unjustified refusal by the Ministry of Labour and Social Welfare to register trade unions, and also various cases of anti-union dismissals and anti-union acts in public institutions, most of them further to the establishment of trade union organizations*

- 488.** The complaint is contained in communications dated 14 February 2012; 20 and 21 May, 30 July and 18 September 2013; and 22, 23, 25, 26, 28 and 29 May, and 1, 5 and 6 June 2014, presented by the Trade Union, Indigenous and Campesino Movement of Guatemala (MSICG).
- 489.** The Government sent its observations in communications dated 27 and 29 August and 17 December 2014, 15 April, 8 and 22 May, 22 June and 15, 16, 21 and 28 October 2015.
- 490.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

**A. The complainant's allegations**

***Refusal by the labour administration to register trade union organizations***

- 491.** In its various communications sent in the context of the present case, the complainant organization indicates that sections 218 and 220 of the Labour Code establish the procedure for the registration and recognition of the legal personality of trade union organizations. The aforementioned sections stipulate that: (i) the Labour Directorate-General shall examine, within a ten-day period, whether the constitution and deed of establishment of the trade union are in line with the law; (ii) a negative decision can only be issued where there are irremediable flaws in the application for registration, whereas remediable errors shall be communicated to the parties concerned so that they can be rectified. The complainant alleges that in practice the abovementioned sections encourage arbitrary and discretionary intervention by the Labour Directorate-General in that process, that the latter imposes a number of unlawful requirements causing union registration to take more than a year and registration to be refused in the majority of cases, especially where the unions applying for registration are affiliated to the MSICG. The complainant then refers to the observations of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) concerning ILO Convention No. 87 published in 2008, 2011 and 2012, which highlight difficulties in this respect and the need

for the labour administration to adopt an approach that facilitates the registration of trade union organizations.

- 492.** The complainant also alleges that the Ministry of Labour and Social Welfare is refusing to register trade union organizations having members who have been unlawfully hired for the State of Guatemala on civil, temporary and/or piece-rate contracts financed under budget items 029, 021, 022 or 031, thereby infringing Articles 2 and 3 of Convention No. 87.
- 493.** In a communication dated 18 September 2013, the complainant also alleges that the Government's policy of obstructing the registration of new trade unions and its lack of willingness to apply Convention No. 87 were demonstrated on 27 November 2012 by the Deputy Minister of Labour in a speech to the National Congress, when she maintained that: (i) it is the prerogative of the Ministry of Labour and Social Welfare to define who may enjoy the right to unionization, which depends, among other things, on the type of contracts enjoyed by the workers; (ii) the employers may oppose the establishment of trade union organizations by applying to the Ministry of Labour and Social Welfare and, in this way, their right of defence is observed; and (iii) on the basis of an employer's objections, the Ministry decides which workers may form a union and which may not, depending on the legal status of the contractual relationship. In this regard, the complainant is of the view that the labour administration goes beyond its judicial functions, in so far as the powers granted by the Labour Code are exclusively concerned with the administrative process of registration.
- 494.** To illustrate the State's alleged anti-union policy denying workers the right to join unions, the complainant describes in detail the process which it claims led to the unjustified refusal to register eight trade union organizations.

### ***Federation of Workers of the Export Processing Industry of Guatemala (CENTRIMAG)***

- 495.** The complainant organization states that: (i) the application for the registration of CENTRIMAG was submitted on 17 June 2013 in compliance with all the legal requirements; (ii) on 26 July 2013, with reference to section 215(c) of the Labour Code, which requires that sectoral trade unions account for at least "50 per cent plus one" of the workers in that sector, the Worker Protection Department denied CENTRIMAG the status of sectoral trade union, ordering it to modify its designation and constitution in order to apply for registration as an enterprise trade union; (iii) on 6 August 2013, the trade union lodged an appeal, which was also turned down; (iv) in parallel, the MSICG filed an action to have section 215(c) of the Labour Code declared unconstitutional by the Constitutional Court; and (v) although a decision on the case is still pending, the Constitutional Court has refused a temporary suspension of the abovementioned section of the Labour Code, despite the fact that the MSICG has based its case on Convention No. 87 and on relevant pronouncements by the ILO supervisory bodies.
- 496.** The complainant goes on to say that CENTRIMAG has over 500 members; however, to comply with the requirements of section 215(c) of the Labour Code, it would need to have a membership of some 75,000 workers, with each of them signatory to the deed of establishment. This demonstrates that it is absolutely impossible to establish sectoral trade unions in Guatemala, with the result that the trade union movement in the country remains fragmented and weak.

**Western Indigenous and Campesino Federation (CICO)**

497. The complainant organization states that: (i) CICO, affiliated to the MSICG, was established on 12 October 2013 for the purpose of developing trade union organizations by branch of activity, thereby preventing the fragmentation of trade union action; (ii) CICO comprises farm workers from several departments including Huehuetenango, San Marcos, Quiché and Totonicapán; (iii) the application for the registration of CICO was submitted to the Director-General of Labour on 7 November 2013; and (iv) on 22 May 2014, the Ministry of Labour and Social Welfare adopted a decision which makes the registration of the organization contingent on the removal of any mention of “men and women workers” from its constitution and requires that the profession or position of the union members should be specified. The complainant states that this decision violates the autonomy of trade union organizations, as enshrined in Convention No. 87.

**Southern Campesino Federation**

498. The complainant organization states that: (i) the Southern Campesino Federation, affiliated to the MSICG, was established on 4 September 2012 with the purpose of developing trade union organizations by branch of activity, thereby preventing the fragmentation of trade union action; (ii) after a delay of several months due to numerous changes to the union’s constitution required by the Ministry of Labour and Social Welfare, the Ministry’s Worker Protection Department issued an opinion on 1 February 2013 in favour of registration and this was sent to the Labour Directorate-General; (iii) however, it was only on 18 July 2013 that the aforementioned department issued a new order for the deed of establishment to be redrafted and requesting new amendments to the union’s constitution, including with regard to issues that the trade union had already corrected; and (iv) the appeal lodged by the trade union was declared inadmissible by the Deputy Minister of Labour, leaving court action as the only possible remedy. The complainant adds that over one year since its establishment the Southern Campesino Federation and its over 3,500 members are unable to exercise their rights even though the Labour Code requires the labour administration to carry out the registration procedure within ten days, and that this case reflects a policy not to register trade unions affiliated to the MSICG.

**Teachers’ Federation of Chiquimula (CETRAMACH)**

499. The complainant organization states that: (i) on 18 July 2013, the MSICG formed the Teachers’ Federation of Chiquimula (CETRAMACH) and hundreds of teachers participated in the launch; (ii) on 23 July 2013, the application for the trade union’s registration, which was backed up by the fact that some 300 workers had taken out membership, was sent to the Director-General of Labour; (iii) despite the fact that the Labour Code provides that the trade union registration process cannot take more than ten days, several months passed without the Ministry sending any notification, despite the various written requests made by the organization; (iv) in view of this silence, the MSICG brought an *amparo* action (for the protection of constitutional rights) against the Director-General of Labour on 19 December 2013; and (v) in its memorandum to the Court on 28 January 2014, the Director-General of Labour argued that the trade union’s registration application was being verified and that the Labour Inspectorate-General was checking that the members of the union were indeed Ministry of Education workers, that they did not occupy positions of trust and that there had been no resignations from the union.

500. The complainant adds that: (i) by means of these checks, the Director-General of Labour is assuming powers that overstep the legal provisions, since he or she only has the authority to check whether the trade union’s deed of establishment and constitution comply with the

law, which is why only ten days are allowed for the completion of this task; (ii) the statements of the Director-General prove that he notified the employer of the identity of the members, with the subsequent risk of dismissal that this entails; (iii) the administration's practice also means that it is the employer who decides which employees hold positions of trust and therefore who can exercise their right to join a union; and (iv) the case of CETRAMACH illustrates the arbitrary attitude of the labour administration to the registration of trade union organizations, given that its actions vary depending on the leanings of the trade union organization concerned.

### ***Autonomous Union of Teachers of Guatemala (SAMGUA)***

501. The complainant organization states that: (i) SAMGUA, affiliated to the MSICG, sent its registration application to the Ministry of Labour and Social Welfare on 15 November 2012; (ii) on 5 February 2013, the Ministry notified the trade union that, to be registered, it would need to amend section 8 of its constitution, which established that workers at the Ministry of Education can become members of the union regardless of the type of contract through which the employment relationship has been formalized, in accordance with the ILO Employment Relationship Recommendation, 2006 (No. 198); and (iii) when the trade union refused to modify its constitution as indicated, the Ministry of Labour and Social Welfare confirmed on 24 July 2014 that it would not proceed with the trade union registration process.

### ***Guatemalan National Union of Naturopathic Practitioners (GNGMN)***

502. The complainant organization alleges that the Ministry of Labour and Social Welfare has obstructed the registration of the Guatemalan National Union of Naturopathic Practitioners (GNGMN) by obliging it to reconvene its constituent assembly three times and prohibiting the inclusion in its constitution of the right to engage in collective bargaining. When the workers refused to accept this, the Ministry rejected the trade union's application for registration.

### ***Authentic National Union of Workers at the Ministry of Public Health and Social Assistance***

503. The complainant organization alleges that: (i) on 27 May 2013, the application to register the trade union was submitted to the Labour Directorate-General; (ii) on 3 June 2013, the Ministry of Labour and Social Welfare notified the organization that it should modify its scope of action, divesting the union of its national status and preventing workers in other workplaces belonging to the same entity from joining the union as well as abolishing the branches provided for in its constitution; and (iii) in response to the union's dissent, on 23 June 2013 the Ministry of Labour and Social Welfare upheld its refusal to proceed with the registration process.

### ***Union of Workers of the Workers' Financial Group and other bodies comprising the same economic unit (SITRAGFIT)***

504. The complainant organization states that: (i) on 8 July 2013, the Ministry of Labour and Social Welfare was notified that SITRAGFIT had been established; (ii) the enterprise immediately started the process to dismiss the founding members, informing them that they could avoid being dismissed by signing a letter of resignation from the trade union;

(iii) on 16 July 2013, the Ministry of Labour and Social Welfare demanded that the union amend its constitution, eliminating in particular the possibility for the union to have branches and for leaders to be elected to the latter; (iv) in response to the trade union's refusal to make changes in violation of freedom of association, the Ministry of Labour and Social Welfare shelved the file without registering the union; (v) in the majority of cases of dismissal of the founders of SITRAGFIT, the courts illegally delayed issuing reinstatement orders, allowing 11 months to pass from the complaint being lodged without the employees being reinstated and with no certainty about the status of the proceedings; and (vi) in the few cases in which the judges ordered reinstatement, the employer failed to comply unless the judges issued writs of execution or referred the case to the criminal courts. The complainant adds that SITRAGFIT is the first financial group trade union in the country and the first in the banking sector for decades, and that the dismissals are due to the illegal disclosure of information to the employer concerning those involved in establishing the trade union.

**505.** In two communications dated 14 February 2012 and 18 September 2013, the complainant organization also included two lists of trade union organizations whose registration had allegedly been refused by the labour administration without justification. The first list refers to the registration applications submitted in 2010, which were rejected either for irrelevant reasons of form or owing to interference by the labour administration in the autonomy of the trade union organizations:

- (1) Union of Workers at Imperia Investments and Services SA
- (2) Union of Municipal Workers of Fray Bartolomé de las Casas
- (3) Union of Municipal Public Servants of San Lorenzo Suchitepéquez
- (4) Union of the Ministry of Education of the Department of Alta Verapaz
- (5) Union of Workers at the Duruelo Coeducational School Establishment (known as the "Ramón Adán Sturtze Workers' Union")
- (6) Union of Financial Managers at the Ministry of Public Health and Social Assistance
- (7) Union of Technical and Administrative Workers at the Western Ministry of Education
- (8) Union of the Ixcan Quiché Health Sector
- (9) Workers' Union at the Tax Administration Supervisory Authority
- (10) Union of Workers at San Marcos Hospital in the Department of San Marcos
- (11) National Union of Workers at the Executive Secretariat of the National Coordinating Authority for Disaster Reduction
- (12) Union of Administrative and Financial Managers at the Ministry of Public Health and Social Assistance
- (13) Union of Municipal Workers of Chiquimula in the Department of Chiquimula
- (14) Union of Workers at San Marcos National Hospital in the Department of San Marcos
- (15) United Workers' Union of the Municipality of San Pedro Sacatepéquez in the Department of San Marcos



---

(16) Guatemalan Union of Labour Supporters and Defenders of Human Rights

**506.** The second list refers to unsuccessful registration applications submitted in 2012 and 2013. The complainant organization adds that in the last ten cases mentioned, the registration was not granted on account of the opposition expressed by the employer to the registration of the respective trade union:

- (1) Union of Workers and Employees at the Ministry of Education and Private Schools
- (2) Union of Workers of the Municipality of Santa Lucía Milpas Altas
- (3) Union of Education Workers at National Institutes for Secondary-Level Distance Learning in Jutiapa
- (4) Union of “Teachers for Change”
- (5) Union of Workers at Avandia SA
- (6) Union of Security Workers and Officials at the Public Prosecutor’s Office
- (7) Union of Workers of the Municipality of San Pedro Sacatepéquez in the Department of San Marcos
- (8) Union of Workers of the Municipality of Pachulum
- (9) Union of Workers of the Municipality of Villa de Tejutla in the Department of San Marcos
- (10) Union of Workers of the Municipality and Electricity Company of Guastatoya El Progreso
- (11) Union of Workers of the Directorate-General for Sports and Recreation at the Ministry of Sport
- (12) Teachers’ Union of Jalapa
- (13) Union of Workers of the Municipality of Palín in the Department of Escuintla
- (14) Union of Education Workers at National Institutes for Secondary-Level Distance Learning in Izabal
- (15) Union of Workers of the Municipality of Santa Cruz El Chol in the Department of Baja Verapaz
- (16) Union of Workers of the Municipality of San Miguel Tucurú in the Department of Alta Verapaz
- (17) Union of Workers of the Municipality of Usumatlán
- (18) Union of Workers and Employees of the Municipality of San Carlos Sija in the Department of Quetzaltenango
- (19) Union of Collection Agents at Cable Star SA
- (20) Union of Workers at SEAK HWA SA

- (21) General Union of Municipal Employees of Coatepeque
- (22) “Principles and Values” Workers’ Union at the Tax Administration Supervisory Authority
- (23) Union of Workers at the Departmental Education Directorate of Alta Verapaz
- (24) Union of Workers of the Municipality of San José El Rodeo in the Department of San Marcos
- (25) Union of Workers of the Municipality of San Pedro Ayampuc
- (26) Union of Workers at the Ministry of the Interior
- (27) Union of Workers at the Port of Santo Tomás de Castilla
- (28) Union of Workers at RENAP Guatemala
- (29) Union of Workers of the Directorate-General for Sports and Recreation
- (30) Union of Workers at the Department of Conservation and Restoration of Pre-Hispanic Archaeological Sites
- (31) Union of Workers at Ternium Internacional Guatemala SA
- (32) Union of Workers of the Guatemalan Heart Disease Association
- (33) “Pro Dignity” Workers’ Union at the Tax Administration Supervisory Authority

***Denunciation of a number of cases of discrimination and anti-union acts within various state bodies***

Union of Workers of the Guatemalan Heart Disease Association (SIDETRALICO)

- 507.** In a communication dated 18 September 2013, the complainant organization alleges that: (i) on 8 August 2012, the employees who founded SIDETRALICO informed the labour administration of the establishment of the trade union with the aim of enjoying guarantees of trade union immunity under current legislation that protects the founders of trade unions from anti-union dismissal; (ii) the labour administration leaked this information to the employer, who dismissed almost all the founders of SIDETRALICO (Ms Ana María Taracena Ríos, Ms Aura Elena Sosa, Mr Carlos Enrique Soto Menegazo, Mr Carlos René Herrera Donis, Ms Castula Isabel Figueroa Aguirre, Ms Dora Herlinda Patzan Arriaga, Mr Fernando Enrique Niz López, Ms Helda Zulema Ruano Najera, Ms Isabel Figueroa de Polanco, Ms Karen Alicia Morales Mortaya, Ms Magdalia Toc Flores, Mr Marco Tulio Amado, Ms María Mercedes Soto Marroquin, Ms Mildred Amarilis Melgar Cárcamo, Ms Milvia Lucrecia Carrillo Reyes de Alvarado, Ms Miriam Araceli Rivas Barrios, Ms Rosly Elizabeth Pellecer, Ms Sandra Morales de Sandoval and Mr Teddy Daniel Fletcher Albrez), fraudulently backdating the dismissal date to 7 August 2012; (iii) on 10 August 2012, the workers, who were unaware of their dismissal, were denied access to the institution; (iv) in the following days, the employer submitted to the labour administration its objection to the establishment of the trade union; (v) on 10 December 2012, the labour administration refused the registration of SIDETRALICO; (vi) the employees brought an *amparo* action (for the protection of constitutional rights) on grounds of violation of freedom of association but the court did not grant it despite the

seriousness of the allegations; (vii) of the 19 employees dismissed, 14 contested their dismissal before the labour courts and obtained first-instance orders for reinstatement, which the employer did not respect, except in the case of Ms Ana M. Taracera, though she was dismissed once again shortly after being reinstated; (viii) the employer is appealing against the first-instance reinstatement rulings; and (ix) the Third Chamber of the Labour and Social Welfare Court of Appeal is not treating the parties equally, admitting illegal evidence for the employer and rejecting evidence submitted by the workers. Lastly, the complainant maintains that the actions of both the Ministry of Labour and Social Welfare and the judicial authorities demonstrate the existence of a state policy which consists in making it impossible to establish trade union organizations.

Union of Workers at the Peace Secretariat of the Office  
of the President of the Republic (SITRASEPAZ)

**508.** In a communication dated 25 May 2014, the complainant organization alleges that: (i) the Union of Workers at the Peace Secretariat of the Office of the President of the Republic (SITRASEPAZ) was officially registered on 29 December 2011; (ii) on 10 February 2012, in connection with a socio-economic labour dispute, Mr Luis Antonio Mérida Ochoa, the union general secretary, was dismissed; (iii) his reinstatement was ordered by the courts on 23 February 2012, although the order has not yet been complied with; (iv) on 24 April 2012, the head of the Peace Secretariat of the Office of the President of the Republic requested the Minister of Labour to initiate regular proceedings for dissolution of the trade union, claiming that the union members were contract workers hired under budget item 29 and as such did not enjoy the right to join a trade union. On this occasion, the head of the Peace Secretariat listed all of the trade union's founding members, which was information that could only have been obtained from the Ministry of Labour and Social Welfare; (v) on 29 May 2012, the following workers were dismissed: Mr José Roberto Paz Guilarte, Ms María del Rosario Toj Zacarias, Mr Carlos Humberto Morales López, Mr Alvaro René Sosa Ramos, Mr Armando Pérez Trabanino, Mr Pedro Celestino Cutzal Son, Mr José Láines Jiménez, Mr Azarías Perencén Acual, Mr Luis Armando Huertas Cruz and Mr Daniel Eduardo Vásquez Cisneros, who make up almost half of the members of the trade union, leaving less than 20 active employees who are union members; (vi) in addition, on 23 April 2012, the Peace Secretariat of the Office of the President of the Republic applied through the courts for the annulment of the collective agreement signed with SITRASEPAZ which had been approved by the public administration on 9 November 2011; (vii) on 30 July 2013, the labour courts confirmed the validity of the collective agreement; and (viii) as of February 2012, the union's general secretary, Mr Luis Antonio Mérida Ochoa, has been the subject of a number of unfounded criminal complaints made by the Peace Secretariat of the Office of the President of the Republic, which shows that there is a plan to criminalize the union's activity.

Union of Workers at the Office of the Human Rights  
Ombudsman (SITRAPDH)

**509.** In a communication dated 1 June 2014, the complainant organization alleges that: (i) an application for the registration of SITRAPDH was submitted on 16 May 2013; (ii) on 21 May, notice was given that Ms Eva Luz Urizar Solís, Mr Julio César Fernández Villagrán, Ms Karla Joanna García Santiago, Ms Ana Lucia del Carmen Carrascosa Barrera, Mr Julio Mizraim Tzul Hernández, Ms Sandra Bernarda Baquíás Rojas de Yax and Ms Sonia Gabriela Quiroa Morales joined the movement to establish the trade union; (iii) in an act of anti-union reprisal, these workers were dismissed on 29 May 2013; (iv) on 29 May 2013, the Labour Inspectorate-General confirmed the anti-union nature of the dismissals and requested the Prosecutor's Office to reinstate the workers within two days; (v) despite the fact that the request was not met, the Labour Inspectorate failed to institute infringement proceedings through the labour and social welfare courts; (vi) on 3 June

2013, the dismissed workers brought actions before the Labour and Social Welfare Enforcement Court of First Instance of the Department of Quetzaltenango; (vii) despite the fact that, under the law, the reinstatement of workers must be decreed and executed within 24 hours, the judge imposed a number of illegal procedural obstacles to delay the process, further to which, at the date on which the complaint was lodged, the first-instance ruling had still not been issued; and (viii) the *amparo* action (for the protection of constitutional rights) brought by the workers for lack of legal protection also remains pending.

Union of Administrative and Education Service Workers of Guatemala (STAYSEG) and Union of Workers at the Departmental Directorates of the Ministry of Education of the State of Guatemala (SITRADEMEG)

**510.** In a communication the complainant organization alleges that: (i) STAYSEG and SITRADEMEG tried to conduct collective bargaining with their employer to improve the precarious conditions of work of administrative staff at the Ministry of Education and these efforts led to a series of anti-union reprisals; (ii) Mr Byron Rolando Fuentes León, a SITRADEMEG official, was dismissed on 14 May 2013 while completing the direct procedures for negotiating a collective accord on conditions of work; (iii) as a result of delaying tactics by the State, both the National Civil Service Board and the Labour, Social Welfare and Family Court of First Instance of the Department of Chiquimula have still not issued a ruling on the actions brought by the worker against his dismissal; (iv) on 25 March 2013, the Ministry of Education proceeded to dismiss Ms María Magdalena Aju Upun, a member of the advisory board of STAYSEG, and the legal action brought before the Fourth Labour and Social Welfare Court of the Department of Guatemala did not secure her reinstatement; and (v) in response to the request from STAYSEG to negotiate a collective agreement on conditions of work, on 4 January 2013 the Ministry of Education requested judicial authorization for the trade union general secretary, Mr Jorge Byron Valencia Martínez, to be dismissed in relation to acts that allegedly occurred on 19, 20 and 21 January 2012, despite the fact that, under the Civil Service Act, the employer does not have the authority to impose sanctions against an employee after three months.

“United for Development” Workers’ Union at the Office of the Comptroller-General (SITRAUD)

**511.** In a communication dated 5 June 2014, the complainant organization alleges that, in reprisal for the request for negotiation of a collective accord relating to conditions of work, the Office of the Comptroller-General, a state body, proceeded in 2012 to dismiss several leaders and members of the trade union and repeatedly refused to comply with the reinstatement orders handed down by the courts of first and second instance. The complainant provides details in this regard of the situation of Mr Julio César Monzón Ramírez, member of SITRAUD, indicating that: (i) the reinstatement of the worker was ordered by the court of first instance on 22 December 2012; (ii) the reinstatement was confirmed by the court of second instance in August 2013; (iii) between August and October 2013, executors came to the Office of the Comptroller-General on three occasions to ensure that the reinstatement order would be enforced, but the Office did not comply with the order; and (iv) following the repeated refusal of the Office of the Comptroller-General, the judge failed to reissue the reinstatement orders and to take the necessary measures to enforce them. The complainant organization adds that a similar situation emerged with regard to the workers Mr Juan Domingo Pinula Santay and Mr José Ramos Méndez, who are members of SITRAUD.

## B. The Government's reply

### ***Allegations concerning applications for trade union registration***

- 512.** In a communication dated 29 August 2014, the Government indicates that: (i) the Ministry of Labour and Social Welfare is an institution that serves workers and employers and that the trade union registration process has been codified in legislation; (ii) under section 218(d) of the Labour Code, the Labour Directorate-General is under the obligation to check that the trade unions being established comply with the legally established requirements; and (iii) in a speech to the National Congress on 27 November 2012, on being questioned about the right of employers to oppose a trade union's registration, the Deputy Minister of Labour emphasized that anybody can exercise his/her constitutional right of petition and submit requests to the authorities, without it having a favourable or unfavourable impact on the decision issued by the administration. The Government also forwards the statement of the Labour Inspector-General, which, in reference to the registration process for trade unions, indicates that the Labour Inspectorate-General works with the Labour Directorate-General to check the status of applicant workers, since it is only possible to establish whether there is a real or false labour relationship through direct checks, and it is not the responsibility of the administrative body but of the judiciary to conclude whether or not such a relationship exists, based on the principle of the primacy of actual conditions.
- 513.** In a communication dated 27 August 2014, the Government provides its observations concerning the alleged refusal to register the Autonomous Union of Teachers of Guatemala (SAMGUA), indicating that: (i) section 8 of the draft constitution of SAMGUA specifies that, to join the union, it is necessary to be a worker in the service of the Guatemalan State through the appointing authority, the Ministry of Education, "regardless of the type of contract through which the employment relationship has been formalized in accordance with ILO Recommendation No. 198"; (ii) the Worker Protection Department (part of the Labour Directorate-General) established that section 8 of the union's constitution must be amended inasmuch as Ministerial Decision No. 215-2004 of the Ministry of Public Finance establishing budget classifications for the public sector in Guatemala indicates that technical and professional services subject to the payment of fees are provided by contract staff who are not covered by a dependent employment relationship and, consequently, are not eligible for membership of a public-sector union; and (iii) the Worker Protection Department also requested a further four amendments to rectify errors contained in the union's constitution and to ensure its full compliance with the legal provisions. In view of the above, the Government considers that there are insufficient grounds to consider that the refusal to register constitutes a violation of trade union rights.
- 514.** In a communication dated 15 April 2015, the Government provides its observations regarding the alleged refusal to register the Teachers' Federation of Chiquimula (CETRAMACH), indicating that, in a ruling of 18 March 2014, the First Chamber of the Labour and Social Welfare Court of Appeal, acting as an *amparo* court, ordered the Labour Directorate-General to issue a decision on CETRAMACH's application for registration within five days, and that on 15 July 2014 the Labour Directorate-General rejected the application. With respect to the decision by the Labour Directorate-General, the Government maintains that: (i) on 18 July 2013, a total of 20 people met with the aim of establishing CETRAMACH and setting up its provisional executive committee; (ii) on 23 July 2013, the CETRAMACH provisional executive committee sent a communication to the Labour Directorate-General requesting it to note that 278 workers had been party to the process of establishing the trade union and including a copy of the record of their memberships; (iii) the Directorate-General of Labour ruled that the memberships could not be taken into consideration when examining the registration application because they were

not accompanied by a clear and precise expression of the members' wish to form the union, as required by sections 216(a) and 220 of the Labour Code; that the provisional executive committee of a trade union does not have the authority to receive registration applications; and that, in accordance with section 220(a) of the Labour Code, other workers who were not party to the trade union's deed of establishment could not be included in the procedure for establishing the trade union; (iv) based on checks carried out by the Labour Inspectorate-General, the Labour Directorate-General noted that 14 out of the 20 founders of the union were teachers/directors with tenure and, because they represented the employer's interests, they could not participate in the establishment of the trade union, in line with section 212 of the Labour Code; and (v) on the basis of the above, the Labour Directorate-General decided that the requirement to have 20 founding members had not been met, nor the legal conditions to register CETRAMACH.

- 515.** In a communication of 8 May 2015, the Government sends its observations regarding the alleged refusal to register the Southern *Campesino* Federation (CCS). The Government indicates that: (i) the CCS Provisional Executive Committee submitted on 24 September 2012 the documentation for the recognition of its legal personality, the approval of its constitution and its registration; (ii) on 1 February 2013, after having issued two orders for the applicant trade union to correct a number of errors, the Worker Protection Department of the Ministry of Labour and Social Welfare approved the recognition of its legal personality, its constitution and its registration, forwarding its file to the Ministry's Labour Directorate-General; (iii) on 18 July 2013, the Labour Directorate-General issued Order No. 892-2013 requesting the CCS Provisional Executive Committee to correct a number of errors, in order to be able to continue with the registration process; (iv) the CCS Provisional Executive Committee filed an appeal against said order, but it was declared inadmissible by the Deputy Minister of Labour on 7 August 2013, under Order No. 286-2013; and (v) the CCS filed *amparo* proceedings against the aforementioned order but these were dismissed on two occasions by the Supreme Court of Justice.
- 516.** The Government adds that the Supreme Court of Justice considered that: (i) the Ministry of Labour and Social Welfare acted in accordance with the law, considering that the trade union could not bring an appeal against the Ministry's order requiring the CCS to comply with a series of legal requirements before continuing with the procedure for registration, in so far as the appealed order referred to simple procedural matters that did not impinge upon the complainant's rights; and (ii) the trade union had moreover not indicated how the Ministry's failure to examine the appeal violated its constitutional rights. Lastly, the Government indicates that the CCS was not registered due to non-compliance with basic requirements by the applicant trade union and that delays in the administrative proceedings resulted from the various administrative and judicial appeals filed by the CCS.
- 517.** In a communication of 8 May 2015, the Government sends its observations regarding the alleged refusal to register the Guatemalan National Union of Naturopathic Practitioners (GNGMN). The Government denies that the Labour Directorate-General of the Ministry of Labour and Social Welfare has requested the GNGMN to reconvene its constituent assembly and to remove from its constitution the reference to collective bargaining. The Government adds that, on 29 May 2014, it proceeded with the registration of the GNGMN under Order No. 11-2014.
- 518.** In a communication dated 16 October 2015, the Government sends its observations on the application for registration of the Western Indigenous and Campesino Federation (CICO). The Government indicates that: (i) the Labour Directorate-General at the Ministry of Labour and Social Welfare received the application for registration from CICO on 7 November 2013; (ii) on 20 November 2013, the National Worker Protection Department at the Ministry sent an order to the applicant trade union requiring it to make amendments

to its deed of establishment and draft constitution; (iii) after the six-month period prescribed by law had elapsed without any response from the applicant trade union, the Worker Protection Department issued a new order on 22 May 2014 giving the applicant trade union a deadline of ten days to incorporate the requested changes; (iv) on 30 May 2014, the lawyer of the applicant trade union submitted a brief questioning whether the law had been correctly applied by the Ministry and refusing to incorporate the aforementioned changes; and (v) on 2 June 2014, the Labour Directorate-General issued an order rejecting the brief submitted by the lawyer of the applicant trade union on the grounds that it had not been signed by any officer of the union, and confirming that the application for registration had been shelved on the grounds that the six-month period prescribed by law had elapsed. Lastly, the Government indicates, on the basis of the above, that the non-registration of CICO is due solely to the applicant trade union's failure to comply with the relevant requirements of the labour legislation.

- 519.** In a communication dated 21 October 2015, the Government submits its observations regarding the Union of Workers of the Financial Group and other entities that form the same economic unit (SITRAGFIT). The Government indicates that: (i) the Ministry of Labour and Social Welfare received the application for the registration of SITRAGFIT on 8 July 2013; (ii) throughout the months of August and September, the Ministry received seven resignations of trade union members, who have expressed opposition to the creation of the union; (iii) many of such workers, among whom is a person registered as a founding member of the union, indicated that their consent had been improperly obtained; (iv) three members of the Provisional Executive Committee of the Union were also leaders of another organization, the Union of Bank Employees Workers (SEBT), which is contrary to article 212 of the Labour Code which prohibits dual union membership; (v) the charter of the union indicates that it may be joined by workers of six companies that form the same economic group but its founding members only come from three of these companies, thus violating the requirement that enterprise unions, which may include one or more of the same companies, are composed of workers who serve in them; and (vi) based on the various points indicated above, the Ministry of Labour and Social Welfare decided to reject the application to register SITRAGFIT.
- 520.** Regarding the allegations of anti-union dismissal of the founding members of the union and failure to comply with reinstatement orders, the Government indicates that the legal proceedings related to the reinstatements are pending because of appeals and application of the writ to *amparo*.
- 521.** In a communication dated 28 October 2015, the Government sends observations relating to the request for registration of the Federation of Workers of the Export-processing Industry of Guatemala (CENTRIMAG). The Government indicates that the refusal to register CENTRIMAG is based on non-compliance with section 215(c) of the Labour Code, which requires that industrial unions affiliate 50 per cent plus one workers of the sector of activity, whereas the newly established union had only 23 trade union members.
- 522.** The Government also includes the information provided by the Labour Directorate-General concerning the list of 33 cases in 2012 and 2013 – contained in the complainant organization's allegations – in which trade union registration was refused:

- (1) Union of Workers and Employees at the Ministry of Education and Private Schools

The file has been shelved. The trade union's legal personality has not been recognized owing to irremediable errors and flaws, in particular because of the attempt to group together in a single union employees of state institutions and private schools, which is not in conformity with the provisions of the Act concerning unionization and strike regulation for state workers and section 215 of the Labour Code. Analysis of both

legislative texts shows that no category exists which might allow for the establishment of a trade union organization with both public servants and private-sector workers.

(2) Union of Workers of the Municipality of Santa Lucía Milpas Altas

The file has been shelved because more than six months have elapsed without any activity, in accordance with section 5 of the Administrative Litigation Act, which states that “files or proceedings in which the parties do not act for over six months shall be shelved if the administrative body has carried out all duties incumbent upon it and has sent notification”.

(3) Union of Education Workers at National Institutes for Secondary-Level Distance Learning in Jutiapa

The file is before the Labour Directorate-General for the review of educational staff lists prior to recognition of the trade union, in accordance with section 212(2) of the Labour Code, which stipulates that nobody may belong to two or more trade unions at the same time.

(4) Union of “Teachers for Change”

The file has been shelved because the members of the union’s executive committee did not comply with an order of 19 March 2012 from the Labour Directorate-General and because, in accordance with section 5 of the Administrative Litigation Act, more than six months have elapsed since the last notification.

(5) Union of Workers at Avandia SA

The file has been shelved on account of failure to comply with an order from the Labour Directorate-General and also because, in accordance with section 5 of the Administrative Litigation Act, more than six months have elapsed since the last notification.

(6) Union of Security Workers and Officials at the Public Prosecutor’s Office

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

(7) Union of Workers of the Municipality of San Pedro Sacatepéquez in the Department of San Marcos

The file has been shelved because an order from the Worker Protection Department established that the documentation submitted does not comply with the legal requirements, inasmuch as 27 days elapsed between the date on which the general assembly for the establishment and formation of the trade union was held and the date on which the documentation was sent to the information and document reception unit at the general secretariat of the Ministry of Labour and Social Welfare, in breach of the provisions of section 218(a) of the Labour Code, which sets a maximum deadline of 20 working days.



---

(8) Union of Workers of the Municipality of Pachulum

The file has been shelved and the application for recognition of the legal personality and registration of the union was rejected, because the Labour Directorate-General established that four of the 20 founding members were municipal police officers and, under the law on municipal service, municipal police officers are considered as employees occupying positions of trust, which is an irremediable flaw in the establishment of the trade union.

(9) Union of Workers of the Municipality of Villa de Tejutla in the Department of San Marcos

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

(10) Union of Workers of the Municipality and Electricity Company of Guastatoya El Progreso

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

(11) Union of Workers of the Directorate-General for Sports and Recreation at the Ministry of Sport

The file has been transferred to the Technical and Legal Advisory Board of the Ministry of Labour and Social Welfare as *amparo* action No. 62-2013, assigned to the second court official, against Supreme Court Decision No. 228-2012.

(12) Teachers' Union of Jalapa

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

(13) Union of Workers of the Municipality of Palín in the Department of Escuintla

The file was shelved because the registration documents were submitted 22 days after the trade union's constituent assembly, instead of the 20 days required under section 218(a) of the Labour Code.

(14) Union of Education Workers at National Institutes for Secondary-Level Distance Learning in Izabal

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

- (15) Union of Workers of the Municipality of Santa Cruz El Chol in the Department of Baja Verapaz

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

- (16) Union of Workers of the Municipality of San Miguel Tucurú in the Department of Alta Verapaz

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

- (17) Union of Workers of the Municipality of Usulután

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

- (18) Union of Workers and Employees of the Municipality of San Carlos Sija in the Department of Quetzaltenango

The file has been closed, with the registration of legal personality (No. 2238, p. 001030, book 23, 23 June 2013).

- (19) Union of Collection Agents at Cable Star SA

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

- (20) Union of Workers at SEAK HWA SA

The file has been shelved, in accordance with section 5 of the Administrative Litigation Act, because more than six months have elapsed since the last notification.

- (21) General Union of Municipal Employees of Coatepeque

The file has been shelved in accordance with Order No. 1S27-2012 of the Labour Directorate-General, issued on the basis of Order No. 232-2012 of the Worker Protection Department.

- (22) “Principles and Values” Workers’ Union at the Tax Administration Supervisory Authority

The file has been shelved after being declared inadmissible owing to the presence of employees deemed to be occupying positions of trust.

- (23) Union of Workers at the Education Directorate of the Department of Alta Verapaz

The file has been shelved because the relevant documents were submitted after the 20-day deadline established in section 218(a) of the Labour Code.

- (24) Union of Workers of the Municipality of San José El Rodeo (Department of San Marcos)

The file has been shelved after recognition of its legal personality was declared inadmissible owing to the presence of employees deemed to be occupying positions of trust and the absence of the legally required number of members (20).

## (25) Union of Workers of the Municipality of San Pedro Ayampuc

The file was registered on 26 January 2012. Union members then submitted an application for dissolution of the trade union, claiming that the organization no longer had the minimum number of members, which was contested by the union's labour and disputes secretary, thereby giving rise to an internal dispute which it is not the labour administration's role to resolve. Legal proceedings are in progress in the First Chamber of the Labour and Social Welfare Court of Appeal.

## (26) Union of Workers at the Ministry of the Interior

The file has been closed, with the registration of legal personality No. 2139, book 22, 2 December 2011.

## (27) Union of Workers at the Port of Santo Tomás de Castilla

The file has been transferred to the Technical and Legal Advisory Board of the Ministry of Labour and Social Welfare as *amparo* action No. 687-2013, assigned to the third court official.

## (28) Union of Workers at RENAP Guatemala

The file has been closed, with the registration of legal personality (No. 2193, pp. 379–393, book 23, 12 May 2012).

## (29) Union of Workers of the Directorate-General for Sports and Recreation

The file has been cancelled, since the union's executive committee withdrew the registration application.

## (30) Union of Workers at the Department of Conservation and Restoration of Pre-Hispanic Archaeological Sites

The file has been closed, with the registration of legal personality No. 2196, pp. 585–598, book 23, 14 May 2012.

## (31) Union of Workers at Ternium Internacional Guatemala SA

The file is before the Technical and Legal Advisory Board of the Ministry of Labour and Social Welfare, in accordance with a Constitutional Court order to examine the substance of the appeal.

## (32) Union of Workers of the Guatemalan Heart Disease Association

The file is before the Technical and Legal Advisory Board of the Ministry of Labour and Social Welfare, in accordance with a Constitutional Court order to examine the substance of the appeal.

## (33) "Pro Dignity" Workers' Union at the Tax Administration Supervisory Authority (SBFBOSAT)

The file has been transferred to the Technical and Legal Advisory Board of the Ministry of Labour and Social Welfare as an *amparo* action against Decision No. 12-2012.

***Allegations concerning dismissals and other anti-union acts***

Union of Workers at the Peace Secretariat of the Office of the President of the Republic (SITRASEPAZ)

**523.** In a communication dated 17 December 2014, the Government provides its observations concerning the Union of Workers at the Peace Secretariat of the Office of the President of the Republic (SITRASEPAZ). The Government indicates that: (i) the termination of the temporary supervisory services contract of the general secretary of the union, Mr Luis Antonio Mérida Ochoa, does not constitute an act of anti-union reprisal; (ii) the Supreme Court of Justice rejected the application for the reinstatement of Mr Luis Antonio Mérida on the grounds that his functions of executive director and director of conciliation at the Peace Secretariat gave him the undoubted status of a worker occupying a position of trust and a representative of the employers and that therefore he could not legally hold office as a trade union official; (iii) the other alleged anti-union dismissals stem from the closure on 25 May 2012 of the archives directorate at the Peace Secretariat; (iv) the Ministry of Labour and Social Welfare did not notify the Peace Secretariat of the names of the union founders; it was the union's own general secretary who included these particulars in his legal action against the Secretariat dated 21 February 2012; (v) the application for judicial dissolution of the union was made on the grounds that its founders were contract staff hired under budget item 29 and therefore did not have the official status of employed workers; (vi) the application to invalidate the collective agreement also stems from the fact that the agreement was signed by persons who did not have the official status of employed workers and the case is pending before the Supreme Court of Justice; and (vii) the criminal proceedings brought against Mr Luis Antonio Mérida Ochoa are not of an anti-union nature but, in accordance with section 298 of the Code of Criminal Procedure, are obligatory inasmuch as they are concerned with possible offences that are liable to public prosecution.

“United for Development” Workers’ Union at the Office of the Comptroller-General (SITRAUD)

**524.** In communications dated 22 May and 22 June 2015, the Government provides its observations concerning the allegations of anti-trade union dismissals against members of the “United for Development” Workers’ Union at the Office of the Comptroller-General (SITRAUD). In relation to the refusal of the Office of the Comptroller-General to comply with the court order to reinstate Mr Julio César Monzón Ramírez, the Government indicates that the complaint concerning the offence of disobedience of the reinstatement order of the abovementioned worker was rejected by the Multi-person First Criminal Peace Court. The Government adds that the mediation process had begun between the SITRAUD and the Office of the Comptroller-General within the ILO Committee for the Settlement of Disputes in the area of Freedom of Association and Collective Bargaining.

Union of Workers of the Human Rights Office (SITRAPDH)

**525.** In a communication dated 15 October 2015, the Government sent its observations regarding the Union of Workers of the Human Rights Office (SITRAPDH). The Government refers to the delay in granting registration of the union, indicating that the length of the time elapsed before the registration is due to the number of appeals lodged in connection with the creation of the SITRAPDH.

## C. The Committee's conclusions

**526.** *The Committee observes that the present case refers, firstly, to 57 cases in which the Ministry of Labour and Social Welfare is alleged to have refused to register trade unions without any justification and, secondly, to various cases of dismissals and anti-union acts within public institutions, most of them occurring further to the establishment of trade union organizations.*

### Cases in which registration of trade union organizations was refused

**527.** *With regard to the cases in which registration of trade union organizations was refused, the Committee observes that the complainant denounces in general: (i) the arbitrary nature of decisions by the Ministry of Labour and Social Welfare, especially where unions belonging to the MSICG are concerned; (ii) the denial of the right of trade union organizations to affiliate workers on civil contracts within the public administration; (iii) the impossibility of forming branch unions; (iv) the recognition by the labour administration of the employer's right to oppose the establishment of a union; (v) the communication to the employer of the data of the workers who founded the union; and (vi) the fact that the labour administration decides which workers have the right to join a union and which do not (workers occupying positions of trust, etc.).*

**528.** *The Committee also observes that, with regard to the abovementioned general allegations, the Government states that: (i) the procedure for the registration of trade unions is defined by law; (ii) under the Labour Code, the Labour Directorate-General has the obligation to verify that trade unions in the process of being established meet the requirements laid down by law; (iii) as a result of that obligation, the Ministry has to ensure, through direct monitoring, that the union founders are workers who have the right to join trade unions; and (iv) the employer has the same right as any other citizen to bring requests before the authorities.*

**529.** *Furthermore, the Committee notes that, with respect to the 57 cases in which registration of trade unions was refused, the complainant has sent detailed information with regard to eight unions and, in addition, has provided two lists of 33 and 16 cases, respectively, in which registration was refused.*

#### Guatemalan National Union of Naturopathic Practitioners (GNGMN)

**530.** *The Committee notes that, according to the Government's reply: (i) the Labour Directorate-General of the Ministry of Labour and Social Welfare did not request the GNGMN to reconvene its constituent assembly; (ii) neither did the Directorate request the removal from its constitution of the reference to collective bargaining; and (iii) on 29 May 2014, the GNGMN was registered under Order No. 11-2014. This being the case, the Committee will not pursue its examination of this allegation.*

#### Autonomous Union of Teachers of Guatemala (SAMGUA)

**531.** *The Committee notes the complainant's allegation that the registration of the Autonomous Union of Teachers of Guatemala (SAMGUA) was refused because its constitution envisaged union membership for all workers in the service of the Ministry of Education, regardless of the type of employment contract whereby the employment relationship had been formalized, and that this constituted a violation of Article 2 of Convention No. 87 by the Ministry of Labour and Social Welfare. The Committee further notes the Government's indication that the scope of affiliation established in the SAMGUA constitution is contrary*

to Ministerial Decision No. 215-2004 of the Ministry of Public Finance establishing budget classifications for the public sector in Guatemala, which indicates that technical and professional services subject to the payment of fees are provided by contract staff who are not covered by a dependent employment relationship and, consequently, are not eligible for membership of a public-sector union. The Committee notes the Government's additional indication that SAMGUA failed to rectify four errors of form in its constitution identified by the Labour Directorate-General.

- 532.** *The Committee recalls that, by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 254]. The Committee also recalls that it has already underlined the need for the Government of Guatemala to recognize the right to organize of workers who are hired by the State on the basis of civil contracts for professional services [see 363rd Report, Case No. 2768, March 2012, paras 641 and 644]. Accordingly, the Committee again urges the Government to take the necessary steps to recognize the right to trade union membership of workers who provide services for the State on the basis of civil contracts and requests it to ensure that immediate recognition is given to the validity of the provision in the constitution of SAMGUA which envisages union membership for all workers at the Ministry of Education, regardless of the type of contract through which the employment relationship has been formalized. The Committee also requests the complainant to report on the rectification of the errors of form called for by the labour administration and requests the Government to keep it informed without delay on the finalization of the procedure for the registration of SAMGUA.*

#### Teachers' Federation of Chiquimula (CETRAMACH)

- 533.** *The Committee notes the complainant's allegation that: (i) despite several written applications sent by the organization, which is composed of hundreds of workers, five months elapsed without any notification being sent by the Ministry of Labour and Social Welfare in response to the application for registration of the Teachers' Federation of Chiquimula (CETRAMACH) submitted in July 2013; (ii) in view of this silence, the MSICG instituted amparo proceedings (for the protection of constitutional rights) against the Director-General of Labour, who claimed in court that the union's application for registration was being processed and that the Labour Inspectorate-General was verifying that the union members are indeed workers at the Ministry of Education, that they do not occupy positions of trust and that there have been no resignations from the union, whereas the legislation only authorizes the labour administration to verify whether the union's deed of establishment and its constitution are in line with the law; and (iii) furthermore, in practice, the labour administration asks the employer which employees occupy positions of trust and who, consequently, can exercise the right to join a union.*

- 534.** *The Committee notes the Government's statement in its reply that after being instructed by a court amparo ruling to issue a decision on the application for the registration of CETRAMACH, the Labour Directorate-General decided to reject the application on 15 July 2014. The Committee also notes that, according to the Government, the refusal to register was on the following grounds: (i) 14 out of the 20 founders of the union were teachers/directors with tenure and therefore occupied positions of trust that were incompatible with union membership; and (ii) the membership taken out by 278 workers that was communicated to the Labour Directorate-General a few days after the union's*

*establishment could not be taken into consideration because the workers in question had not been party to the union's deed of establishment (and because their joining of the union had not been accompanied by a clear and precise expression of their wish to form the union, as required by the Labour Code).*

- 535.** *Recalling that a long registration procedure constitutes a serious obstacle to the establishment of organizations and amounts to a denial of the right of workers to establish organizations without previous authorization [see **Digest**, op. cit., para. 307], the Committee observes with the utmost concern that it took two years and a court order before the labour administration reached a decision on the application for registration of CETRAMACH. The Committee also expresses its concern at the fact that the registration of CETRAMACH was refused on the grounds that the federation did not have the minimum of 20 founding members stipulated by the Labour Code, despite having hundreds of worker members, something that was not queried by the labour administration. Observing that the membership of 278 workers recorded a few days after the establishment of the union was not taken into consideration on formal procedural grounds and recalling that the formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations and that any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No. 87 [see **Digest**, op. cit., para. 279], the Committee considers that in this case the labour administration should provide assistance to the trade union organization in order to find a prompt practical solution to the procedural issues that have been identified and proceed with the registration of the trade union organization without delay.*
- 536.** *With regard to the Government's indication that 14 of the 20 founders of the organization were workers occupying positions of trust who were not entitled to join a trade union organization, the Committee recalls that an excessively broad interpretation of the concept of "worker of confidence" [worker occupying a position of trust], which denies such workers their right of association, may seriously limit trade union rights and even, in small enterprises, prevent the establishment of trade unions, which is contrary to the principle of freedom of association [see **Digest**, op. cit., para. 251]. Moreover, taking into consideration the numerous reported cases of delay in the registration of trade union organizations caused by the time spent by the labour administration on examining the types of employment relationship and the categories of job occupied by union founders, the Committee considers that issues involving complex legal appraisals in certain cases, such as determining whether or not the union's founders occupy positions of trust, should not delay the registration process. The Committee therefore requests the Government to take the necessary steps to ensure that such issues are dealt with after registration in the event of any objections. In view of the above, and taking account of the substantial membership of CETRAMACH, the Committee urges the Government to proceed immediately with the registration of CETRAMACH and to keep it informed in this regard.*

#### Southern Campesino Federation

- 537.** *Regarding the refusal to register the Southern Campesino Federation (CCS), the Committee notes that the following elements emerge from the complainant's allegations and the Government's reply: (i) the CCS, after having submitted its application for registration on 4 September 2012, incorporated on two occasions the amendments to its constitution called for by the Worker Protection Department of the Ministry of Labour and Social Welfare; (ii) as a result of the above, on 1 February 2013, said Department issued an opinion in favour of the registration of the CCS and forwarded its file to the Labour Directorate-General; (iii) on 18 July 2013, the Labour Directorate-General requested the CCS Provisional Executive Committee to carry out a number of corrections in order to be able to continue with the registration process; (iv) the CCS Provisional Executive*

*Committee filed an appeal against this decision, but it was declared inadmissible by the Deputy Minister of Labour; and (v) the CCS filed amparo proceedings against the decision by the Deputy Minister of Labour, which were rejected by the Supreme Court of Justice on the grounds that the Ministry order against which the appeal had been brought referred to simple procedural matters that did not impinge upon the trade union's rights.*

- 538.** *The Committee observes, however, that the decision by the Labour Directorate-General, requesting the CCS to carry out corrections, was issued ten months after the CCS had submitted its request for registration and five months after another department of the Ministry of Labour and Social Welfare issued an opinion in favour of the registration of the CCS, once it had carried out the corrections requested by that department. In the light of these elements, the Committee again regrets the excessive delay with which the Ministry of Labour and Social Welfare issues decisions regarding applications for registration by organizations and also expresses concern at the complexity of the Ministry's internal proceedings in this regard. The Committee also observes that, despite the time that has elapsed since the application for registration and the difference in focus between the opinion of the Worker Protection Department and the decision of the Labour Directorate-General, both the administrative and judicial authorities declared inadmissible the appeals filed by the CCS against this decision. In this regard, the Committee recalls that judges should be able to deal with the substance of a case concerning a refusal to register so that they can determine whether the provisions on which the administrative measures in question are based constitute a violation of the rights accorded to occupational organizations by Convention No. 87 [see **Digest**, op. cit., para. 304]. In these circumstances, the Committee urges the Government to take all necessary measures to expedite considerably its internal registration procedures and to ensure that trade unions have access to rapid and effective administrative and judicial remedies if they are not registered. The Committee also invites the CCS to resubmit its application for registration and urges the Government to process it without delay. The Committee requests the Government to keep it informed in this regard.*

Federation of Workers of the Export Processing  
Industry of Guatemala (CENTRIMAG)

- 539.** *With regard to the registration of the Federation of Workers of the Export Processing Industry of Guatemala (CENTRIMAG), the Committee notes the complainant's allegation that, despite the federation having 500 members, the Labour Directorate-General refused to register it on the basis of section 215(c) of the Labour Code, which stipulates that industry trade unions must comprise more than half the workers of the sector. The Committee observes that the complainant adds that the aforementioned legal provision has given rise to repeated requests for revision from the CEACR and that the action to have that provision declared unconstitutional is still awaiting a substantive decision from the Constitutional Court. The Committee also notes the observations of the Government indicating that CENTRIMAG's registration request was denied due to lack of compliance with section 215(c) of the Labour Code, which requires industry trade unions to comprise more than half the workers of the sector, whereas the members of the union in formation only had 23 members, according to the Government.*

- 540.** *In this regard, and observing the significant divergence between the union and the Government as to the number of members, the Committee recalls that the legally required minimum number of members must not be so high as to hinder in practice the establishment of trade union organizations. With regard to section 215(c) of the Labour Code, the Committee also recalls that in the context of the "roadmap" adopted by the Government in October 2013, following the complaint concerning non-observance by Guatemala of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made under article 26 of the ILO Constitution, the Government*



*pledged to adopt the legislative measures requested by the CEACR with respect to Convention No. 87, including the amendment of section 215(c) of the Labour Code. In view of the above, the Committee urges the Government to take the necessary steps, as a matter of urgency, to revise section 215(c) of the Labour Code so that it is possible to establish industrial trade unions, to communicate the present conclusions to the Constitutional Court, to proceed without delay with the registration of CENTRIMAG, and to keep it informed in this respect.*

#### Western Indigenous and Campesino Federation (CICO)

- 541.** *With regard to the registration of the Western Indigenous and Campesino Federation (CICO), the Committee notes the complainant's allegation that more than seven months after submission (on 7 November 2013) of the application for registration of this branch organization, the Ministry of Labour and Social Welfare rejected the application, stating that registration of the organization was subject to the removal of references to "men and women workers" in its constitution and requiring that the occupation or office of the trade union members be indicated. The Committee also notes the Government's observations indicating that ten days after the application for the registration, the Ministry of Labour and Social Security requested the trade union in formation to amend its charter and draft statutes and that the decision to close the application for registration was solely due to the union's refusal to incorporate such changes and, therefore, to the failure to meet the requirements of the labour legislation.*
- 542.** *Based on the above, the Committee notes on the one hand that the complainant organization alleges that the refusal to register the CICO was because the Ministry of Labour and Social Welfare requested amendments to the union statutes provisions related to the categories of workers covered by the trade union being formed, thus violating its autonomy. The Committee notes on the other hand, that the Government does not specify the content of amendments required by the Ministry, pointing out only that the requested changes were based on the provisions of the labour legislation. Recalling 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] and observing the complainant's indication that CICO is a branch organization and not an occupational trade union, the Committee requests the Government to inform it without delay about the content of the modifications of the statutes requested, and to ensure in the meantime that the latter can represent the workers covered by its constitution.*

#### Authentic National Union of Workers at the Ministry of Public Health and Social Assistance

- 543.** *The Committee notes that the complainant alleges that the Ministry of Labour and Social Welfare notified the Authentic National Union of Workers at the Ministry of Public Health and Social Assistance that it should modify its scope of action, divesting the union of its national status, preventing workers in other workplaces belonging to the same entity from joining the union and abolishing the branches provided for in its constitution. Regretting that the Government has not sent its observations concerning this allegation and recalling that under Article 2 of Convention No. 87, workers have the right to establish organizations of their own choosing, including organizations grouping together workers from different workplaces and different cities [see **Digest**, *op. cit.*, para. 335], the Committee requests the Government to send its observations without delay concerning the refusal to register the aforementioned trade union and to ensure in the meantime that the trade union can represent workers of the Ministry of Labour and Social Welfare, even if they are employed in different workplaces.*

Union of Workers of the Workers' Financial Group and other bodies comprising the same economic unit (SITRAGFIT)

- 544.** *The Committee notes the complainant's allegation that: (i) the Ministry of Labour and Social Welfare demanded that the union amend its constitution, eliminating in particular the possibility for the union to have branches and for leaders to be elected to the latter and, further to the union's refusal to comply, shelved the application for registration of the union; and (ii) at the same time, all the founding members of the union were dismissed immediately without any adequate protection from the justice system, either because the courts delayed in taking any decision on reinstatement or because the reinstatement orders which were issued were not complied with. The Committee notes on the other hand that the Government indicates that: (i) some weeks after the request for the registration of the union, the Ministry of Labour received the resignations of several workers affiliated to SITRAGFIT, including a person registered as a founding member, indicating that their affiliation was improperly obtained; (ii) the refusal of the application to register SITRAGFIT was further based on the violation of section 212 of the Labour Code which prohibits dual union membership and on the fact that the union in formation included six companies that did not have members in each one of them; and (iii) the legal proceedings related to the reinstatements are pending because of appeals and an application of the writ of amparo.*
- 545.** *With regard to the prohibition of double union membership by section 212 of the Labour Code, the Committee recalls that it has already indicated on several occasions that workers should be able, if they so wish, to join trade unions at the branch level as well as the enterprise level at the same time [see **Digest**, op. cit., para. 360]. Similarly, in the present case the Committee emphasizes that workers should be able to simultaneously join a company union and a union of groups of undertakings and that section 212 of the Labour Code, of which review has been requested for many years by the Committee of Experts on the Application of Conventions and Recommendations, should not therefore impede the registration of SITRAGFIT. In relation to the Government's indications that several workers had complained that their affiliation was obtained improperly and that the union did not have members in three of the six companies covered by its statutes, the Committee requests the complainant to send its corresponding observations.*
- 546.** *Furthermore, underlining the fact that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest**, op. cit., para. 771] and further recalling that in the context of the Memorandum of Understanding concluded with the Workers' group of the ILO Governing Body on 26 March 2013 following the complaint concerning non-observance by the Government of Guatemala of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made under article 26 of the ILO Constitution, the Government pledged to adopt "policies and practices to ensure the application of labour legislation, including ... timely and effective judicial procedures", the Committee expects that the pending judicial rulings relating to the dismissal of the founding members of SITRAGFIT will be handed down in the very near future, and that all existing and pending reinstatement orders will be complied with immediately. The Committee requests the Government to keep it informed in this respect.*
- 547.** *With respect to the 33 trade unions listed that were reportedly unsuccessful in applying for registration in 2012 and 2013, the Committee notes the information supplied by the Government in relation to each of the aforementioned cases. The Committee notes that the following organizations were registered and acquired legal personality: (i) Union of Workers and Employees of the Municipality of San Carlos Sija in the Department of Quetzaltenango; (ii) Union of Workers at the Ministry of the Interior; (iii) Union of*

*Workers at RENAP Guatemala; and (iv) Union of Workers at the Department of Conservation and Restoration of Pre-Hispanic Archaeological Sites. In view of the above, the Committee will not pursue its examination of the allegations relating to these organizations.*

- 548.** *Furthermore, the Committee notes that the application for registration of the Union of Workers of the Directorate-General for Sports and Recreation was cancelled because the executive committee of the organization indicated that it was withdrawing the application. The Committee will therefore not pursue its examination of this allegation.*
- 549.** *With regard to the applications for registration from the Union of Workers of the Municipality of San Pedro Sacatepéquez in the Department of San Marcos, the Union of Workers of the Municipality of Palín in the Department of Escuintla and the Union of Workers at the Education Directorate of the Department of Alta Verapaz, the Committee notes that registration was refused on the grounds of non-compliance with section 218(a) of the Labour Code, which stipulates a maximum period of 20 working days between the union's constituent assembly and the submission of the registration application documents. The Committee requests the complainant organization to send any observations it may wish to make on this matter.*
- 550.** *The Committee also notes that the registration of the Union of Workers of the Municipality of Pachulum was refused after the Labour Directorate-General established that four of the 20 workers belonging to the union were members of the police force. Recalling that the Committee recognizes that States have the authority to exclude members of the police from the scope of trade union rights and that the requirement of a minimum of 20 members for establishing a trade union is not incompatible with the principles of freedom of association, the Committee requests the complainant to send any additional information that it considers relevant concerning the refusal to register the aforementioned union.*
- 551.** *With respect to the Union of Workers and Employees at the Ministry of Education and Private Schools, the Committee notes the Government's indication that registration was refused because, under the terms of section 3 of the Act concerning unionization and strike regulation for state workers and section 215 of the Labour Code, it is impossible for the same union to group together public servants and private-sector workers. The Committee recalls once again that the free exercise of the right to establish and join unions implies the free determination of their structure and composition, and emphasizes the fact that in this case it should be possible for a trade union organization in the education sector to group together workers from both public and private schools, on the understanding that each group should conduct separate negotiations, being subject to a separate budget and separate regulations. In view of the above, the Committee requests the Government to proceed with the registration of the abovementioned organization.*
- 552.** *As regards the application for registration of the Union of Education Workers at National Institutes for Secondary-Level Distance Learning in Jutiapa, the Committee notes the Government's indication that educational staff lists are being reviewed to ensure that, in accordance with section 212(2) of the Labour Code, members of the union do not belong to any other organization. Recalling that workers should be able, if they so wish, to join trade unions at the branch level as well as the enterprise level at the same time [see **Digest**, *op. cit.*, para. 360], the Committee highlights the fact that the Union of Education Workers at National Institutes for Secondary-Level Distance Learning in Jutiapa submitted its application for registration in 2013. Recalling that a long registration procedure constitutes a serious obstacle to the establishment of organizations and amounts to a denial of the right of workers to establish organizations without previous authorization [see **Digest**, *op. cit.*, para. 307], the Committee urges the Government to proceed immediately with the registration of the Union of Education Workers at National*

*Institutes for Secondary-Level Distance Learning in Jutiapa, while retaining the possibility that any complaints regarding dual membership at the same workplace may be examined subsequently. The Committee requests the Government to keep it informed in this respect.*

- 553.** *The Committee also notes the Government's indication that, in accordance with section 5 of the Administrative Litigation Act, the registration requests from 18 trade unions were shelved because more than six months had elapsed since the last notification from the administration (Union of Workers of the Municipality of Santa Lucía Milpas Altas; Union of "Teachers for Change"; Union of Workers at Avandia SA; Union of Workers of the Municipality of Villa de Tejutla in the Department of San Marcos; Union of Workers of the Municipality and Electricity Company of Guastatoya El Progreso; Teachers' Union of Jalapa; Union of Education Workers at National Institutes for Secondary-Level Distance Learning in Izabal; Union of Workers of the Municipality of Santa Cruz El Chol in the Department of Baja Verapaz; Union of Workers of the Municipality of San Miguel Tucurú in the Department of Alta Verapaz; Union of Workers of the Municipality of Usumatlán; Union of Collection Agents at Cable Star SA; Union of Workers at SEAK HWA SA; General Union of Municipal Employees of Coatepeque). The Committee requests the Government to provide information as soon as possible, with respect to the 13 aforementioned unions, on the reason for their non-registration and also on the content and dates of the notifications sent to them by the labour administration.*
- 554.** *Moreover, the Committee notes the Government's indication that, in five cases, the registration applications from the trade union organizations have been the subject of legal proceedings which are still in progress (Union of Workers of the Directorate-General for Sports and Recreation at the Ministry of Sport; Union of Workers at the Port of Santo Tomás de Castilla; Union of Workers at Ternium Internacional Guatemala SA; Union of Workers of the Guatemalan Heart Disease Association; "Pro Dignity" Workers' Union at the Tax Administration Supervisory Authority (SBFBOSAT)). The Committee requests the Government to provide information on the reasons for the aforementioned legal proceedings and on the outcome thereof.*
- 555.** *With respect to the application for registration of the "Principles and Values" Workers' Union at the Tax Administration Supervisory Authority and the Union of Workers of the Municipality of San José El Rodeo (Department of San Marcos), the Committee notes the Government's brief statement that the two unions were not registered because their membership included workers occupying positions of trust. In this regard, the Committee recalls that an excessively broad interpretation of the concept of "worker of confidence" [worker occupying a position of trust], which denies such workers their right of association, may seriously limit trade union rights and even, in small enterprises, prevent the establishment of trade unions, which is contrary to the principle of freedom of association [see **Digest**, op. cit., para. 251]. In addition, the Committee reiterates the fact that determining whether or not the union's founders occupy positions of trust, which may involve a complex legal appraisal, should not delay the registration procedure, since that question could be considered after registration in the event of any objections, especially where there are allegations of interference by the employer in the process of establishing the trade union. The Committee therefore requests the Government to review without delay the registration applications from the two unions in the light of these principles and to keep it informed of the outcome.*
- 556.** *As regards the list of 16 trade unions whose applications for registration submitted in 2010 were, according to the complainant, rejected without justification, the Committee observes that 13 of these 16 cases have already been examined by the Committee in the context of Case No. 2840, the Committee having asked the Government to take steps to ensure their prompt registration [see 365th Report, paras 1057 and 1063]. The Committee notes with concern that it has not received any information from the Government on this*

matter. The Committee therefore urges the Government to provide information without delay, in the context of Case No. 2840, on the registration of the aforementioned trade union organizations. With regard to the applications for registration of the Union of the Education Ministry of the Department of Alta Verapaz, the Union of the Ixcán Quiché Health Sector and the Guatemalan Union of Labour Supporters and Defenders of Human Rights, the Committee requests the Government to provide information as soon as possible on the registration of the aforementioned organizations or, if applicable, to indicate the reasons that prevented registration.

- 557.** *In addition to the conclusions adopted by the Committee in relation to each of the specific cases of application for registration contained in the complainant's allegations, the Committee expresses serious concern in general at the greatly reduced number of cases in which the Government reports that the applications for trade union registration have been successful (5 out of 57 cases), at the lengthy periods of time that often elapse before any decision is issued by the labour administration, and at the frequency of cases in which the labour administration calls for substantive amendments to a union constitution, thereby affecting the autonomy that should be enjoyed by trade union organizations by virtue of the principles of freedom of association. The Committee recalls that for many years this issue has been the subject of recurrent pronouncements by the ILO supervisory bodies as a whole and by this Committee in particular [for example: 299th Report (Case No. 1595, June 1995, paragraph 410); 302nd Report (Case No. 1823, March 1996, paragraph 446); 363rd Report (Case No. 2768, March 2012, paragraph 638), and Case No. 2840 referred to previously] and that, at its 324th meeting (June 2015), as part of the complaint concerning non-observance by Guatemala of Convention No. 87, made under article 26 of the ILO Constitution, the Governing Body of the ILO included the unimpeded registration of trade unions by the Ministry of Labour and Social Welfare among the priority issues that required further urgent action by the Government. The Committee therefore again urges the Government to eliminate the various legal obstacles to the free establishment of trade union organizations referred to in the preceding paragraphs and, in consultation with the country's trade union federations and employers' organizations, to review the handling of registration applications, with a view to adopting an approach that enables the rapid resolution, in conjunction with the founders of trade union organizations, of issues of substance or form that arise and facilitating as far as possible the registration of trade union organizations. Recalling that technical assistance is available from the ILO, the Committee requests the Government to keep it informed without delay on the initiatives taken and the results achieved in this respect.*

### **Allegations of anti-union discrimination and persecution**

Union of Workers at the Peace Secretariat of the Office of the President of the Republic (SITRASEPAZ)

- 558.** *The Committee observes that the complainant's allegations concerning SITRASEPAZ refer to: (i) the anti-union dismissal of 11 workers including the union's general secretary; (ii) the application for judicial dissolution of the union on the grounds of being largely composed of contract staff who did not have the official status of workers; (iii) the denial of that union's right to engage in collective bargaining; and (iv) the criminalization of union activity through various criminal proceedings instituted against the union's general secretary, Mr Luis Antonio Mérida Ochoa.*
- 559.** *With regard to the dismissal of Mr Luis Antonio Mérida Ochoa, the Committee notes the Government's indication that the termination of his temporary services contract did not constitute an act of anti-union reprisal, and that the Supreme Court of Justice refused to reinstate him on the grounds that his position as director disqualified him from*

membership of SITRASEPAZ and that, consequently, he was not entitled to trade union immunity. In this regard, the Committee recalls that it is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to establish their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership [see *Digest*, op. cit., para. 247]. The Committee observes, however, that the ruling of the Supreme Court of Justice refers only to whether or not trade union immunity exists for Mr Luis Antonio Mérida Ochoa but not to the grounds for the worker's dismissal. The Committee therefore requests the Government to keep it informed of any court decisions relating to the validity of the termination of the worker's contract.

- 560.** With regard to the other ten dismissals concerning members of SITRASEPAZ, the Committee notes the Government's indication that this stems from the closure of the peace archives directorate. With a view to conducting an exhaustive examination of the allegations of anti-union discrimination in this case, the Committee requests the Government to send additional information on the total number of dismissals that have occurred because of the aforementioned closure. The Committee also requests the complainant to provide information on any court proceedings that exist in relation to those dismissals. With regard to the status of contract staff (budget item 29) held by the majority of workers constituting the membership of SITRASEPAZ, the Committee again recalls that all workers must be able to enjoy the right to freedom of association regardless of the type of contract by which the employment relationship has been formalized. The Committee therefore requests the Government to ensure the full application of this principle within the Peace Secretariat. As regards the collective agreement signed by SITRASEPAZ, the Committee recalls that all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service [see *Digest*, op. cit., para. 886]. The Committee requests the Government to disseminate the abovementioned principles to public institutions and to keep it informed as to their application in the Peace Secretariat, that account will be taken of the aforementioned principle in the judicial settlement of the dispute, and requests the Government to keep it informed in this respect. Lastly, with regard to the criminal proceedings instituted against the union's general secretary, Mr Luis Antonio Mérida Ochoa, the Committee requests the Government to provide further details of the charges brought against this worker and to keep it informed of the outcome of the aforementioned criminal proceedings.

“United for Development” Workers’ Union at the Office  
of the Comptroller-General (SITRAUD)

- 561.** The Committee observes that the complainant's allegations concerning SITRAUD refer to the anti-union dismissal of various members of the union by the Office of the Comptroller-General in retaliation for the request for negotiation of a collective accord relating to conditions of work. The Committee notes the complainant's allegation that the aforementioned institution has repeatedly refused to comply with the court orders for the reinstatement of SITRAUD members, Mr Julio César Monzón Ramírez, Mr Juan Domingo Pinula Santay and Mr José Ramos Méndez, without the necessary steps being taken to penalize the aforementioned contempt of court and put an end to this situation of violation of freedom of association.
- 562.** The Committee notes the Government's observations stating that the complaint concerning the offence of disobedience of the order to reinstate Mr Julio César Monzón Ramírez was

rejected by the Multi-person First Criminal Peace Court. However, the Committee observes that the Government's response does not specify the grounds for rejecting the complaint, does not indicate whether or not Mr Julio César Monzón Ramírez was in fact reinstated and does not include any information regarding why Mr Juan Domingo Pinula Santay and Mr José Ramos Méndez were not reinstated. The Committee expresses concern regarding the alleged repeated refusals by a public institution to comply with court orders for the reinstatement of workers who had been victims of anti-union dismissal. While noting the Government's indication that a mediation process between the SITRAUD and the Office of the Comptroller-General had been initiated within the ILO Committee for the Settlement of Disputes in the area of Freedom of Association and Collective Bargaining, the Committee urges the Government to ensure, should the existence of the aforementioned court orders be substantiated, that the administration concerned immediately reinstates the dismissed workers in their posts and to keep it informed in this respect.

Union of Workers of the Guatemalan Heart Disease Association (SIDETRALICO)

- 563.** *With regard to the anti-union acts reportedly affecting members of SIDETRALICO, the Committee observes that the complainant's allegations refer to: (i) the dismissal of almost all the founding members of the union on the same day that the labour administration was notified of the establishment of the union, which suggests collusion between the labour administration and the employer; (ii) failure to comply with orders for the reinstatement of the workers issued by the court of first instance; and (iii) unequal treatment by the appeal court responsible for reviewing the first-instance rulings, allowing all the evidence submitted by the employer but rejecting that submitted by the workers.*
- 564.** *The Committee notes with regret that the Government has not sent its observations concerning the abovementioned allegations despite the time that has elapsed. The Committee recalls that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest**, op. cit., para. 820]. The Committee urges the Government to send its observations concerning the abovementioned allegations as a matter of urgency and expects that the various court actions brought in relation to the events described will result in prompt decisions which respect the principles of freedom of association and are being complied with. The Committee requests the Government to keep it informed without delay in this regard.*

Union of Workers at the Office of the Human Rights Ombudsman (SITRAPDH)

- 565.** *The Committee observes that the complainant's allegations concerning the Union of Workers at the Office of the Human Rights Ombudsman (SITRAPDH) refer to the anti-union dismissal of seven workers further to their joining the aforementioned union and to obstruction by the courts, which reportedly refuse to issue a ruling on the action for reinstatement submitted in June 2013 and also on the amparo action for lack of legal protection lodged due to the lack of any decision by the ordinary courts.*
- 566.** *While noting the observation of the Government about delays in the registration of the SITRAPDH, the Committee notes with regret that, despite the time that has elapsed, the Government has not sent its observations concerning the alleged anti-union dismissals and the delay in the administration of justice. The Committee recalls that 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 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., para. 826]. The Committee also recalls once again that, in the context of the Memorandum of Understanding concluded with the Workers' group of the ILO Governing Body on 26 March 2013 further to the complaint concerning non-observance by the Government of Guatemala of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made under article 26 of the ILO Constitution, the Government pledged to adopt "policies and practices to ensure the application of labour legislation, including ... timely and effective judicial procedures". In view of the above, the Committee urges the Government to send its observations concerning the aforementioned allegations as a matter of urgency. The Committee expects that the various court actions brought in relation to the events described will result in prompt decisions which respect the principles of freedom of association and are being complied with. The Committee requests the Government to keep it informed without delay in this regard.*

Union of Administrative and Education Service Workers of Guatemala (STAYSEG) and Union of Workers at the Departmental Directorates of the Ministry of Education of the State of Guatemala (SITRADEMEG)

**567.** *The Committee observes that the complainant's allegations concerning the Union of Administrative and Education Service Workers of Guatemala (STAYSEG) and the Union of Workers at the Departmental Directorates of the Ministry of Education of the State of Guatemala (SITRADEMEG) refer to: (i) the supposed anti-union dismissal of two officials from the aforementioned unions and the request for judicial authorization of the dismissal of the general secretary of STAYSEG in response to the promotion of a collective bargaining process by these unions; and (ii) the inadequate response and delay on the part of the judicial bodies examining these cases. Noting once again with regret that the Government has not sent its observations concerning the aforementioned allegations despite the time that has elapsed, the Committee recalls, as it did with regard to the previous allegations of anti-union discrimination, that no person should be prejudiced in employment by reason of legitimate trade union activities and that cases of anti-union discrimination should be dealt with promptly and effectively by the competent institutions. The Committee urges the Government to send its observations concerning the abovementioned allegations as a matter of urgency and to ensure the free exercise of the right of collective bargaining within the Ministry of Education. The Committee expects that the various court actions brought in relation to the events described will result in prompt decisions which respect the principles of freedom of association and are being complied with.*

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

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

*(a) The Committee again urges the Government to take the necessary steps to ensure recognition of the right to trade union membership of workers who provide services for the State on the basis of civil contracts and requests it to immediately recognize the validity of the provision in the constitution of the Autonomous Union of Teachers of Guatemala (SAMGUA) which envisages union membership for all workers at the Ministry of Education, regardless of the type of contract through which the employment relationship has been formalized. The Committee also requests the complainant to report on the*



---

*rectification of the errors of form called for by the labour administration and requests the Government to keep it informed without delay on the finalization of the procedure for the registration of SAMGUA.*

- (b) The Committee urges the Government to proceed immediately with the registration of CETRAMACH. Furthermore, the Committee requests the Government to take the necessary steps to ensure that issues involving complex legal appraisals in certain cases, such as determining whether or not the union's founders occupy positions of trust, do not delay the registration process, since these could be dealt with after registration in the event of any objections. The Committee requests the Government to keep it informed in this respect.*
- (c) The Committee urges the Government to take all necessary measures to expedite considerably its internal registration procedures and to ensure that trade unions have access to rapid and effective administrative and judicial remedies if they are not registered. The Committee also invites the CCS to resubmit its application for registration and urges the Government to process it without delay. The Committee requests the Government to keep it informed in this regard.*
- (d) The Committee urges the Government to take the necessary steps, as a matter of urgency, to revise section 215(c) of the Labour Code so that it is possible to establish industrial trade unions. The Committee further requests the Government to proceed without delay with the registration of the Federation of Workers of the Export Processing Industry of Guatemala (CENTRIMAG), and to keep it informed in this respect.*
- (e) The Committee requests the Government to provide information on the types of modifications required to the statutes of the CICO and to ensure in the meantime that the latter is able to represent the workers envisaged in its constitution.*
- (f) The Committee requests the Government to send its observations without delay concerning the refusal to register the Authentic National Union of Workers at the Ministry of Public Health and Social Assistance and to ensure in the meantime that the latter is able to represent workers at the aforementioned ministry even if they are employed in different workplaces.*
- (g) In relation to SITRAGFIT, the Committee requests the complainant to send its observations in relation to the Government's indications that several workers had complained that their affiliation was obtained improperly and that the union did not have members in three of the six companies covered by its statutes. Furthermore, the Committee expects that the pending judicial rulings relating to the dismissal of the founding members of SITRAGFIT will be handed down in the very near future, and that all existing and pending reinstatement orders will be complied with immediately. The Committee requests the Government to keep it informed in this respect.*
- (h) The Committee requests the Government to proceed with the registration of the Union of Workers and Employees at the Ministry of Education and Private Schools.*

- (i) The Committee urges the Government to proceed immediately with the registration of the Union of Education Workers at National Institutes for Secondary-Level Distance Learning in Jutiapa, while retaining the possibility that any complaints regarding dual membership at the same workplace may be examined subsequently. The Committee requests the Government to keep it informed in this respect.*
- (j) With regard to the Union of Workers of the Municipality of San Pedro Sacatepéquez in the Department of San Marcos, the Union of Workers of the Municipality of Palín in the Department of Escuintla and the Union of Workers at the Education Directorate of the Department of Alta Verapaz, on the one hand, and the Union of Workers of the Municipality of Pachulum, on the other, the Committee requests the complainant organization to send any observations it may wish to make regarding the Government's statements concerning the reasons for refusing to register the aforementioned unions.*
- (k) With regard to the shelving of registration applications from 13 trade unions because more than six months had elapsed since the last notification from the labour administration, the Committee requests the Government to provide information without delay on the reason for non-registration of the aforementioned unions and also on the content and dates of the notifications sent to them by the labour administration.*
- (l) With regard to the applications for registration from five trade union organizations in relation to which legal proceedings are still in progress, the Committee requests the Government to provide information without delay on the reasons for the aforementioned legal proceedings and on the outcome thereof.*
- (m) With regard to the failure to register the "Principles and Values" Workers' Union at the Tax Administration Supervisory Authority and the Union of Workers of the Municipality of San José El Rodeo (Department of San Marcos), the Committee requests the Government to review its decisions in the light of the principles underlined by the Committee relating to workers occupying positions of trust and to keep it informed in this respect.*
- (n) With regard to the list of 16 trade unions whose applications for registration submitted in 2010 were, according to the complainant, refused without justification, the Committee requests the Government to provide information without delay on the registration of the Union of the Education Ministry of the Department of Alta Verapaz, the Union of the Ixcán Quiché Health Sector and the Guatemalan Union of Labour Supporters and Defenders of Human Rights or, if applicable, to indicate the reasons that prevented registration. The Committee also urges the Government to provide, in the context of Case No. 2840, information without delay on the registration of the other 13 trade union organizations.*
- (o) The Committee expresses its concern at the large number of cases in which applications for trade union registration have been unsuccessful, at the lengthy periods of time that often elapsed before any decision is issued by the labour administration, and at the frequency of cases in which the labour*

*administration calls for substantive amendments to a union constitution, thereby affecting the autonomy that should be enjoyed by trade union organizations by virtue of the principles of freedom of association. The Committee again urges the Government to eliminate, in consultation with the country's trade union federations and employers' organizations, the various legal obstacles to the free establishment of trade union organizations referred to in the preceding paragraphs and to review the handling of registration applications, with a view to adopting an approach that enables the rapid resolution, in conjunction with the founders of trade union organizations, of issues of substance or form that arise and facilitating as far as possible the registration of trade union organizations. Recalling that technical assistance is available from the ILO, the Committee requests the Government to keep it informed without delay on the initiatives taken and the results achieved in this respect.*

- (p) *With regard to the allegations concerning the Union of Workers at the Peace Secretariat of the Office of the President of the Republic (SITRASEPAZ), the Committee requests the Government to: (i) keep it informed of any court decisions relating to the validity of the termination of the contract of the union's general secretary, Mr Luis Antonio Mérida Ochoa; (ii) provide additional information on the total number of dismissals that have occurred because of the closure of the peace archives and requests the complainant to provide information on any court proceedings that exist in relation to those dismissals; (iii) ensure within the Peace Secretariat that all workers enjoy the right to freedom of association, regardless of their contractual relationship and that all workers not engaged in the administration of the State enjoy the right to collective bargaining, and to keep it informed in this respect; (iv) disseminate to public institutions the abovementioned principles; and (v) provide further details of the charges brought against Mr Luis Antonio Mérida Ochoa and to keep it informed of the outcome of the criminal proceedings instituted against him.*
- (q) *The Committee requests the Government to provide its observations without delay concerning the alleged anti-union dismissals of members of the Union of Workers of the Guatemalan Heart Disease Association (SIDETRALICO) and of the Union of Workers at the Office of the Human Rights Ombudsman (SITRAPDH). The Committee expects that the various court actions brought in relation to the events described will result in prompt decisions which are implemented and respect the principles of freedom of association and are being complied with. The Committee requests the Government to keep it informed without delay in this regard.*
- (r) *The Committee requests the Government to provide its observations without delay concerning the allegations of anti-union discrimination against the Union of Administrative and Education Service Workers of Guatemala (STAYSEG) and the Union of Workers at the Departmental Directorates of the Ministry of Education of the State of Guatemala (SITRADEMEG) and to ensure the free exercise of the right to collective bargaining within the Ministry of Education. The Committee expects that the various court actions brought in relation to the events described will result in prompt decisions*

*which respect the principles of freedom of association and are being complied with.*

- (s) *The Committee urges the Government to ensure, should the existence of the court orders referred to in the conclusions be substantiated, that the administration concerned immediately reinstates the dismissed workers in their posts, and to keep it informed in this respect.*

CASE No. 3062

INTERIM REPORT

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

- **the General Confederation of Rural and Urban Workers (CTC) and**
- **the Workers' Union of the Guatemalan Olympic Committee (SITRACOGUA)**

*Allegations: The complainant organizations denounce mass dismissals in retaliation for the establishment of the Workers' Union of the Guatemalan Olympic Committee, as well as acts of intimidation against the workers of the Guatemalan Olympic Committee with a view to their resignation from the union*

**569.** The complaint is contained in communications dated 12 February and 23 April 2014, presented jointly by the General Confederation of Rural and Urban Workers (CTC) and the Workers' Union of the Guatemalan Olympic Committee (SITRACOGUA), and in subsequent communications from SITRACOGUA dated 9 September 2014, 17 February and 2 July 2015.

**570.** The Government sent its observations in a communication dated 23 June 2015.

**571.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organize 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 complainants' allegations**

**572.** In their communication dated 12 February 2014, the complainant organizations denounce mass dismissals in retaliation for the establishment of SITRACOGUA, as well as acts of intimidation against the workers of the Guatemalan Olympic Committee with a view to their resignation from the union, actions that violate not only ILO Conventions Nos 87 and 98 but also the spirit of the Olympic Charter. With respect to the allegations, the complainant organizations indicate that: (i) on 28 November 2013, the ad hoc committee of workers of the Guatemalan Olympic Committee was founded, and a collective labour agreement was concluded with the employer on 2 December 2013; (ii) on 5 December 2013, 37 workers from the Guatemalan Olympic Committee held a general assembly establishing SITRACOGUA, having notified the General Labour Inspectorate; (iii) in accordance with the Labour Code, on 13 December 2013, the General Labour Inspectorate issued a decision protecting the founding members of the union as well as new members

against dismissal for a period of 60 days; (iv) on 31 January 2014, the new management of the Guatemalan Olympic Committee informed 20 workers, including all the members of the executive committee and the interim advisory council of the union, that it was terminating their employment contracts; (v) each worker was given the option of signing a letter of resignation or being dismissed and told that if they opted for dismissal, they would have to apply to the courts to obtain the benefits provided for under the law in the event of dismissal; (vi) while some workers were officially dismissed because of downsizing, others were dismissed on the alleged grounds that they were trusted staff of the former management of the Guatemalan Olympic Committee; (vii) on 4 February 2014, the dismissed workers who were members of the union filed a request for reinstatement with the General Labour Inspectorate; (viii) after meeting with the complainants and the management of the Guatemalan Olympic Committee, the General Labour Inspectorate issued an injunction that day, requesting the employer to reinstate the workers who had founded the union, a request that was denied by the management of the Guatemalan Olympic Committee, whose representatives did not attend the meeting on 11 February 2014 arranged by the General Labour Inspectorate; (ix) the filing of the complaint with the General Labour Inspectorate gave rise to further reprisals, and on 5 February 2014, another two workers who belonged to the union were dismissed, one of whom was a founding member of the union; (x) that day, the vehicles of the union's interim secretary-general, Ms Marina García, and interim proceedings secretary, Ms Suleima de León, were vandalized; (xi) acts of intimidation also began to occur within the Guatemalan Olympic Committee in order to pressure workers in the institution to resign from the union; and (xii) on 10 and 11 March 2013, representatives of the union filed a complaint with the Office of the Attorney-General for anti-union discrimination and for psychological and physical violence against various women members of the union, and also requested safety measures for the union leaders, Ms Marina García and Ms Suleima de León.

- 573.** In their communication dated 23 April 2014, the complainant organizations sent additional information indicating that: (i) on 28 February 2014, Ms Débora Agosto and Ms Jazmín Urbina, both founding members of the union, were dismissed, once again allegedly due to downsizing of the Guatemalan Olympic Committee; (ii) on 6 March 2014, the registration process for SITRACOGUA, the first trade union in the history of the Guatemalan Olympic Committee, was concluded; (iii) on 5 and 10 March 2014 respectively, the union filed a formal complaint with the Prosecutor-General of Human Rights and an action with the employment tribunals to override the unlawful dismissals of its members; (iv) on 21 March 2014, the union received a notification from the Ministry of Labour, stating that the Guatemalan Olympic Committee had forwarded to the Ministry a series of "voluntary letters" of resignation from the union; and (v) in the same document, the management of the Guatemalan Olympic Committee communicated its decision to repeal the adoption of the collective agreement between the Guatemalan Olympic Committee and the ad hoc committee of workers of the Guatemalan Olympic Committee on grounds of unlawfulness.
- 574.** In their communications dated 9 September 2014 and 17 February 2015, the complainant organizations report: (i) a lack of any progress in the proceedings of various complaints and actions filed with the Prosecutor-General of Human Rights and the employment tribunals; (ii) a lack of response from the Office of the Attorney-General to the criminal action filed for anti-union discrimination, violence against women and coercion, consisting of the issuance of a minor indictment against the general manager and advisers of the Guatemalan Olympic Committee; (iii) the dismissal, on 31 January 2015, of Mr Ronald Senta, a member of the union; (iv) persistent acts of coercion pressuring the members of the union still working for the Committee to resign from the organization; and (v) *amparo* proceedings brought by officials of the Guatemalan Olympic Committee against the union registration ruling, which is before the Constitutional Court.

575. In their communication of 2 July 2015, the complainant organizations once again report a lack of any progress in the proceedings before the various bodies considering the anti-union acts committed against their members. They point out that the hearing of 2 June 2015 before the labour court resulted in yet another delay due to a new stalling tactic used by the Guatemalan Olympic Committee. The complainant organization concludes by stating that the session of the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining held on 23 June 2015 once again revealed the stalling tactics of the employer, which refused to discuss the reinstatement of the dismissed workers and preferred to wait for the ruling of the labour courts, which has been delayed because of the institution's procedural tactics.

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

576. In its communication of 23 June 2015, the Government begins by communicating the information provided by the General Labour Inspectorate. The General Labour Inspectorate states that: (i) on 3 and 4 February 2014, it received two complaints concerning the dismissal of 14 workers from the Guatemalan Olympic Committee, one of which indicated that the grounds for dismissal was the establishment of SITRACOGUA; (ii) during the initial visit carried out by the General Labour Inspectorate, the Director-General of the Guatemalan Olympic Committee said that he was not aware of the existence of any union within the entity; (iii) the inspectors nevertheless noted the existence of a decision by the General Labour Inspectorate of 13 December 2013, affording the founding members of SITRACOGUA temporary protection against dismissal; (iv) in the light of the above, on 4 February 2014, the labour inspectors requested the Guatemalan Olympic Committee to reinstate 12 dismissed workers who were protected against dismissal, setting a hearing for 11 February to ensure compliance with this request; (v) the employer party did not appear at the hearing on 11 February; and (vi) the inspectors considered that day that their decision had been totally disregarded and referred the case to the competent court so that it could impose the relevant sanctions.

577. The Government also indicates that: (i) the proceedings in the employment tribunals are still under way, as the action for lack of jurisdiction filed by the Guatemalan Olympic Committee was found to be without merit; (ii) the Office of the Attorney-General is investigating the alleged acts of discrimination, coercion and violence against women, the alleged victims of which were women who worked for SITRACOGUA; (iii) the economic, social and cultural rights unit of the Prosecutor-General of Human Rights issued a final decision stating that the complaint that it had received concerning the dismissal of 20 workers who were members of SITRACOGUA was already being considered by the employment tribunals; and (iv) this case is being heard by the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining, which held an initial mediation session on 19 May 2015, at which the representatives of SITRACOGUA demanded the reinstatement of the members of the organization who had been dismissed, while the representatives of the Guatemalan Olympic Committee who were present stated that they lacked decision-making power, which resulted in the scheduling of a second session on 23 June 2015.

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

578. *The Committee notes that this case refers to the complaint concerning mass dismissals within the Guatemalan Olympic Committee in retaliation for the establishment of SITRACOGUA, as well as acts of intimidation against this institution's workers with a view to their resignation from the union.*

579. *With respect to the alleged anti-union dismissals, the Committee notes, firstly, that the identity and exact number of workers belonging to SITRACOGUA who were dismissed on 31 January 2014 is not exactly clear from the allegations of the complainant organizations and the Government's observations. The Committee therefore requests the complainant organizations to provide this information quickly. The Committee notes, however, that both the complainant organizations and the Government agree that: (i) all the members of the executive committee and the interim advisory council of SITRACOGUA were dismissed on 31 January 2014, approximately a month and a half after the organization was established; (ii) the employer failed to comply with the decision of the General Labour Inspectorate of 13 December 2013, affording temporary protection against dismissal to the founding members of SITRACOGUA, and with its injunction of 4 February 2014, requesting the reinstatement of 12 workers who had been dismissed for founding the trade union; (iii) the objection to the dismissals before the labour courts is still awaiting an initial decision; and (iv) the case has been before the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining since May 2015.*
580. *The Committee therefore notes, in the light of the foregoing and, in particular, the reports of the General Labour Inspectorate forwarded by the Government, that the dismissals made by the institution on 31 January 2014 affected all the leaders of the recently created SITRACOGUA and that the employer ignored the temporary protection afforded to these workers under Guatemalan legislation as well as the request for reinstatement issued by the labour inspectors. Recalling that no person should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and that the persons responsible for such acts should be punished [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 772], the Committee expresses its concern at the ineffectiveness of the General Labour Inspectorate's intervention in this case and at the fact that 18 months after the decision of the General Labour Inspectorate requesting the reinstatement of the founding members of SITRACOGUA, no ruling has been handed down in this case. In this regard, the Committee highlights that 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 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.*, para. 826].*
581. *Also recalling that, under the terms of the Memorandum of Understanding signed with the Workers' group of the ILO Governing Body on 26 March 2013 further to the complaint concerning non-observance by Guatemala of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made under article 26 of the ILO Constitution, the Government made a commitment to adopt "policies and practices to ensure the application of labour legislation, including ... effective and timely judicial procedures", the Committee strongly hopes that the legal challenge to the dismissal of the founding members of SITRACOGUA will soon be examined and that, in the event that the decision of first instance upholds the request for reinstatement issued by the General Labour Inspectorate, all necessary measures will be taken to ensure that the workers will be effectively and immediately reinstated. The Committee requests the Government to inform it urgently in this regard.*
582. *With respect to the alleged acts of intimidation against the members of SITRACOGUA, the Committee notes that the complaint before the Office of the Attorney-General concerning discrimination, coercion and violence is still under investigation. Recalling that under the roadmap adopted by the Government of Guatemala in September 2013 in consultation*

with the social partners with a view to implementing the Memorandum of Understanding referred to in the preceding paragraph, the Government made a commitment to “strengthen the prevention, protection and response mechanisms in respect of threats and attacks against trade union leaders, unionized workers and others seeking to form trade unions”, the Committee strongly hopes that the investigation will be completed without further delay. The Committee requests the Government to inform it urgently in this regard.

**583.** *The Committee further notes that the Government has not provided its observations in relation to the request for safety measures for the union’s interim secretary-general, Ms Marina García, and the interim proceedings secretary, Ms Suleima de León, which was made after their cars were vandalized. The Committee requests the Government to ensure that the competent authorities have considered the aforementioned request for protection measures in a timely, appropriate manner and to inform it urgently of the decisions taken in this regard.*

**584.** *Lastly, the Committee trusts that the interventions of the various aforementioned public institutions will ensure the free exercise of freedom of association and collective bargaining within the Guatemalan Olympic Committee.*

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

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

- (a) The Committee requests the complainant organizations to indicate clearly the identity and the exact number of workers belonging to SITRACOGUA who were dismissed on 31 January 2014.*
- (b) The Committee strongly hopes that the legal challenge to the dismissal of the founding members of SITRACOGUA will soon be examined and that, in the event that the decision of first instance upholds the request for reinstatement issued by the General Labour Inspectorate, all necessary measures will be taken to ensure that the workers will be effectively and immediately reinstated. The Committee requests the Government to inform it urgently in this regard.*
- (c) The Committee strongly hopes that the investigation of the Office of the Attorney-General into the acts of discrimination, coercion and violence against members of SITRACOGUA will be completed without further delay. The Committee requests the Government to inform it urgently in this regard.*
- (d) The Committee requests the Government to ensure that the competent authorities have examined the aforementioned request for protection measures for the union leaders, Ms Marina García and Ms Suleima de León, in a timely, appropriate manner and to inform it urgently of the decisions taken in this regard.*
- (e) The Committee trusts that the interventions of the various aforementioned public institutions will ensure the free exercise of freedom of association and collective bargaining within the Guatemalan Olympic Committee.*



CASE No. 3051

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

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

- the National Confederation of Trade Unions (ZENROREN)
- the Japan Federation of National Service Employees (KOKKOROREN) and
- the All Health and Welfare Ministry Workers' Union (ZENKOSEI)

*Allegations: The complainants allege that, in the context of open hostility of the authorities against the trade unions of the Japan Social Insurance Agency (SIA), the dismissal on 31 December 2009 of 525 employees following the dismantling of the SIA constituted an act of anti-union discrimination*

- 586.** The complaint is contained in communications dated 6 November 2013 and 31 January 2014, presented jointly by the National Confederation of Trade Unions (ZENROREN), the Japan Federation of National Service Employees (KOKKOROREN) and the All Health and Welfare Ministry Workers' Union (ZENKOSEI).
- 587.** The Government submitted its observations in communications dated 21 May and 2 October 2014 and 8 April 2015.
- 588.** 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**

- 589.** In a communication dated 6 November 2013, the complainants alleged that the Government failed to comply with its obligations under Conventions Nos 87 and 98 when it dismissed 528 employees of the Social Insurance Agency (SIA) in December 2009.
- 590.** According to the complainants, the public pension service was ensured by the Ministry of Health, Labour and Welfare (hereinafter referred to as the MHLW) and its external organ, the SIA. The SIA employees were therefore subject to the application of the National Public Service Law. In July 2007, the Government enacted the Japan Pension Service Law which stipulated that the SIA would be abolished on 31 December 2009, and that the Japan Pension Service Organization would be established to take over all the SIA's operations starting from 1 January 2010. The Japan Pension Service Law did not provide for automatic continuation of employment of SIA employees in the Japan Pension Service Organization. Instead, the employees of the new organization were to be hired as "new employees" through the selection of former SIA employees who wanted to continue to work in the new organization.
- 591.** Furthermore, the complainants indicated that in July 2008 the Government adopted in a Cabinet meeting the "Basic Plan" for the creation of the Japan Pension Service Organization including its hiring criteria and the number of workers to be hired by the new

organization. According to the “Basic Plan”, SIA employees who had a past record of being subject to disciplinary punishment, regardless of the motif of that punishment, would not be hired by the new organization. For that reason, over 1,000 SIA employees in total found themselves disqualified for hiring by the Japan Pension Service Organization. A number of these employees had a record of disciplinary punishment for union activities. Finally, on 28 December 2009, the Director of the SIA notified 528 employees that their employment would be terminated on 31 December in accordance with article 78, paragraph 4, of the National Public Service Law.

- 592.** According to the complainants, in 2004 a drastic reform was made in the public pension system, consisting of cuts in the amount of pension on one hand and increase in people’s contributions to the pension fund on the other, which provoked a mounting popular criticism of the management of the pension system in place. At the same time, a large number of errors and mistakes found in the individual pension records was revealed to the public. The scandals – which also concerned a number of ministers and members of the Diet – increased the distrust of the population in the public pension system. The complainants indicated that the Government claimed that the cause of the problems related to pension records was to be found in the employee organizations and shifted the responsibility for the calamitous management of pension records onto the trade unions (that is the SIA section of the All Japan Prefectural and Municipal Workers’ Union (JICHIRO) and ZENKOSEI). Since then, the Government adopted a hostile attitude towards the trade unions and alleged that the non-payment of contributions to the public pension fund by ministers and Diet members was exposed due to the leak of individual pension records from the SIA under the influence of tense labour–management relations. The Government ultimately denied all trade union rights that had so far been accorded to the trade unions within the SIA.
- 593.** According to the complainants, since Japanese state employees have been denied the right to strike and the right to conclude labour agreements under the National Public Service Law, the trade unions were unable to take any efficient action such as strike when the dismantling and privatization of the SIA was announced and could not resist effectively the massive dismissals.
- 594.** Government hostility towards the SIA trade unions was clearly illustrated by the abolition of the practice of consultation with trade unions. The SIA authorities used to have prior consultations with the trade unions, through memoranda and written confirmation, before notifying the personnel about the changes in working conditions, but they unilaterally abolished this practice in March 2004. The trade unions were unable to get involved in determining changes in a context of deteriorating working conditions during the period when the workloads increased considerably with the problem of missing pension records.
- 595.** Moreover, the complainants indicated that strong popular criticisms grew against those who were managing the pension system, especially the then ruling party which eventually lost the 2004 House of Councillors election. The party attributed the cause of its electoral defeat to the disclosure of pension records by SIA employees and decided to drastically transform the SIA. While a working group to discuss about the new organization for social insurance service was set up, the latter put into question the practice of “written confirmation” exchanged between SIA authorities and the trade unions concerning working conditions. It affirmed that it was “the unions that provided the documents related to non-payment of pension contributions to the opposition parties”; consequently “it was impossible to maintain normal industrial relations with anti-state unions”.
- 596.** According to the complainants, bodies established during the transformation process, that is the “Committee of Experts for a New Social Insurance Organization” or the “Committee for Organizational Revival of Pension Service” undertook hearings of the SIA trade

unions. However, these hearings were more to pin down the trade unions' responsibility for various problems of pension service, than listen to their views.

- 597.** Furthermore, the complainants denounced repeated investigations into cases of breach of working regulation targeted to union activities. Following the enactment of the Japan Pension Service Law, the Government (Chief Cabinet Secretary via Committee for Organizational Revival of Pension Service) instructed the SIA to conduct personnel management investigation of the past ten years regarding unauthorized full-time union officers, union activities undertaken during working hours, political actions, side jobs, tardiness, absence from work, etc. Investigations focused on union activities were conducted persistently on the pretext of "breach of working regulations". A Committee for Investigating Working Regulations Breach was established under the MHLW. As a result, disciplinary measures were imposed on 31 employees, ten managers and two general managers.
- 598.** The complainants also denounced the fact that the Government decided unilaterally to bring criminal charges against "unauthorized full-time union officers" although SIA management had accepted without going through legally defined procedures that union members take part in union activities within working hours. The Tokyo District Prosecutor's Office, however, decided not to prosecute them.
- 599.** While the Committee for Investigating Working Regulations Breach in its final report recommended that "it should be made possible for SIA employees who have records of disciplinary punishment to be hired as fixed-term employees of the Japan Pension Service Organization", the ruling party and its allies objected to the recommendation and insisted that "these employees should not be hired even as fixed-term employees". The Japan Federation of Bar Association and other organizations of jurists expressed their strong criticism against the denial of hiring on the ground of past punishment record which would constitute "double jeopardy". The Government ignored the criticism and adopted in July 2007 in a Cabinet meeting the "Basic Plan" that laid down the policy of denying to SIA employees who would have a record of disciplinary punishment whatsoever the possibility to be hired in the Pension Service Organization.
- 600.** The complainants stated that despite the fact that SIA workplaces had shortage of staff, the Government fixed in the "Basic Plan" a number of employees to be recruited by the Japan Pension Service Organization which was inferior to the number of SIA employees. But it also decided to hire 1,000 new workers from the private sector. In fact, when the Japan Pension Service Organization was inaugurated in January 2010, there were still over 300 posts to be filled, which had considerable negative impacts on a smooth delivery of pension services.
- 601.** The Government established "Headquarters for Employment Adjustment" to avoid dismissals in the event of "redundancy" following the reduction of posts in national public service, through employees' transfers among the ministries and governmental agencies. However, the Government explicitly refused to refer SIA employees with records of disciplinary punishment to the "Headquarters for Employment Adjustment". This led to the massive dismissals of December 2009.
- 602.** The SIA employees were thus terminated in the context of open hostility of the Government against SIA trade unions and repeated violations of their right to organize, in violation of Convention No. 87, while many employees with a record of disciplinary punishment were punished for "peruse of pension records for unintended purposes" and were subject to prejudicial treatment on the ground of their union activities in violation of Convention No. 98.

- 603.** The complainants mentioned some cases of ZENKOSEI members who were punished for being “unauthorized full-time union officers” and were consequently dismissed, but where the National Personnel Authority (NPA) annulled their disciplinary punishment. This illustrated how unfair it was to exclude without distinction all SIA employees with disciplinary records from the hiring process of the new pension service organization. According to the complainants, 46 former SIA employees in total have taken their cases to the NPA to date. The NPA accorded 16 of them the annulment of dismissal for lack of effort made by the MHLW to avoid dismissal. So far, the Government has complied with the NPA decision and reinstated the employees concerned as state employees. However, the Government still refuses to withdraw the dismissal order for other employees in a similar situation.
- 604.** The complainants referred extensively to disciplinary actions and dismissals of three individuals, Mr Hiroyuki Kawaguchi, Mr Kunihiko Nakamoto and Mr Kazuo Kitakubo. All three were employees of the Kyoto Social Insurance Bureau as well as officers of ZENKOSEI. All three were subject to investigation through questionnaires and hearings regarding violation of the Public Service Regulations and unauthorized union activities.
- 605.** Mr Kawaguchi (Secretary-General of the ZENKOSEI branch) was subject to investigation from December 2007 to January 2008. In April 2008, the SIA submitted a report of investigations on the cases of violation of Public Service Regulations by SIA employees. This report stated that “Mr Kawaguchi denied his involvement in unauthorized union activities”. However, “given the testimonies of his managers and co-workers as well as the supporting evidences including evidences of sharing of administrative duties, approval documents and business trips, it can be reasonably admitted that he was engaged in unauthorized union activities”. This report indicates that the SIA, while acknowledging that the managers had authorized “union activities within duty hours”, accused Mr Kawaguchi of having engaged in “unauthorized union activities”. In the complainants’ opinion, this clearly illustrates that the investigation was incriminatory from its start against Mr Kawaguchi.
- 606.** On 30 July 2008, the SIA via its local office in Kyoto sent a questionnaire to Mr Kawaguchi inquiring the name of the person who was responsible for giving the order for union activities. However, the questionnaire stated that the SIA considered that if Mr Kawaguchi were carrying on union activities on his own initiative, he himself should be considered as the one who decided and executed unauthorized union officer activities. Mr Kawaguchi replied to the questionnaire on 31 July stating that “an action policy or activity policy of the trade union are not something that is decided upon the order of a particular individual”.
- 607.** On 9 September 2008, the Director of the SIA local office in Kyoto announced the disciplinary punishment decided for Mr Kawaguchi who was handed a document specifying the disciplinary measure taken against him (20 per cent cut of monthly salary for two months) and a letter explaining the details of that measure. The Commission on Public Service Regulations Violation issued a report in November 2008 calling for caution for bringing penal charges against unauthorized union officers. However, in December 2008, penal charges were brought by the authorities at Tokyo District Public Prosecutors’ Offices against Mr Kawaguchi and 39 other SIA employees working in Tokyo, Osaka and Kyoto for breach of article 247 of the Penal Code.
- 608.** With regard to the investigations concerning Mr Yamamoto (Head of the ZENKOSEI Kyoto Branch) and Mr Kitakubo (former ZENKOSEI Branch Secretary), the complainants indicated that the SIA local office in Kyoto sent a questionnaire to the two union officers on July 2008. The questionnaire included questions such as “Were you aware of the union activities carried on in SIA Shimogyo Branch Office?”, or “Who instructed the union

activities carried on in SIA Shimogyo Branch Office?”. They were intended to identify the person responsible for giving orders for “unauthorized union activities” or “union activities within duty hours”. The two union officers replied to the questionnaire on 10 July and explained that the union activities they had carried out were not unauthorized union activities but legal activities within duty hours, authorized by the management. They also indicated that they carried out these activities within the limit of what was allowed by the management without being instructed by any particular individual. Between 23 and 28 July, both union officers received three consecutive questionnaires which aimed at determining among managers the particular individual responsible for authorizing their union activities. The reply was “it is not possible to tell precisely from whom the authorization came”.

- 609.** Lastly, on 30 July 2008, the SIA local office in Kyoto sent a questionnaire to Mr Yamamoto inquiring as to the name of the person responsible for giving the order for union activities. However, the questionnaire already testified the intent of the authorities to impose the conclusion that Mr Kawaguchi was engaged in unauthorized union activities. Mr Yamamoto replied to the questionnaire that “the union policy is not decided by somebody’s order”.
- 610.** On 9 September 2008, the Director of the SIA local office in Kyoto announced the disciplinary punishment decided for Mr Kitakubo who received a document specifying the disciplinary measure taken against him (20 per cent cut of monthly salary for two months) and a letter explaining the details of that measure.
- 611.** As a result of the investigations conducted on SIA employees concerning violation of Public Service Regulations, the respondents were said to have given the name of Mr Kunihiko Nakamoto (Vice-President of the ZENKOSEI branch) as the person engaged in unauthorized union officer activities. In February 2009, the Head of General Affairs Section of SIA local office in Kyoto instructed the Director of Kamigyō Social Insurance Branch Office to have Mr Nakamoto answer the questionnaire on Public Service Regulations violation. Mr Nakamoto replied that he had not been engaged in unauthorized union officer activities. On 15 July 2009, the SIA local office in Kyoto again instructed the Director of Kamigyō Social Insurance Branch Office to hear Mr Nakamoto. The hearing of Mr Nakamoto was carried out at the SIA local office. As he had not heard about the investigation before, Mr Nakamoto could not sufficiently stir up his memory to answer the questions asked. Nevertheless, to the question “in a month, how do you allocate your working time between your professional work as social insurance agent and the work as the general secretary of your union”, he replied “About half-and-half, I believe”. He explained that, more concretely, he was taking part in the inspection of actual salaries indicated in the income declaration used for determining the insurance premiums and the amount of pension the insured will receive in future. On 31 July 2009, the Director of the SIA local office in Kyoto announced the disciplinary punishment of Mr Nakamoto and handed him the document specifying the disciplinary measure applied to him (20 per cent cut of monthly salary for two months) and some explanation about the punishment.
- 612.** Finally, on 25 December 2009, Director of the SIA local office in Kyoto handed to Mr Kawaguchi, Mr Kitakubo and Mr Nakamoto the documents regarding their change of status and explanation of the disciplinary measure, announcing that they would be dismissed after 31 December 2009 in accordance with article 78-4 of the National Public Service Law.
- 613.** Furthermore, the complainants referred to the court trials and other legal procedures following the sanctions against the ZENKOSEI officers and their outcome. In this regard, on 3 September 2008, a formal objection was filed before the NPA by virtue of the National Public Service Law provisions, asking for the annulment of the disciplinary

measure of 20 per cent salary cut for two months, taken by the Director of the SIA local office in Kyoto against Mr Kawaguchi and Mr Kitakubo. The NPA Appeal Committee examined the cases during a four-day hearing in April 2009 with examination, cross-examination and re-examination by the Committee of SIA witnesses. The examination ended at the end of June 2009. The NPA resumed the examination without prior notice in December 2009 which consisted of inquiring in writing to Mr Kitakubo and Mr Kawaguchi about inducing union activities. On 1 September 2011, the NPA concluded the examination. On 10 September 2011, Mr Kitakubo received a letter from the NPA announcing that “the disciplinary measure taken for him would be cancelled”. While Mr Kawaguchi received a letter from the NPA stating “the disciplinary measure for him is approved”.

- 614.** The complainants indicated that Mr Kawaguchi and Mr Kitakubo, after having filed the official objection against the decision of the NPA, lodged on 27 February 2009 a lawsuit in the Kyoto District Court calling for the annulment of the disciplinary measures applied to them. The District Court held a total of 13 hearings. As the NPA had cancelled the disciplinary measure against him on 10 September 2011, Mr Kitakubo withdrew the lawsuit. On 28 September 2011, the District Court finally handed down its decision to dismiss the objection lodged by Mr Kawaguchi. Dissatisfied with the court decision, he appealed to the Osaka High Court, which decided to dismiss the appeal by a decision of 12 March 2012. Mr Kawaguchi took his case to the Supreme Court which rejected the appeal on 12 November 2012.
- 615.** On 24 September 2009, Mr Nakamoto filed a formal objection before the NPA seeking the annulment of the disciplinary action of 20 per cent salary cut for two months applied by decision of the Director of the SIA local office in Kyoto of 31 July 2009. On 1 September 2011, the NPA decided to “approve the disciplinary measure for Mr Nakamoto” and the latter was informed by a letter of 10 September 2011 of the decision of the NPA. Mr Nakamoto, unhappy with the NPA decision, took his case to the Osaka District Court on 15 December 2011. After 11 hearings of witnesses, the trial was concluded on 12 December 2013 and, according to the complainants, the decision was expected on 24 February 2014.
- 616.** The complainants declared that the National Public Service Law in effect today does not guarantee the freedom of union activities to state employees although that freedom is stipulated in the Japanese Constitution. This is why, even if the managers in workplaces have authorized union activities during on-duty hours, in the judgment concerning Mr Kawaguchi, the court stated that “because the complainant was executing duties for the employees’ organization instead of his primary duties as public servant despite that he was receiving salaries from the State, the disciplinary punishment in the present case cannot be considered as illegal. Therefore the complainant must submit to the punishment of two months of salary reduction.” However, the court admits that “what is seen as problematic in this case of disciplinary punishment is that Mr Kawaguchi was dismissed merely because he had the record of disciplinary punishment”. As a matter of fact, the disciplinary measure applied to Mr Yamaguchi and some other SIA employees (two months of salary reduction) was the most severe measure that could be taken in accordance with the disciplinary criteria in place at that time. To make it possible to dismiss them, the SIA had a two-step disciplinary scheme consisting of salary cut and dismissal and through that scheme they succeeded in excluding some union leaders from being hired in the new organization. The court decision however questioned the fact that a two-month salary reduction, which is ultimately a minor disciplinary punishment, has led to the public service employees losing their public servant status. The court rulings of the second and third instance have also sustained this questioning.

617. The complainants observed that, on 18 January 2010, 15 SIA employees dismissed in Kyoto lodged formal objections before the NPA calling for the annulment of their dismissal. On 24 October 2013, the NPA announced its decision cancelling the dismissal of three people including Mr Kitakubo and Mr Nakamoto, and sustaining the dismissal of 12 other people including Mr Kawaguchi. Mr Kitakubo, whose dismissal was cancelled, was reinstated in the Kamigyo Pension Office of the Japan Pension Services and Mr Nakamoto was appointed to the Kinki Regional Office in Kyoto of Health and Labour Ministry, both in December 2013. However, Mr Kitakubo and Mr Nakamoto upheld their compensation claims filed when their dismissal was annulled. The next hearing is expected on 24 February 2014.

## B. The Government's reply

618. In a communication dated 21 May 2014, the Government referred to the background behind the abolishment of the SIA. The SIA was established in July 1962 as an extra-ministerial bureau of the MHLW. Until its abolishment at the end of 2009, the SIA was responsible for overseeing the operation of government-managed health insurance, seamen's insurance, employees' pension insurance, as well as the national pension. In addition to its internal bureaus, the SIA included affiliated facilities (the social insurance operation centres and the social insurance college), and local branch offices such as 47 local social insurance bureaus and 312 social insurance offices. A total of approximately 12,500 employees were working for the SIA at the time of its abolishment on 31 December 2009.

619. While poor service and improper operations of the SIA were disputed, a scandal erupted in March 2004. A report alleged that there had been leaks of personal information of individuals who had not paid the national pension fund. This scandal led to the loss of public confidence in the SIA. Although the leaks of personal pension information were never confirmed, it was determined that many individuals had accessed the personal pension information for purposes other than official business. It was also discovered that a number of the employees had violated the National Public Service Ethics Act by accepting gifts from service providers. These individuals would subsequently be disciplined. The public demanded that the SIA should be revamped and in response an "Expert Study on the Functioning of the Social Insurance Agency" was established under the Chief Cabinet Secretary in August 2004. The final report on the SIA Reform Plan was issued in May 2005. As for the organization of the SIA, the final report stated "the panels concluded that it would be appropriate that the public pension system and the government-managed health insurance system be separated, and an organization for each system be established to manage operations". As for the organization for the public pension system, the report stated "the organization must specialize in operations related to the public pension system, and it must sufficiently fulfil its operational responsibilities with the Government's direct involvement in all of its operations, including the collection of payments". In June 2005, an "Expert Study for the Restructuring of the Social Insurance Agency" was established under the supervision of the MHLW. The objectives of this study were to discuss the details and processes for the realization of a new organization. In December 2005, the study summarized the ways to reform the SIA and provided ideas on legal positioning, name, structure and responsibilities for a new organization. They also suggested that the SIA was to be abolished and a brand new organization (a special organization as described in the National Government Organization Act) should be established.

620. Based on the summary, the MHLW submitted the "Public Pension Operation Structure Bill" to the Diet in March 2006. The bill indicated that it should be a special organization established within the organizations of the MHLW and not operated by non-government workers. In May 2006, however, during the course of deliberations of this bill, improper clerical handling of exemptions from the national pension fund was revealed and

developed into a national scandal. In December, the bill was scrapped without actually being considered. Many employees of the SIA received disciplinary action for the improper clerical handling of exemptions from the national pension fund.

- 621.** In December 2006, the Council prepared a plan, “Implementation of SIA Reform”, which focused on the abolishment and dismantlement of the SIA and the establishment of a new public organization operated by non-government workers, in order to restructure the administration of the public pension system and to regain public confidence. In addition to these recommendations, the Council clearly expressed that the officers and staff of the SIA should not automatically be assigned to positions in the new organization. Based on the suggestions made by the Council, the MHLW submitted the “Japan Pension Organization Act Bill” to the Diet in March 2007. During deliberations of this bill in the Diet, the absence of provisions regarding the reassignment of the employees of the SIA was also discussed. However, the Prime Minister responded that, in order to regain public confidence in the public pension system, the SIA employees should not be automatically re-employed, and that impartial screening for employment in the new organization should be conducted by an independent third party.
- 622.** In June 2007, the Japan Pension Organization Act (Act No. 109 of 2007, hereinafter referred to as “Organization Act”) was passed. In accordance with this new law, the SIA was to be abolished on 31 December 2009. The new system was to take effect as of January 2010, under which the Government remained responsible for financing and administrative matters regarding public pension, while all clerical operations (including pension application processing, collection of payments, record-keeping, management, consultation and benefit payments) were to be handled by the Japan Pension Service (hereinafter referred to as “Service Office”) that was to be established in accordance with the Organization Act. The objective of the Organization Act was to establish an organization that would recapture public confidence by ensuring that the public pension system was always stably administered based on public confidence, and thereby creating a sense of solidarity with Japanese citizens. The Organization Act included regulations on objectives, organizational structure, operational procedures and preparations for establishment.
- 623.** The Organization Act did not include provisions on the reassignment of SIA employees. Article 8 of the Supplementary Provisions of the Organization Act stipulated that the hiring of SIA employees was to be as follows: the Commissioner of the Social Insurance Agency (hereinafter referred to as “SIA Commissioner”) selects candidates from those who express a willingness to become an employee of the Service Office, in accordance with employment criteria presented by the Committee for Establishment of the Japan Pension Service (hereinafter referred to as “Establishment Committee”). The SIA Commissioner shall prepare and submit a list of candidates to the Committee. The Committee members shall then review the list and select employees for the Service Office. This provision was included in order to avoid the automatic transfer of SIA employees to the Service Office. Due to growing mistrust in operations of the SIA, it was necessary for the Service Office to have its own personnel system and hiring policy in order to establish an organization to respond to the public trust and ensure fair employment opportunities based on individual work performance and other achievements.
- 624.** In August 2007, in order to develop a “Basic Plan for Temporary Business Operations of the Japan Pension Service” (hereinafter referred to as “Basic Plan”), the Government established the “Pension Service/Organization Reform Conference” (hereinafter referred to as “Reform Conference”) under the supervision of the minister in charge of federal/local administrative reform. The missions of the Reform Conference included summarizing the opinions on the organizational structure of the Service Office, outsourcing of operations, hiring policies and determining the necessary number of employees, in order to ensure the



Service Office was an organization trusted by the people. In June 2008, after vigorous debates on 33 occasions, the Reform Conference prepared a document entitled the “Basic Policies for Temporary Business Operations of the Japan Pension Service (Final Coordination)” (hereinafter referred to as “Final Coordination”) regarding the organizational structure and staff sizing, hiring of employees and outsourcing of operations of the Service Office. Based on the Final Coordination prepared by the Reform Conference and through discussions with the then ruling party, the Government approved the Basic Plan in a Cabinet meeting held in July 2008.

**625.** The Government specified that the following points were included in the Basic Plan with regard to staff hiring:

- (i) Under the basic principles of the Service Office which include securing public trust, responding to the voice of the people, providing improved services, providing for efficiency of operations and ensuring fairness and transparency, individuals hired by the Service Office must be able to correctly and efficiently perform the required tasks for the administration of public pension services, abide by all applicable laws and regulations, and possess the willingness and the capability of instituting required reforms.
- (ii) With regard to staff hiring at the time of establishment of the Service Office, all members of the Japan Pension Service Staff Screening Committee (hereinafter referred to as “Screening Committee”) organized under the Establishment Committee, and all individuals who conduct hiring interviews under the supervision of the Screening Committee, shall be from the private sector.
- (iii) In order to regain public trust in the public pension system, SIA employees who have received disciplinary action shall not be employed by the Service Office as either permanent or limited-term employees. (As of April 2008, there were 867 SIA employees that had received disciplinary action.)
- (iv) In order to establish an organization that will gain the public trust and perform efficient, fair and transparent operations while improving the quality of the services rendered, talented personnel resources from outside the social insurance sector including civilians and other government employees shall be aggressively sought. Individuals who have skills and experience that SIA personnel may not possess, such as for the improvement of business administration, labour management, organizational and IT governance for compliance and internal audit, and business accounting, shall be hired from other fields and assigned to the main positions in each field. Individuals for general operations other than the specific fields mentioned above shall be aggressively hired from the private sector.
- (v) The required number of staff for the Service Office at the time of establishment shall be approximately 17,830, consisting of 10,880 permanent employees and 6,950 limited-term employees. Approximately 1,000 of the permanent employees shall be hired from non-social insurance fields.

**626.** As for employees of the SIA that are not employed by the Service Office, the Basic Plan specified that “the Government will consider every possible means, such as encouragement of retirement, transfer to the MHLW or use of the centre for personnel interchanges between the government and private entities (hereinafter referred to as “Personnel Interchange Centre”) to avoid dismissals”.

**627.** With regard to the hiring process for the Service Office, the Government indicated that the Establishment Committee was formed in November 2008 to handle the requirements necessary for the establishment of the Service Office. On 22 December 2008, the

Establishment Committee set the employment qualifications and working conditions for the Service Office and requested the SIA Commissioner to provide this information to SIA employees, advertise for job opportunities at the Service Office, select candidates and submit the list to the Committee.

**628.** The qualifications for SIA employees who could be hired by the Service Office were as follows:

- (i) Candidates from the SIA are screened based on their service and performance record, especially how they responded to the pension record scandal, as well as prior experience with restructuring operations.
- (ii) A candidate from the SIA (including those who had been employed by the SIA and retired before establishment of the Service Office):
  - (a) who has been the subject of disciplinary action shall not be considered for hiring. In the event such discipline is discovered after a job offer is made, such offer shall be withdrawn. In the event such discipline is discovered after he/she is employed, the Service Office shall terminate the employment contract;
  - (b) who has been the subject of corrective action shall be investigated thoroughly as to the details and reason(s) behind the action and her/his rehabilitation process and status; and
  - (c) who has made negative comments on the reform, or shown unwillingness to enact reform, shall be investigated thoroughly on his/her skills and service performance to see if he/she currently possesses sufficient willingness to enact reform. In the event he/she does not cooperate with investigations by the SIA or the fact that he/she has little incentive to enact reform becomes obvious after the job is offered, the Establishment Committee will reconsider his/her employment.

**629.** The Establishment Committee decided on the staffing size of the Service Office based on the required number of employees specified in the Basic Plan, before job openings were advertised. After the Establishment Committee presented information on qualifications for employment at the Service Office, on 24 December 2008 and on 21 January 2009, the SIA directed the local social insurance bureaus and the social insurance offices (hereinafter collectively referred to as “local social insurance offices”) to distribute that information to all staff. Details of “intention surveys” for all employees of the SIA and the local social insurance offices were explained at a meeting of the directors-general of the local social insurance offices held on 9 January 2009.

**630.** In particular, the following procedure was explained: the SIA Commissioner checks the intention of each SIA employee to determine if he/she is willing to become an employee of the Service Office, selects candidates from among the individuals who are willing to become employees based on the designated hiring criteria, and submits a list of potential candidates to the Establishment Committee; the Screening Committee reviews and analyses the results of document screening and interviews; and the Establishment Committee makes a final decision on which individuals are to be hired. Job openings in the Japan Health Insurance Association (hereinafter referred to as the “Association”) as well as transfer opportunities to the MHLW were also explained. Then managers such as directors-general and local administrative managers were instructed to provide their employees with an in-depth explanation of job opportunities and the intention survey.

**631.** In January 2009, all employees of the SIA were required to complete an intention survey to determine if they were willing to work for the Service Office. Then a list of candidates who met the designated hiring criteria was prepared based on the results and submitted to

the Establishment Committee. The Screening Committee reviewed the list and other submitted documents and reported its decisions to the Establishment Committee. Between May and December of 2009, the Establishment Committee offered positions at the Service Office to a total of 12,419 individuals.

- 632.** Furthermore, the Government explained the approach and described the measures taken to avoid dismissals. Recalling the approach to be taken to avoid dismissals specified by the Basic Plan: “The Government will consider every possible means, such as encouragement of retirement, transfer to the MHLW or use of the Personnel Interchange Centre, to avoid dismissals of the employees of the SIA who are not employed by the Service Office”; and the Government indicated that the approaches were initiated after approximately 10,000 employees of the SIA received a job offer from the Service Office in May 2009.
- 633.** On 24 June 2009, the SIA Commissioner established the Headquarters for Support of Re-employment of Employees of the SIA (with the SIA Commissioner as the General Manager) in order to promote such approaches. Under the administration of this Headquarters, the Office for Support of Re-employment of Employees of the SIA (at the SIA Headquarters) and the Office for Support of Re-employment of Employees of local social insurance offices (each local social insurance office) were also established.
- 634.** In order to avoid the dismissal of employees of the SIA, the intention of each employee needed to be confirmed. Between June and July 2009, following an announcement of job offers from the Service Office, the Association and the MHLW, those individuals who did not receive a job offer were interviewed. In the interview, the approach to avoid dismissal was explained and an additional intention survey was conducted.
- 635.** Pursuant to the amendment of the Mariners Insurance Act in accordance with the Act Revising a Portion of the Employment Insurance Act (Act No. 30 of 2007), the Japan Health Insurance Association was to assume responsibility for operations of seamen’s insurance effective January 2010. On 25 December 2008, the Association defined working conditions and required qualifications and requested the SIA Commissioner to provide such information to SIA employees, advertise job openings, select and list the candidates, and submit a list no later than February 2009. Following announcement of the hiring information of the Association, the SIA, in January 2009, conducted a survey of all SIA employees to verify their willingness to become an Association employee, as well as their willingness to become an employee of the Service Office, selected and listed candidates based on the results of that survey as well as the hiring criteria of the Association, and then provided that list to the Association. The SIA received information on the Association’s decision to hire 45 individuals as general office employees and notified each SIA employee concerned of the job offer. The Government specified that the Association adopted the criterion set by the Basic Plan that those that have been subject to disciplinary action shall not be hired by the Service Office either as permanent or limited-term employees.
- 636.** Since a portion of the public pension operations was to be carried over from the SIA to the MHLW after the abolishment of the SIA, some SIA employees needed to be transferred to the MHLW in order to ensure such operations went smoothly. In addition, the Basic Plan of the Service Office stated that the SIA was to make a maximum effort to avoid the dismissal of employees that were not employed by the Service Office by reallocating them to the MHLW. For these reasons, the SIA requested the MHLW to employ a certain number of individuals selected from those who wished to be transferred to the MHLW. As a result, 1,284 individuals received a job offer by the end of December 2009. Among these individuals there were some that had been subject to disciplinary action.

- 637.** In addition, in an executive meeting of the personnel management officers of ministries on 8 July 2009, the Director of the Personnel Division of the MHLW Minister's Secretariat called for other ministries/agencies to cooperate with the reassignment of SIA employees. The Japan Fair Trade Commission and the Financial Services Agency responded to the requests stating that they were willing to accept SIA employees upon consideration of the age structure, job levels, and work locations of their current organizations. The Japan Fair Trade Commission and the Financial Services Agency conducted document screening and interviews of candidates and decided to hire eight and one individual(s) respectively, as of January 2010.
- 638.** Moreover, the Government indicated that on 3 July 2009, the SIA submitted a letter to the Association of Prefectural Governors, Japan Association of City Mayors and National Association of Towns & Villages, requesting that they consider hiring SIA employees whenever a position in a local government office becomes vacant. The local social insurance bureaus also submitted a letter with the same request to local public authorities. However, the SIA did not receive any favourable responses from local public authorities.
- 639.** The Government added that another measure taken to avoid the dismissal of SIA employees was assistance by the Personnel Interchange Centre administered by the Cabinet Office. The SIA explained the necessity to register with the Personnel Interchange Centre to the employees who were willing to seek new employment and encouraged them to do so. The MHLW and the SIA also handed in person or mailed brochures of the Personnel Interchange Centre and letters signed by the Vice-Minister of Health, Labour and Welfare to their associated bodies in order to promote use of the Personnel Interchange Centre for the hiring of SIA employees. As a result, out of 348 individual requests for assistance, 108 individuals were re-employed through the Personnel Interchange Centre.
- 640.** In addition to the use of the Personnel Interchange Centre, the SIA decided to provide its employees with job-hunting assistance using the Public Employment Security Offices, such as by distributing brochures of these offices. On 13 July 2009, the SIA instructed the local social insurance offices to inform their SIA employees of such assistance.
- 641.** Also, in May 2009, the Establishment Committee decided to advertise additional openings for limited-term employees at the Service Office, targeting SIA employees and other outside individuals. The SIA Commissioner provided this information to SIA employees who had not found a job. As a result, 154 individuals received job offers. The Establishment Committee again advertised additional openings for limited-term employees in December 2009. As a result, 60 individuals received job offers.
- 642.** Also in December 2009, the MHLW decided to publicly advertise 200 to 250 non-full-time employee positions in its local branch offices. As a result, 152 individuals received job offers.
- 643.** In June 2009, in order to assist job-hunting activities of SIA employees, the SIA decided to approve encouraged retirement regardless of duration of service (age) of the employee, provided that the employee expressed the intention to accept this encouragement, and notified the local social insurance offices of their decision and informed the employees of the decision.
- 644.** As a result of the above approaches, amongst 12,566 SIA employees, 10,069 were hired by the Service Office, 45 were hired by the Japan Health Insurance Association, 1,293 were transferred to the MHLW and other related organizations, 631 retired with encouragement and three retired for personal reasons by December 2009.

- 645.** The SIA had no other option but to dismiss 525 employees in accordance with article 78, item 4, of the National Public Service Act (Act No. 120 of 1947, hereinafter referred to as “Dismissals-in-Question”) upon the abolishment of the SIA because these employees were neither hired by/transferred to the Service Office, the Association nor the MHLW, nor accepted encouragement of retirement. Among these 525 dismissed employees, 251 had received disciplinary action.
- 646.** The Government added that in accordance with article 5 of the Act on National Public Officers’ Retirement Allowance, the dismissed employees received an amount in addition to the severance pay received by employees who had retired for personal reasons and employees with less than 25 years of service who had retired with encouragement.
- 647.** In view of the above, the Government concluded that the allegations that it made no effort to avoid dismissal upon the dismantling of the SIA are unfounded.
- 648.** With regard to appeals lodged with the Dismissals-in-Question, the Government recalled that when a national public service employee in regular service is subject to disadvantageous disposition such as dismissal, such an employee may enter an appeal against the NPA in accordance with the National Public Service Act. In this regard, 71 individuals out of 525 lodged an appeal with the NPA and all 71 cases were determined between 29 March and 20 December 2013. The NPA approved the dismissal of 46 individuals and annulled the dismissal of 25 individuals. These 25 individuals have had their pre-dismissal status reinstated.
- 649.** The NPA verified the legality and the relevance of the dismissal based on fact-finding and other investigations that they conducted for each appeal. The NPA determined that the dismissals of 25 individuals were not relevant from the point of fairness and equity and annulled the dismissals. This does not, however, mean that the NPA determined that the dismissal decisions taken by the SIA at the time of its abolishment were illegal or irrelevant.
- 650.** The Government indicated that lawsuits seeking nullification of Dismissals-in-Question were filed with the district courts of jurisdiction by 32 out of the above 71 individuals and, except in three cases, were still pending as of February 2014. These three suits were subsequently withdrawn due to the nullification of the Dismissals-in-Question in accordance with the determination by the NPA.
- 651.** With regard to the complainants’ allegations that the Government attributed responsibility for the exposure of the pension record scandal to the National Expenditure Council of JICHIRO (JICHIRO Council), as well as ZENKOSEI, the Government asserted that it never attributed responsibility for the pension record scandal to the JICHIRO Council or any other trade union.
- 652.** The Government indicated that in March 2007, the Japan Pension Organization Act Bill was submitted to the Diet. During the course of deliberations on this bill, the fact that approximately 50 million pension records had not been consolidated with basic pension numbers was revealed, and this problem intensified the scandal. A Pension Record Scandal Investigation Committee was established in June 2007 under the supervision of the Minister for Internal Affairs and Communications. This Committee consisted of seven independent experts and intellectuals, and they were charged with looking into the background, causes and responsibility for the scandal. The investigation report prepared by the Committee, published in October 2007, observed as root causes to the scandal the total lack of a sense of responsibility throughout the organization, both in the MHLW and the SIA, and the SIA’s insufficient awareness of the importance of maintaining accurate pension records. The report outlined four direct factors, among which the generation of

inaccurate pension records due to online data input errors, as well as four indirect factors to these causes. The Government observed that the report identified, among the indirect factors, the fact that “the management and the employee organizations of the SIA were not aware of importance of pension records, and were not on the ‘same page’ when it came to improving operations”. Consequently, the Government did not attribute responsibility for the scandal to the trade unions or harbour any hostility towards them. In this regard, the Government claimed that there is no evidence that the SIA employees were terminated in the context of open hostility of the Government against trade unions and repeated violations of their right to organize. Therefore, the allegations that the Dismissals-in-Question violate Article 2 of Convention No. 87 are unfounded.

- 653.** With regard to the complainants’ allegations that the SIA unilaterally discontinued the practice of consultation with the trade unions, the Government explained that members of the “Expert Study on Function of the Social Insurance Agency”, established in August 2004, requested that all agreements between the SIA and the trade unions be submitted to the Study. The SIA submitted all confirmations and agreements between the SIA Commissioner and JICHIRO stretching back to the “Memorandum regarding Implementation of the Nationwide Online Plan” of March 1979. The members of the Study pointed out that confirmations and agreements with the trade unions needed to be reviewed. The SIA consulted with each of the employee organizations and, in November 2004, requested in writing that JICHIRO and ZENKOSEI review and dispose of past confirmations. JICHIRO disposed of 97 confirmations as well as of the “Memorandum regarding Implementation of the Nationwide Online Plan”. ZENKOSEI disposed of four confirmations. In addition the directors-general of the local social insurance offices disposed of all confirmations they had made and into which they had entered.
- 654.** The notifications from the SIA to the local social insurance offices were to be issued after consultation with, and approval by, the employee organizations. However, since such customary practice was based on a confirmation, the practice was subsequently discontinued after the disposal of the confirmations. The confirmations with the trade unions were disposed of following the SIA’s consultation with the trade unions concerned. Upon disposal, the practice of prior consultation was also discontinued. Therefore, the Government asserted that the SIA did not unilaterally dispose of such confirmations and discontinue the practice.
- 655.** The Government noted the complainants’ allegations that the authorities took disciplinary action against SIA employees for “unauthorized engagement” and “violation of service discipline” despite the fact that the SIA management allowed trade unions officers to conduct union activities during working hours without any legally designated procedure.
- 656.** First and foremost, the Government recalled that article 108-6, paragraph 1, of the National Public Service Act provides that an official may engage exclusively in business of a registered employee organization as an officer of the organization with the permission of the head of the government agency employing him/her. The period for which the permission is effective is deemed as administrative leave and no official shall carry on the business or act on behalf of an employee organization while receiving remuneration as a national public officer (article 108-6, paragraphs 5 and 6, of the National Public Service Act). Moreover, an “unauthorized engagement” is an illegal act in which an employee engages exclusively in the business of an employee organization without designated permission but still receives remuneration from the government even though he/she is not actually carrying out any duties as a national public officer.
- 657.** According to the Government, the Reform Conference, established in August 2007, pointed out there was unauthorized engagement in the SIA and requested it investigate past violations of service discipline. The SIA subsequently investigated violations of service

discipline, including unauthorized engagement, during the period between April 1997 and September 2007. Such investigation revealed unauthorized engagement by 30 employees (including two individuals who had already retired). The Reform Conference issued its Final Coordination suggesting that the employees who were involved in unauthorized engagement needed to be punished immediately. In September 2008, the SIA took disciplinary action against 28 employees confirmed by further investigations from the MHLV to have been involved in unauthorized engagement (including one employee who had promoted unauthorized engagement, ten managers who were aware of unauthorized engagement but took no action, as well as two supervisors where the unauthorized engagement had taken place).

- 658.** In July 2008, the MHLW established the “Committee for Investigation on Violation of Service Discipline” made up of independent experts, including attorneys-at-law, under the direct management of the Minister. The investigation team established under this Committee verified the efficacy of the investigation conducted by the SIA, investigated all employees of the SIA, and initiated an investigation to determine violations of service discipline such as unauthorized engagement and union activities within working hours. As a result, the team confirmed that an additional three employees had committed unauthorized engagement. The SIA took disciplinary action against these individuals except for one who had already retired. For officials who were the subject of the complaint but had already retired such as one employee who committed unauthorized engagement, and 28 managers and 26 supervisors who had knowledge of but ignored the unauthorized engagement, the SIA requested that they voluntarily return an amount equal to the reduction in their salary that they would have had, had they been subject to punishment.
- 659.** The Service Investigation Committee also considered criminal prosecution for unauthorized engagement. The Service Investigation Committee report pointed out that the employees who committed unauthorized engagement as well as the individuals who had authority over the payroll of these employees (such as those responsible for maintaining working hour records, the head of payroll division, advance payment clerk, director-general of the Bureau and head of the Office) could be considered as co-principals in a breach-of-trust charge. In December 2008, the MHLW filed criminal complaints with the Tokyo District Public Prosecutors Office against 40 individuals, including the employees who committed unauthorized engagement, on a charge of breach of trust.
- 660.** The disciplinary action in question was taken against individuals who continued to receive remuneration from the Government despite non-performance of duties as a national public officer. The disciplinary action and the criminal complaints were taken or filed not only against employees that had committed unauthorized engagement, but also against managers who were knowledgeable of such engagements and/or who had supervising authority over the payroll of the employees. Therefore, the allegation that disciplinary action was taken against employees involved in union activities is unfounded.
- 661.** Moreover, the Government contested the allegations that employees that had received punishment for non-work-related data access but were dismissed due to union activities. The Government recalled that it did not blame trade unions for the pension record scandal. However, the investigation did reveal that many SIA employees had been unnecessarily accessing personal pension information. In July 2004, 321 employees and 192 supervisors were subject to disciplinary action for non-work-related access to personal pension information. The SIA also looked into the communication history of the SIA online system to see if there was any non-work-related access of the personal pension information on Diet members and celebrities between January and December of 2004. As a result, 2,694 SIA employees and 579 supervisors were disciplined in December 2005.

- 662.** The disciplinary action taken against these individuals was for non-work-related access of personal pension information. It was obvious that no involvement of trade unions was confirmed in this investigation, and no disciplinary action was taken due to an employee's involvement in trade union activities.
- 663.** The Government also contested the allegations that the dismissals in the present case constitute a violation of Article 1(2) of ILO Convention No. 98. In this regard, the Government observed that the extent of public servants to be excluded from the application of Convention No. 98 under its Article 6 should be determined through a judgment of whether they benefit from statutory terms and conditions of service. This is clear from the discussions during the session of the International Labour Conference that adopted Convention No. 98. The Government added that, in Japan, legislative measures have been taken based on such an assumption, and the Committee on Freedom of Association also expressed on numerous occasions its views to the effect that such a legal system does not pose any problem to the application of Convention No. 98 (see Second Report (paragraph 43), 54th Report (paragraph 179), and 139th Report (paragraph 174)). Employees of the SIA were public servants who benefited from statutory terms and conditions of service. Therefore, those employees were excluded from the application of Convention No. 98 and, as such, the allegations that dismissals in the present case violated Convention No. 98 are unfounded.
- 664.** Furthermore, the Government asserted that the allegations that it agreed in advance during a Cabinet meeting that the Service Office would not hire those who had been subject to disciplinary action thereby excluding the officers of ZENKOSEI from employment with the Service Office have no basis in fact.
- 665.** The Government referred to the disciplinary action and the dismissals of the three individuals raised in the complaint, Mr Kawaguchi, Mr Kitakubo and Mr Nakamoto. The Government recalled that the three were employees of the Kyoto Social Insurance Bureau (KSIB) as well as officers of ZENKOSEI.
- 666.** With regard to Mr Kawaguchi, the Government indicated that in December 2007, after the SIA's notification, each local social insurance office conducted an investigation into the possibility of violations of service discipline by its employees. After the subsequent investigation, a manager at the KSIB pointed out the likelihood of unauthorized engagement by Mr Kawaguchi. The KSIB requested that Mr Kawaguchi and his supervisor and colleagues respond to a written questionnaire. Mr Kawaguchi was also interviewed. Following the investigation, the KSIB was able to confirm unauthorized engagement by Mr Kawaguchi and, in September 2008, Mr Kawaguchi was disciplined and forced to take a pay cut of 20 per cent for two months.
- 667.** Mr Kawaguchi lodged an appeal before the NPA for the review of his disciplinary action in October 2008. The hearing was held over three days in April 2009 and the investigation resumed in October 2010. Finally, in September 2011, the NPA informed Mr Kawaguchi that it approved the disciplinary action.
- 668.** Mr Kawaguchi also filed a complaint with the Kyoto District Court in February 2009, requesting a revocation of the disciplinary action taken against him. The Court dismissed the complaint in September 2011 stating "as long as this disciplinary action was not illegal, the plaintiff's claim for revocation has no grounds". Mr Kawaguchi appealed this decision to the Osaka High Court which dismissed his claim in March 2012 stating "the plaintiff's claim has no merit; therefore, the original decision of dismissal of the claim was appropriate". The Court also negated all claims by Mr Kawaguchi. Mr Kawaguchi filed a petition for the acceptance of his appeal to the Supreme Court, which decided on 9 November 2012 not to accept his petition.



- 669.** With regard to his dismissal, the Government recalled that Mr Kawaguchi did not meet the employment criteria for the Service Office since he had been subject to disciplinary action for unauthorized engagement, and was also not selected as a candidate to be transferred to the MHLW due to the result of the screening. Although the KSIB pursued various approaches to avoid dismissal, Mr Kawaguchi was dismissed effective 31 December 2009, upon the abolishment of the SIA.
- 670.** In January 2010, Mr Kawaguchi lodged an appeal before the NPA for the review of his Dismissal-in-Question. The NPA approved the Dismissal-in-Question in October 2013, stating: “Since there is no reason to believe this dismissal was illegal or irrelevant, the dismissal is found to be appropriate.” Mr Kawaguchi filed a suit for revocation of the Dismissal-in-Question with the Kyoto District Court in July 2010. This case was transferred to the Osaka District Court and is currently pending.
- 671.** The Government referred to the complainants’ allegations that “the court decision however questioned the fact that a two-month salary reduction, which constitutes a minor disciplinary punishment, had led the public service employees to lose their public servant status. According to the complainants, the court rulings of the second and third instance have also sustained this questioning.” In the Government’s view, this is a misinterpretation of the facts. The Government recalled that the Kyoto District Court had stated that “the case should be discussed and determined by trial for revocation of dismissal and that this had already been raised,” but the Court also stated, “the fact that the plaintiff was excluded from the employment of the Service Office due to the disciplinary action in question and was subject to a dismissal, equivalent to a dismissal for the purposes of reorganization in the private sector, is questionable” and “the fact that the plaintiff was not hired by the Service Office and was subject to a dismissal is also questionable”. The Government denied however that such propositions were then carried over to the subsequent appeal trials (at the Osaka High Court and the Supreme Court). The Supreme Court rejected the appeal from Mr Kawaguchi and did not accept the petition for the acceptance of the appeal.
- 672.** Concerning Mr Nakamoto, the Government indicated that the Service Investigation Committee discovered the likelihood of an unauthorized engagement. The KSIB then requested Mr Nakamoto and his supervisor and colleagues to reply to a written questionnaire. Mr Nakamoto was then interviewed. The KSIB also investigated the use of Mr Nakamoto’s seal on those documents that were prepared and stored at that time in Operation Division 2 of the Shimogyo Social Insurance Office. As a result of this investigation, the General Director of the KSIB confirmed unauthorized engagement and, on 31 July 2009, Mr Nakamoto was disciplined and forced to take a pay cut of 20 per cent for two months.
- 673.** Mr Nakamoto lodged an appeal before the NPA for the review of the disciplinary action and was informed in September 2011 that the NPA approved the disciplinary action. Mr Nakamoto also filed a complaint with the Osaka District Court in December 2011 requesting revocation of the disciplinary action. The Court dismissed the complaint in February 2014. In its conclusions, the Court stated in particular that: “(i) it appears the plaintiff (Mr Nakamoto) was engaged exclusively in operations of the Kyoto Branch (of ZENKOSEI)”; (ii) for the claim that negotiations with the KSIB in which the plaintiff was engaged were work-related operations, “the business of the Kyoto Branch (of ZENKOSEI) in which the plaintiff was engaged are not part of work-related operations of Operation Division 2, thus they cannot be considered as the business of Operation Division 2”; and (iii) for the claim that disciplinary action was taken for an unjustifiable purpose, “it cannot be confirmed that the purpose of this action was to prevent the plaintiff from being employed by the Service Office, and that the result (the fact that the plaintiff was not hired by the Service Office) did not stem from this disciplinary action”. Mr Nakamoto appealed

this decision but the Osaka High Court sustained the lower court's decision. On 14 October 2014, Mr Nakamoto brought his case before the Supreme Court.

- 674.** Although Mr Nakamoto had expressed the wish to be employed by the Service Office, the decision on his hiring was suspended because the Service Investigation Committee had discovered that the KSIB was investigating his possible unauthorized engagement. Since Mr Nakamoto subsequently received disciplinary action for his unauthorized engagement, the Service Office did not hire him due to the fact that he did not meet the employment criteria. Mr Nakamoto also wished to be transferred to the MHLW, but he was not selected as a candidate to be transferred to the Ministry as a result of screening which also included an interview. Although the KSIB pursued various other approaches to avoid dismissal, Mr Nakamoto was dismissed effective 31 December 2009 upon the abolishment of the SIA.
- 675.** Mr Nakamoto lodged an appeal before the NPA for the review of his Dismissal-in-Question. In October 2013, the NPA decided to annul the Dismissal-in-Question on the ground that “the dismissal was not relevant from the point of fairness and equity”. However, the Government clarified that this does not mean that the NPA determined that the Dismissal-in-Question was illegal. Since the NPA nullified the Dismissal-in-Question, Mr Nakamoto subsequently withdrew his suit for revocation of the Dismissal-in-Question, while his claim for national compensation for his Dismissal-in-Question is still pending before the Osaka District Court.
- 676.** With regard to the situation of Mr Kitakubo, the Government indicated that when Mr Kawaguchi, who was found to be involved in unauthorized engagement, became the Secretary-General of the ZENKOSEI branch, Mr Kitakubo was the branch leader of the organization to which Mr Kawaguchi reported. The KSIB conducted a written survey to investigate Mr Kitakubo's involvement as a branch leader in Mr Kawaguchi's unauthorized engagement upon his assumption of the office of Secretary-General. Mr Kitakubo was asked in the survey, “When you asked Mr Kawaguchi to be the Secretary-General, did you tell him that he might need to engage in union activities during working hours?” On 24 July 2008, Mr Kitakubo replied the following: “I understood he needed to stop regular work around the time of negotiations with authorities since he was a contact for the negotiations. I think I asked him to assume the position, saying, ‘the Secretary-General is not an easy job but I count on you’.” Based on his answers, the Director-General of the KSIB deemed the actions taken by Mr Kitakubo led Mr Kawaguchi to become involved in unauthorized engagement, and Mr Kitakubo was disciplined with a pay cut of 20 per cent for two months in September 2008.
- 677.** Mr Kitakubo lodged an appeal before the NPA in October 2008 for the review of his disciplinary action. In September 2011, the NPA cancelled the disciplinary action, on the grounds that: “There is not enough evidence to support the accusation that Mr Kitakubo encouraged Mr Kawaguchi's unauthorized engagement at the time he asked Mr Kawaguchi to be an officer of the branch office. The disciplinary action involving a reduction in Mr Kitakubo's pay should be cancelled.”
- 678.** Since prior to the NPA decision Mr Kitakubo had received disciplinary action, he no longer met the employment criteria for the Service Office and was not included in the list of candidates prepared by the SIA Commissioner. Mr Kitakubo then requested to be transferred to the MHLW, but he was not transferred after screening which included an interview. Although the KSIB pursued various other approaches to avoid dismissal, Mr Kitakubo was dismissed effective 31 December 2009, upon the abolishment of the SIA. Mr Kitakubo lodged an appeal before the NPA which cancelled the Dismissal-in-Question in October 2013 on the ground that “It is irrelevant to maintain the dismissal for an individual whose disciplinary action has been cancelled, who, at the time of the dismissal,

had lost an opportunity to be an employee of the Service Office as he was excluded from the Service Office employee candidates' list prepared by the SIA Commissioner due to having been subject to disciplinary action. For this reason, the dismissal decision should be annulled." As a result of the cancellation of the Dismissal-in-Question by the NPA, Mr Kitakubo withdrew his suit for disaffirmance of the Dismissal-in-Question which was pending before the Osaka District Court. However, his claim for national compensation was still pending.

- 679.** In a broader view, the Government recalled that, after the Reform Conference pointed out the possibility of unauthorized engagement, an investigation was conducted and signs of unauthorized engagement at social insurance bureaus in Tokyo, Kyoto and Osaka were found. Disciplinary action was taken against individuals who were involved in such engagement, including managers of the social insurance bureaus, others that were knowledgeable of the practice but failed to report it, as well as some trade union members who were found to have encouraged such engagement. Individuals who were subject to disciplinary action but had already retired were asked to voluntarily return an amount equal to the reduction in their salary that they would have had, had they been subject to punishment.
- 680.** The Government declared that those disciplined for unauthorized engagement were only from three social insurance bureaus out of 47, and included the branch managers of those bureaus as well. Furthermore, dismissals could have been avoided had those individuals been accepted for transfer to the MHLW, although individuals subject to disciplinary action were not eligible to be employed by the Service Office. Consequently, in the Government's view, the allegations that the authorities forced the dismissals of trade union members due to the result of a Cabinet decision that prevented the Service Office from employing anyone who had been subject to disciplinary action for unauthorized engagement or other reasons is unfounded.
- 681.** In its communication dated 8 April 2015, the Government recalled that, out of 525 dismissed employees upon the dismantling of the SIA, 71 filed an application for review with the NPA. There were also several lawsuits filed (actually 32 employees filed action before the District Court). The Government referred to the motion for a reversal of the dismissal and award of monetary damages for pain and suffering filed by 15 individuals who worked at a social insurance office or other locations within the jurisdiction of the KSIB, and indicated that the Osaka District Court rendered its judgment on 25 March 2015. The Court did not find the dismissals to be illegal and therefore dismissed the motion, finding in favour of the Government. The Court explained the reasoning behind its decision as follows: (i) the dismissal of SIA employees, including the plaintiffs, was due to elimination of all bureaucratic positions at the SIA upon its dismantlement. The dismissals in question were in accordance with article 78, paragraph 4, of the National Public Service Act; (ii) the Court did not find that efforts made by the SIA Commissioner and other officials to avoid such dismissals were insufficient; (iii) the dismissals of employees, including the plaintiffs in this case, were not triggered by the history of disciplinary punishment. Therefore, the Court did not find the dismissals to be "double punishment"; (iv) the Court did not find sufficient cause to believe that the disciplinary action towards the plaintiffs was inappropriate; (v) the Court did not find any reason to believe that the Government had an unwritten policy to dismiss SIA employees who had a history of disciplinary action; (vi) the Court recognized that the SIA Commissioner and other SIA officials provided all dismissed employees with adequate information whenever necessary and conducted surveys on their intention of re-employment or resignation on several occasions; and (vii) the Court recognized that the SIA Commissioner and other SIA officials, upon dismantlement of the SIA, discussed with and provided employee organizations/unions with explanations of dismissal conditions, as well as measures that could be taken to avoid such dismissals.

**682.** The Government assumed that the plaintiffs would challenge the ruling by the Osaka District Court. However, the Government indicated that, as of 6 April 2015, no appeal by the plaintiffs has been filed. Furthermore, there are still 14 cases currently under litigation at the District Court level.

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

**683.** *The Committee notes that this case concerns allegations of open hostility of the authorities against trade unions of SIA which resulted in anti-union dismissals of employees following the dismantling of the SIA because, in line with the hiring criteria established by the Government, the successor organization (Japan Pension Service) could not re-hire SIA employees with a record of disciplinary action, and such punishment had in the past often been imposed due to the exercise of legitimate trade union activities.*

#### **Background to the case: The dismantling of the SIA**

**684.** *The Committee notes from both the complainants and the Government that the present case takes place in the context of an important change to the public pension service administered by the MHLW and its external organ, the SIA. When poor service and improper operations of the SIA were disputed, a scandal erupted in March 2004. A report alleged that there had been leaks of personal information of individuals who had not paid into the national pension fund. This scandal led to the loss of public confidence in the SIA. At that time, the public demanded that the SIA should be revamped, and in response an "Expert Study on the Functioning of the Social Insurance Agency" suggested, in December 2005, that the SIA be abolished and a brand new organization (a special organization as described in the National Government Organization Act) should be established. In December 2006, the Council prepared a plan, "Implementation of SIA Reform", which focused on the abolishment and dismantlement of the SIA and the establishment of a new public organization. The Council clearly expressed that the officers and staff of the SIA should not automatically be assigned to positions in the new organization. Based on the suggestions made by the Council, the MHLW submitted the "Japan Pension Organization Act Bill" to the Diet in March 2007. During deliberations of this bill in the Diet, the absence of provisions regarding the reassignment of the employees of the SIA was also discussed. However, the Prime Minister responded that in order to regain public confidence in the public pension system, the SIA employees should not be automatically re-employed, and that impartial screening for employment in the new organization should be conducted by an independent third party.*

**685.** *In June 2007, the Japan Pension Organization Act (Act No. 109 of 2007) was passed. In accordance with this new law, the SIA was to be abolished on 31 December 2009. The new system was to take effect as of January 2010, under which the Government remained responsible for financing and administrative matters regarding public pension, while all clerical operations (including pension application processing, collection of payments, record-keeping, management, consultation and benefit payments) were to be handled by the Japan Pension Service (Service Office) that was to be established in accordance with the Organization Act. The objective of the Organization Act was to establish an organization that would recapture public confidence by ensuring that the public pension system was always stably administered based on public confidence, and thereby creating a sense of solidarity with Japanese citizens. The Organization Act included regulations on objectives, organizational structure, operational procedures and preparations for establishment.*

**686.** *In August 2007, in order to develop a "Basic Plan for Temporary Business Operations of the Japan Pension Service" (Basic Plan), the Government established the "Pension*

*Service/Organization Reform Conference” (hereinafter referred to as “Reform Conference”) under the supervision of the minister in charge of federal/local administrative reform. The missions of the Reform Conference included summarizing the opinions on the organizational structure of the Service Office, outsourcing of operations, hiring policies and determining the necessary number of employees, in order to ensure the Service Office was an organization trusted by the people.*

- 687.** *In June 2008, the Reform Conference prepared a document entitled the “Basic Policies for Temporary Business Operations of the Japan Pension Service (Final Coordination)” regarding the organizational structure and staff sizing, hiring of employees, and outsourcing of operations of the Service Office. Based on the Final Coordination prepared by the Reform Conference and through discussions with the then ruling party, the Government approved the Basic Plan in a Cabinet meeting held in July 2008.*
- 688.** *Until its abolishment at the end of 2009, in addition to its internal bureaus, the SIA included affiliated facilities (the social insurance operation centres and the Social Insurance College), and local branch offices such as 47 local social insurance bureaus and 312 social insurance offices. A total of approximately 12,500 employees were working for the SIA at the time of its abolishment on 31 December 2009. The required number of staff for the Service Office at the time of establishment was expected to be approximately 17,830, consisting of 10,880 permanent employees and 6,950 limited-term employees. Approximately 1,000 of the permanent employees were to be hired from non-social insurance fields. With regard to the hiring process for the Service Office, the Government indicated that the Establishment Committee was formed on November 2008 to handle the requirements necessary for the establishment of the Service Office. The Establishment Committee defined the qualification standards for employees of the Service Office. The SIA Commissioner was to select and submit a list of qualified candidates from among those that showed willingness to become an employee of the Service Office.*
- 689.** *As for employees of the SIA that are not employed by the Service Office, the Basic Plan specified that “the Government will consider every possible means, such as encouragement of retirement, transfer to the MHLW or use of the centre for personnel interchanges between the Government and private entities (hereinafter referred to as “Personnel Interchange Centre”) to avoid dismissals”. The Committee notes that as a result of that approach, the Government reported the following achievement upon the dismantling of the SIA by December 2009: among 12,566 SIA employees, 10,069 were hired by the Service Office, 45 were hired by the Japan Health Insurance Association, 1,293 were transferred to the MHLW and other related organizations, 631 retired with encouragement, and three retired for personal reasons.*
- 690.** *In this regard, the Committee takes due note of the detailed statistics provided by the Government concerning all the measures taken to prevent dismissals of the SIA employees upon its dismantling. It notes that collective dismissal has affected 525 employees out of 12,566. The Committee emphasizes in this regard 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. Stressing, however, the importance of maintaining sound labour relations that would ensure that workers are not deprived of their fundamental rights and means of furthering and defending interests, the Committee will examine the specific allegations of anti-union discrimination and interference raised in this case.*
- 691.** *Moreover, while taking due note of the Government’s declaration that the extent of public servants to be excluded from the application of Convention No. 98 under its Article 6 should be determined through a judgment of whether they benefit from statutory terms and conditions of service, which according to the Government was the case for the employees*

of the SIA, the Committee recalls that it has on numerous occasions examined allegations relating to anti-union discrimination against public servants and recalls the general principle that where public servants are employed under conditions of free appointment and removal from service, the exercise of the right to freely remove public employees from their posts should in no instance be motivated by the trade union functions or activities of the persons who could be affected by such measures [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 792].

### **Open hostility of the authorities against the trade unions of the SIA**

692. The Committee notes the complainants' allegations that the Government claimed that the cause of the problems related to pension records (the 2004 scandal) was to be found in the employee organizations and that it had shifted the responsibility for the calamitous management of pension records onto the trade unions (that is the SIA section of JICHIRO and ZENKOSEI). According to the complainants, since then the Government adopted a hostile attitude towards the trade unions and alleged that the non-payment of contributions to the public pension fund by ministers and Diet members was exposed due to the leak of individual pension records from the SIA under the influence of tense labour-management relations. The complainants further allege that the Government ultimately denied all trade union rights that had so far been accorded to the trade unions within the SIA.
693. According to the complainants, such hostility clearly materialized in the abolition of the practice of consultation with trade unions. The SIA authorities used to have prior consultations with the trade unions, through memoranda and written confirmation, before notifying the personnel about the changes in working conditions, but they unilaterally abolished this practice in March 2004. The trade unions were allegedly unable to get involved in determining changes in a context of deteriorating working conditions during the period when the workloads increased considerably with the problem of missing pension records.
694. Furthermore, the Committee notes that the complainants denounced repeated investigations into cases of breach of working regulation targeted at union activities. Following the enactment of the Japan Pension Service Law, the Government instructed the SIA to conduct personnel management investigations of the past ten years regarding unauthorized full-time union officers, union activities undertaken during working hours, political actions, side jobs, tardiness, absence from work, etc. Investigations focused on union activities were conducted persistently on the pretext of "breach of working regulations". A Committee for Investigating Working Regulations Breach was established under the MHLW. As a result, disciplinary measures were imposed on 31 employees, ten managers and two general managers. The complainants also denounced the fact that the Government decided unilaterally to bring criminal charges against "unauthorized full-time union officers" although the SIA management had accepted, without going through legally defined procedure, that union members take part in union activities within working hours.
695. The Committee notes the Government's view that it never attributed responsibility for the pension record scandal to the trade unions. In this regard, the Government indicated a Pension Record Scandal Investigation Committee, composed of independent experts and intellectuals, was established in June 2007 to look into the background, causes and responsibility for the scandal. The investigation report prepared by the Committee, published in October 2007, observed as root causes to the scandal the total lack of a sense of responsibility throughout the organization, both in the MHLW and the SIA, and the SIA's insufficient awareness of the importance of maintaining accurate pension records.

The report outlined four direct factors, among which the generation of inaccurate pension records due to online data input errors, as well as four indirect factors to these causes. The Government observed that the report identified, among the indirect factors, the fact that “the management and the employee organizations of the SIA were not aware of importance of pension records, and were not on the ‘same page’ when it came to improving operations”. The Committee notes the Government’s indication that, on the basis of the report, it cannot attribute responsibility for the scandal to the trade unions or harbour any hostility towards them.

- 696.** *With regard to the complainants’ allegations that the SIA unilaterally discontinued the practice of consultation with the trade unions, the Committee notes the Government’s statement that members of the “Expert Study on Function of the Social Insurance Agency”, established in August 2004, requested that all agreements between the SIA and the trade unions be submitted. The SIA submitted all confirmations and agreements between the SIA Commissioner and JICHIRO stretching back to the “Memorandum regarding Implementation of the Nationwide Online Plan” of March 1979. The members of the Study pointed out that confirmations and agreements with the trade unions needed to be reviewed. According to the Government, the SIA consulted with each of the employee organizations and, in November 2004, requested in writing that JICHIRO and ZENKOSEI review and dispose of past confirmations. The notifications from the SIA to the local social insurance offices were to be issued after consultation with, and approval by, the employee organizations. Since such customary practice was based on a confirmation, the practice was subsequently discontinued after the disposal of the confirmations. The confirmations with the trade unions were disposed of following the SIA’s consultation with the trade unions concerned. Upon disposal, the practice of prior consultation was also discontinued.*
- 697.** *Finally, the Government recalls that article 108-6, paragraph 1, of the National Public Service Act provides that an official may engage exclusively in business of a registered employee organization as an officer of the organization with the permission of the head of the government agency employing him/her. The period for which the permission is effective is deemed as administrative leave and no official shall carry on the business or act on behalf of an employee organization while receiving remuneration as a national public officer (article 108-6, paragraphs 5 and 6, of the National Public Service Act). Moreover, an “unauthorized engagement” is an illegal act in which an employee engages exclusively in the business of an employee organization without designated permission but still receives remuneration from the Government even though he/she is not actually carrying out any duties as a national public officer. The Government indicates that the Reform Conference, established in August 2007, pointed out there was unauthorized engagement in the SIA and requested it investigate past violations of service discipline. The SIA subsequently investigated violations of service discipline, including unauthorized engagement, during the period between April 1997 and September 2007. Such investigation revealed unauthorized engagement of a number of employees who were then disciplined. In the Government’s view, disciplinary actions and criminal complaints were taken or filed not only against employees that had committed unauthorized engagement, but also against managers who were knowledgeable of such engagements and/or who had supervising authority over the payroll of the employees. Therefore, in the Government’s view, the allegation that disciplinary action was taken against employees involved in union activities is unfounded.*
- 698.** *In view of the information provided, the Committee is not in a position to conclude, as alleged in the complaint, that the labour relations within the SIA were characterised by open hostility of the management and the Government against the trade unions. However, the Committee cannot but express concern regarding the Government’s admission to a discontinuation of the practice of consultation with the trade unions, in particular in view of the context of the transformation process of the SIA which would impact significantly on*

the workers, including union leaders and unionized workers. While bodies established during the transformation process, that is the “Committee of Experts for a New Social Insurance Organization” or the “Committee for Organizational Revival of Pension Service”, undertook hearings of the SIA trade unions, according to the complainants, these hearings were more to pin down the trade unions’ responsibility for various problems of pension service than listen to their views.

699. In this regard, the Committee wishes to emphasize that it is important that governments consult with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees [see *Digest*, op. cit., para. 1081], and highlights the importance for harmonious labour relations of full and frank consultations on matters affecting the workers’ occupational interests. The Committee expects that the Government will ensure full respect for these principles in the newly established Service Office.

### **Anti-union dismissals as a result of the re-hiring criteria to the Service Office**

700. The Committee notes that the complainants alleged that dismissal of SIA employees was carried out in such a way as to discriminate against trade union officers. In this regard, the complainants indicated that despite strong criticism expressed by the Japan Federation of Bar Association and other organizations of jurists against the denial of hiring on the ground of past punishment record which would constitute “double jeopardy”, the Government adopted, in July 2007, the “Basic Plan” that laid down the policy of denying to SIA employees who would have a record of disciplinary punishment the possibility to be hired in the Pension Service Organization. As a result, SIA employees who had records of disciplinary punishment due to union activity could not even apply for recruitment by the new pension Service Office and were bound to be dismissed.
701. In this regard, from the information provided by the Government, the Committee notes that following the investigation on violations of service discipline, the SIA took action in September 2008 against 30 employees who had been involved in unauthorized engagement (excluding those already retired). The Committee also notes the Government’s assertion that employees disciplined for unauthorized engagement were only from three social insurance bureaus (Tokyo, Kyoto and Osaka) out of 47, and that dismissals could have been avoided had those individuals been accepted for transfer to the MHLW. Furthermore, the Committee notes that upon the abolishment of the SIA, among the 525 dismissed employees, 251 had received disciplinary action while the remaining 274 had never received such punishment. In view of the information available, the Committee is not in a position to sustain that the dismissal of SIA employees due to unauthorized engagement was of an anti-union nature in view of the rehiring criteria to the Service Office. The Committee nevertheless expresses its concern at the apparent lack of clarity concerning the arrangements reported to have been previously agreed at the workplace, and not denied by the Government, which could have given rise to misunderstandings among some trade union officers as to their rights and responsibilities.

### **Individual cases mentioned in the complaint**

702. The Committee takes note of the detailed information provided both by the complainants and the Government on the process which led to the disciplinary action and the dismissal of three ZENKOSEI officers, namely Mr Kawaguchi, Mr Kitakubo and Mr Nakamoto.
703. While noting that Mr Kitakubo, whose dismissal was cancelled by the NPA, was reinstated in the Kamigyō Pension Office of the Japan Pension Services and that Mr Nakamoto was



*appointed to Kinki Regional Office in Kyoto of Health and Labor Ministry, both in December 2013, the Committee requests the Government to keep it informed of the outcome of the legal actions still pending concerning Mr Kawagushi, as well as the cases for compensation filed by Mr Kitakubo and Mr Nakamoto.*

## **The Committee's recommendations**

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

- (a) The Committee emphasizes that it is important that governments carry out prior consultations with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees, and highlights the importance for harmonious labour relations of full and frank consultations on matters affecting the workers' occupational interests. The Committee expects that the Government will ensure full respect for these principles in the newly established Service Office.*
- (b) The Committee requests the Government to keep it informed of the outcome of the legal actions still pending concerning Mr Kawagushi, as well as the cases for compensation filed by Mr Kitakubo and Mr Nakamoto.*

CASE NO. 3081

INTERIM REPORT

### **Complaint against the Government of Liberia presented by the Petroleum Oil Chemical Energy and General Services Union of Liberia**

*Allegations: Unilateral cancellation by the employer of the collective bargaining agreement, unfair dismissal of trade union leaders*

- 705.** The complaint is contained in a communication dated 27 May 2014 from the Petroleum Oil Chemical Energy and General Services Union of Liberia.
- 706.** As the Government has not replied, the Committee has been obliged to adjourn its examination of this case on several occasions. At its June 2015 meeting [see the Committee's 375th Report, para. 8], 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, it could present a report on the substance of the case at its next meeting, even if the observations or information requested had not been received in due time. To date, the Government has not sent any information.
- 707.** Liberia has ratified both 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**

- 708.** In its communication dated 27 May 2014, the complainant organization indicates that on 2 January 2013, following a tedious process of organizing and unionizing the Liberian aviation workers, a collective bargaining agreement (CBA) was signed between the management of Roberts International Airport (RIA) and the National Brotherhood of Teamsters Union of Liberia (NBT, referred to as the mother union). A copy of the CBA is attached to the complaint, which provides in its article 2(a) that “the duration of the Agreement shall be three years, commencing 2 January 2013 and ending 31 December 2015. Either party may give a 30 days written notice of its intention to terminate the Agreement at its expiration, and the notice must be issued at least two months prior to the expiration date of the Agreement; but until a new Agreement is signed between the two parties, this Agreement shall continue to be in effect as required under the Labour Laws of Liberia”. Article 2(b) of the CBA between the RIA and the workers’ union provides for the binding force of the agreement in the following terms: “both parties to this Agreement will ensure compliance with the following standards set out in the current framework of National and International convention laws”. Article 49(a) of the CBA states that: “Both parties recognize that the Agreement imposes serious duties and responsibilities on the Union as well as the Employer” and article 49(b) states that “the union and the employer jointly confirm that the agreement shall become operative from the date of signature and will remain in force for three years after which it shall be deemed to be automatically extended for further periods of one year unless either party gives notice to the other at least three months in advance of its expiry date or date of extensions, that it does not wish renewal”. The complainant further emphasizes that CBAs are binding instruments under Liberian law, and once signed by the negotiating parties and attested to by the Government no party can cancel them unilaterally, which is precisely what the employer nevertheless did in this case.
- 709.** In a memo dated 27 December 2013 (a copy of which is attached to the complaint), the acting Human Resource Manager of the RIA, Ms Regina Ajavon-Benson, informed all employees who were members of the union that with the suspension/dissolution of the CBA the payment of union dues (\$8.00) was also suspended with immediate effect and the employees’ previous contributions would be included in their net pay henceforth. The memo also advised union member employees to call the officials of the union into account for the total of the union dues that the management had remitted in the past.
- 710.** On the same day of 27 December 2013, Roberts International Airport Workers Union (RIAWU) issued a “statement of dissociation” referring to a leaflet that was circulated in the RIA on 26 December, in which it was stated that RIA employees anticipated a strike as a result of dissatisfaction with the conduct of management regarding payment of salaries and benefits as agreed in the CBA. In this statement of dissociation, the union indicates that the director of police convened a meeting on the evening of 27 December, with the participation of the leadership of the RIAWU, representatives of the Liberia Labour Congress, the United Seaman Ports and General Workers’ Union and the International Transport Workers’ Federation. The meeting was also attended by the Acting Minister of Justice and a representative of the Civil Society Network. The representatives of workers’ organizations dissociated themselves from the threat leaflets and reiterated that they had no plan to engage in any strike action at the RIA; however, the union raised some concerns, including the dissolution of the union by the management, the suspension of payment of union dues and some benefits to which they were entitled under the CBA. The Acting Minister of Justice undertook to discuss these issues including the status of the CBA with the employer. The workers confirmed that pending resolution of the issues they would continue to work and would not do anything that would disrupt the operations of the corporation.

- 711.** According to a letter of the RIAWU to the Minister of Labour dated 16 January 2014, on 6 January in a meeting at the Ministry of Labour chaired by the Minister, the management agreed to retract the 27 December memo, but later refused to adhere to that agreement. The union further indicates in this letter that Ms Ajavon-Benson has addressed a communiqué to the RIAWU informing them that workers will not receive their overdue monthly housing and transportation allowance until the Ministry of Labour officially instructs her. The RIAWU requested the intervention of the Ministry.
- 712.** In a letter dated 15 April 2014, the RIAWU informed Mr Alfred Thomas, the President General of Liberia Labour Congress of the suspension/cancellation of the CBA which, the union mentioned would result indirectly in its dissolution. In another letter dated 16 April 2014, the RIAWU informed the Minister of Labour that the acting General Manager, Mr Richelieu A. Williams, and board Chairman, Mr Beyan Kessellie, have orally nullified the CBA without consultation with or the knowledge of the RIAWU. In this letter, the RIAWU expressed concern that the cancellation or suspension of the CBA would mean that all of the provisions enshrined therein would no longer be implemented and stated that the implications of such a turn of events could not be overstated. Reference was made, in particular, to provisions governing workers' monthly transportation allowances; workers' monthly salary scheduled increment; workers' housing allowances and workers' overall welfare health insurance coverage. The RIAWU further indicated that the acting General Manager developed unilaterally and without the involvement of the union and the Ministries of Transport and Labour, a RIA Workers' Handbook and was imposing it on workers as a substitute to the CBA.
- 713.** The complainant further indicates that, dismissal letters dated 1 April 2015 and signed by the Director of Human Resources were communicated to Mr Melliah P.G. Weh and Mr Jaycee W. Garniah, respectively the President and the Secretary General of the RIAWU. The dismissal letters declared termination of employment with immediate effect, on the grounds of absence from work for ten or more consecutive days without an excuse. The employees were required to return all company properties and were given 14 days to vacate the housing units assigned to them. The complainant states that articles 29 and 33 of the signed CBA exempt the two officials of the union from doing regular airport duties, but restricted them to union activities, which the complainant qualifies as an acceptable conventional strategy necessary to guarantee industrial peace and harmony in line with the doctrine of social dialogue. The complainant further states that it views the action of the employer as an attempt to silence union activities at that entity.
- 714.** According to a letter of the RIAWU to the Minister of Labour dated 16 April 2014, following the dismissals of Mr Weh and Mr Garniah on 1 April, Senator Matthew Jaye, the Chairman of the Senate Standing Committee on Labour was mandated by the plenary to put a stay on the actions of the management against the union while the investigation of the situation was under way.
- 715.** The complainant further indicates that the actions of the RIA management benefit from the support of the Ministry of Labour, adding that all requests made by the complainant to the Minister of Labour, the Senate and House Chairmen on Labour and the RIA management seeking audience so as to have a dialogue and amicably resolve the matter were turned down without any form of notification.
- 716.** The complainant finally provides a list of public sector workers' leaders which it states were wrongfully dismissed between 2007 and 2014, without redress from the Ministry of Labour. In addition to the two RIAWU leaders mentioned in this case, this list refers to the President and Secretary General of the workers' organization at the Ministry of Health and Social Welfare (2014); the President of the workers' organization of the Liberia Broadcasting System (2014); the President, Vice-President and Secretary General of the

workers' organization of the National Transit Authority (2011); the Vice-President of the workers' organization of the National Port Authority (2008); the President of the workers' organization of the National Housing Authority (2008); and the President, Vice-President and Secretary General of the workers' organization of National Social Security and Welfare Corporation (2007).

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

- 717.** *The Committee regrets that, despite the time that has elapsed since the presentation of the complaint in May 2014, the Government has not provided a reply to it even though it has been invited to do so on several occasions, including through an urgent appeal. The Committee urges the Government to be more cooperative in the future and reminds the Government of the possibility to avail itself of the technical assistance of the Office.*
- 718.** *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had expected to receive from the Government.*
- 719.** *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 violation of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see the Committee's First Report, para. 31].*
- 720.** *The Committee observes that this case concerns allegations of unilateral cancellation by the employer of a CBA signed between the management of the RIA and the workers' union; the anti-union dismissal of Mr Melliah P.G. Weh and Mr Jaycee W. Garniah, respectively the President and the Secretary General of the RIAWU, and the failure by the Government to ensure that Conventions Nos 87 and 98 are applied in practice.*
- 721.** *With regard to the CBA, the Committee notes the complainant's allegation that on 27 December 2013, the acting Human Resources Manager of the RIA published a memo referring to the suspension/dissolution of the CBA and affirming that the payment of union dues has been suspended with immediate effect. The complainant further indicates that the acting General Manager of the RIA orally nullified the CBA. The Committee notes that according to Article 2(a) of the CBA, the agreement was entered into for a duration of three years, the term of which was to conclude on 31 December 2015, while, according to the complainant, the employer has unilaterally annulled it less than a year after its coming into force. The Committee notes the RIAWU's concern that the cancellation or suspension of the CBA would deprive the workers of the benefits agreed to therein, including monthly transportation allowances; monthly salary scheduled increment; housing allowances and overall welfare health insurance coverage. The Committee further notes the concern expressed by the RIAWU that the cancellation of the CBA would result indirectly in the dissolution of the trade union itself. The Committee notes the complainant's assertion that the management of the RIA is trying to impose a unilaterally drafted a Workers' Handbook as a replacement for the CBA.*
- 722.** *The Committee recalls that agreements should be binding on the parties. Mutual respect for the commitment undertaken in collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground and failure to implement a collective agreement, even on a temporary basis, violates the right to bargain collectively, as well as the principle of*

bargaining in good faith [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth (revised) edition, 2006, paras 939, 940 and 943]. If collective bargaining agreements could be cancelled unilaterally, there could be neither reasonable expectation of industrial relations stability, nor sufficient reliance on negotiated agreements. The *Collective Agreements Recommendation, 1951 (No. 91)*, which guides governments in their understanding of these principles, explicitly recognizes in its Paragraph 3 that “collective bargaining agreements should bind the signatories thereto and those on whose behalf the agreement is concluded”. The Committee further notes that articles 2(b) and 49 of the CBA provide for the binding force of the agreement, while no other provision therein provides for particular or exceptional circumstances in which a unilateral cancellation of the agreement could be envisaged.

- 723.** *The Committee expresses its deep concern at the alleged actions of the RIA management which would be in contradiction with the abovementioned principles. The Committee therefore requests the Government to immediately conduct an independent inquiry into the complainant’s allegations with regard to the unilateral cancellation of the CBA, and the employer’s refusal to comply with the obligations established therein, and if these allegations were proved true, to take immediate measures to ensure that the employer abides by the commitments it has freely assumed, including deduction and payment of union dues in accordance with article 20 of the CBA and to keep it informed of developments.*
- 724.** *The Committee further notes that in the 27 December 2013 memo, the employer not only declared the end of deduction and remittance of union dues to the RIAWU, but also advised all members of the union to hold the trade union officials accountable for the amount of US\$50,903 already remitted, “should members be interested in the accountability of their money”. The Committee expresses its concern at such statements which would appear to unilaterally undermine an agreement freely entered into. The Committee also expresses its concern at the impact that such statements might have on the exercise of trade union rights at the RIA. The Committee requests the Government to reply in full to these allegations.*
- 725.** *With regard to the dismissals of Mr Melliah P.G. Weh and Mr Jaycee W. Garniah, respectively the President and the Secretary General of the RIAWU, the Committee notes the complainant’s allegation that they were dismissed on the grounds of absence from work for ten or more consecutive days without an excuse, while articles 29 and 33 of the CBA exempted them from regular airport duties so as to enable them to exercise their trade union activities. The Committee draws the Government’s attention to Paragraph 5 of Recommendation No. 143 which states that the workers’ representatives in the undertaking should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers’ representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements. The Committee requests the Government to conduct an immediate inquiry into the grounds for Mr Weh and Mr Garniah’s dismissal, and should it appear that they have been dismissed due to their trade union activity, including for actions in conformity with the CBA, which the employer is said to have unilaterally annulled, ensure that they are reinstated in their positions without loss of pay and keep it informed of developments.*
- 726.** *In more general terms, the Committee takes due note of the serious concern expressed by the trade union that the unilateral cancellation of the CBA in this case can effectively threaten the very existence of its organization, as it has resulted in the employer’s refusal to deduct and remit union dues and the dismissal of union officials, while at the same time substituting terms and conditions of employment that are no longer the product of collective bargaining, but rather a unilateral employer-drafted handbook. In view of the*

*serious consequences of this situation for the representation of workers, the Committee requests the Government to take the necessary measures as a matter of urgency to ensure full compliance with the freely concluded collective agreement and to ensure that the RIAWU can continue to fulfil its functions in representing the workers and defend their occupational interests without fear of intimidation or reprisal. The Committee also requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views as well as those of the enterprise concerned on the questions at issue and to keep it informed of developments.*

**727.** *The Committee requests the complainant to furnish further details on its reference to public sector workers' leaders wrongful dismissals from 2007 to 2014 should it wish the Committee to examine this allegation.*

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

**728.** *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 the complaint was presented in May 2014, the Government has still not replied to the complainant's allegations, despite having been invited on several occasions to do so, including by means of an urgent appeal [see 375th Report, para. 8]. The Committee urges the Government to provide its observations on the complainant's allegations without further delay.*
- (b) The Committee requests the Government to immediately conduct an independent inquiry into the complainant's allegations with regard to the unilateral cancellation of the CBA, and the employer's refusal to comply with the obligations established therein, and if these allegations were proved true, to take immediate measures to ensure that the employer abides by the commitments it has freely assumed, including deduction and payment of union dues in accordance with article 20 of the CBA and keep it informed of developments.*
- (c) Expressing its concern at the employer's alleged statements with regard to the remittance of union dues that would appear to undermine a CBA freely entered into, and at the impact that such statements might have on the exercise of trade union rights at the RIA, the Committee requests the Government to reply in full to these allegations.*
- (d) The Committee requests the Government to conduct an immediate inquiry into the grounds for Mr Weh and Mr Garniah's dismissal, and should it appear that they have been dismissed due to their trade union activities, including for actions in conformity with the CBA, which the employer is said to have unilaterally annulled, to ensure that they are reinstated in their positions without loss of pay and keep it informed of developments.*
- (e) The Committee requests the Government to solicit information from the employers' organizations concerned, in order to have at its disposal their views as well as those of the enterprise concerned on the questions at issue.*

- (f) *In more general terms, the Committee requests the Government to take the necessary measures as a matter of urgency to ensure full compliance with the freely concluded collective agreement and to ensure that the RIAWU can continue to fulfil its functions in representing the workers and defend their occupational interests without fear of intimidation or reprisal and to keep it informed of developments.*
- (g) *The Committee requests the complainant to furnish further details on its reference to public sector workers' leaders wrongful dismissals during the period 2007–14, should it wish the Committee to examine this allegation.*

CASE NO. 3076

INTERIM REPORT

**Complaint against the Government of the Republic of Maldives  
presented by  
the Tourism Employees Association of Maldives (TEAM)**

*Allegations: Disproportionate police force used against striking workers; arbitrary arrest of TEAM members and leaders; unfair dismissal of nine workers including TEAM leaders who participated in and led a strike. The complainant reports that despite a definitive court judgment in their favour the dismissed workers have not been reinstated in their positions more than four years after their dismissal*

729. The complaint is contained in a communication dated 8 April 2014 from the Tourism Employees Association of Maldives (TEAM).
730. As the Government has not replied, the Committee has been obliged to adjourn its examination of this case on several occasions. At its June 2015 meeting [see the Committee's 375th Report, para. 8], 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, it could present a report on the substance of the case at its next meeting, even if the observations or information requested had not been received in due time. To date, the Government has not sent any information.
731. The Republic of Maldives has ratified both 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**

732. In its communication dated 8 April 2014, TEAM indicates that between 28 November and 3 December 2008, its leaders engaged in a union action by organizing a strike with the participation of the employees of the luxury hotel, One & Only Reethi Rah Resort

(hereinafter the Resort). The strikers demanded better working conditions and the application of the new Employment Act and protested against anti-union transfer of some Resort employees. Many of the striking workers were members of TEAM. On 1 December, the third day of the strike, 13 workers including TEAM president, vice-president and executive committee members were dismissed. Police forces were deployed to arrest activists on the island. They identified TEAM's president and arbitrarily arrested him and 12 other employees. In the course of the arrest, the police resorted to excessive force, using truncheons and pepper spray to disperse employees. Police brutality sparked other protests in luxury hotels in the capital city of Male and other islands of the Republic of Maldives. The strike ended on the same day following the intervention of the president's office and with the conclusion of an agreement between TEAM, the employer and the president's office.

**733.** The complainant further indicates that at 1.30 a.m. on 13 April 2009, one day after an alleged assault on the Resort general manager, the police took nine leaders of the November 2008 strike and TEAM off the island in a speed boat to the capital Male. Once there, the workers were arrested as the suspected authors of the assault. Findings of the judicial inquiry later cleared them of all suspicion. The criminal court ordered the release of eight out of nine arrested TEAM leaders on the same day at 10.30 p.m. for lack of evidence. The last detained person was released nine days later, once it was established that there was no evidence linking him to the assault either.

**734.** The complainant indicates that on 14 April 2009 at 3.30 p.m., the eight released TEAM leaders were informed at the moment they intended to take the ferry back to the Resort that they had been dismissed. At 5 p.m. TEAM vice-president was arrested a second time in relation to the assault against the general manager of the Resort. The criminal court allowed his detention for three days while the investigations on his potential role in the assault were under way. He was released at the end of these three days for lack of evidence. The police later charged other individuals in relation to the assault. The complainant affirms that these events prove the arrest of TEAM activists was patently flawed and driven by an anti-union agenda.

**735.** The complainant organization indicates that, on 22 July 2009, the Employment Tribunal declared the dismissal of TEAM leaders illegal and ordered their reinstatement in their original positions without loss of pay. The employer repeatedly appealed against this judgment until it exhausted all appellate procedures up to the highest court, losing all of them. The order of reinstatement has now become final, but the employer still refuses to fully comply with it and all the efforts of the dismissed workers to obtain compliance have so far been in vain. At the beginning of September 2012, the employer informed the dismissed TEAM leaders that they would be reinstated with payment of back wages. However, on 30 September, they were informed that their jobs were transferred to Male from the Resort island and that their back wages would not be paid in full. The dismissed workers rejected this and requested full compliance of the employer with the judgment ordering reinstatement. On 25 November 2012, a civil court ordered the employer's bank account to be frozen in case of failure to pay back wages in full. The court also confirmed that the workers must be reinstated in their original position and that their transfer was not acceptable. As a result of this judicial order the employer paid the back wages – up to that moment – in full, but still failed to reinstate the dismissed workers. The complainant further indicates that, on 27 January 2013, the dismissed workers requested the judge to take action against the employer for failure to comply with judicial orders. The judge called upon the board of directors to attend the next hearing. As they failed to appear, the court ordered that their passports be held in judicial custody.

**736.** The complainant states that three of the dismissed TEAM leaders were arrested once again on 23 May 2013 when they were attempting to board the ferry to the Resort with the court



order in hand, with the intention to return to work in accordance with the judgment. They were released five days later. Following this arrest and detention the court forbade the organization from engaging in any form of industrial action against the employer's non-compliance with the judgment ordering the reinstatement.

737. The complainant organization affirms that the retaliatory dismissals and the biased reactions of the Government forces in arresting TEAM leaders create an environment hostile to union activism and discourage workers from exercising their collective rights. As there are no registered trade unions in the country and the formation of TEAM as a workers' association is a first step in organizing the work force, it is critical that the TEAM leaders be reinstated as required by law.

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

738. *The Committee regrets that, despite the time that has elapsed since the presentation of the complaint in April 2014, the Government has not provided a reply to it even though it has been invited to do so on several occasions, including through an urgent appeal. The Committee urges the Government to be more cooperative in the future and reminds the Government of the possibility to avail itself of the technical assistance of the Office.*
739. *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had expected to receive from the Government.*
740. *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 violation of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see the Committee's First Report, para. 31].*
741. *The Committee notes that the complaint concerns events that took place between November 2008, when the employees of the Resort organized a strike in protest against anti-union transfer of some employees and to demand better working conditions, and May 2013. These events include disproportionate use of police force against striking workers, repeated arrest and detention of TEAM leaders, their dismissal, and non-enforcement of the court ruling ordering their reinstatement without loss of pay.*
742. *With regard to the arrest and detention of union leaders, the Committee notes the complainant's allegation that the TEAM president was first arrested along with 12 other workers on 1 December 2008, after being dismissed for organizing the strike at the Resort. According to the complainant, the strike ended with the intervention of the President's Office and the conclusion of an agreement between TEAM, the employer, and the said office. The Committee further notes the allegation that a second set of arrests occurred on 13 April 2009, when nine leaders of the previously mentioned strike and the union were arrested in the wake of an alleged assault on the Resort general manager. According to the complainant, the criminal court ordered the release of eight out of nine arrested workers on the same day. On 14 April, TEAM vice-president was once again arrested and subsequently detained for three days (with the authorization of the criminal court) pending investigations on his eventual links with the assault. One arrested worker remained in detention for nine days. Ultimately all were cleared of the suspicion of any link with the assault, and the police charged other individuals with this offence. The Committee notes*

*the complainant's affirmation that these events prove that the arrest of TEAM activists was patently flawed and driven by an anti-union agenda.*

- 743.** *The complainant further alleges that following the dismissal of eight TEAM leaders, and the employer's refusal to comply with a judicial decision ordering their reinstatement without loss of pay, a third set of arrests occurred on 23 May 2013, when three of the dismissed TEAM leaders were arrested and detained for five days for attempting to board the ferry to the Resort with the intention of returning to work in accordance with the court ruling ordering the employer to reinstate them.*
- 744.** *The Committee recalls that while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists [See **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 72]. The Committee observes that in this case, trade union officials have been allegedly arrested and detained in relation to their trade union activities on at least two occasions: once in the context of a strike organized to defend the occupational interests of workers; and once when they were attempting to protest against the employer's long-standing refusal to comply with a judicial decision that ordered the workers' reinstatement after an illegal dismissal, and that the complainant alleges that the arrests in 2009 were driven by an anti-union agenda.*
- 745.** *With regard to the arrest and detention of trade unionists, the Committee further recalls that the arrest of trade unionists and leaders of employers' organizations may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities [see **Digest**, op. cit., para. 67]. In view of the complainant's affirmation that TEAM is one of the first workers' organizations in the Republic of Maldives, where the State has not yet registered any trade union, the Committee observes with deep concern that these arrests and detentions are likely to have a severely negative impact on the general development of the trade union movement and the organization of workers in defence of their occupational interests. The Committee considers that the allegations of the complainant, should they be proved, are cause for great concern for the respect of freedom of association in the country. The Committee therefore urges the Government to conduct an independent investigation as to the grounds for the arrest and detention of TEAM members on the three abovementioned occasions, and should it appear that they have been arrested because of their trade union activities, to hold those responsible to account and to take the necessary measures to ensure that the competent authorities receive adequate instructions not to resort to arrest and detention of trade unionists for reasons connected to their union activities in the future. The Committee requests the Government to keep it informed of the measures taken in this regard.*
- 746.** *With regard to the dismissals, the Committee notes the complainant's allegation that, on 14 April 2009, the employment of eight TEAM leaders was terminated due to their leadership roles in the union. The complainant further states that, on 22 July 2009, the Employment Tribunal declared the dismissals illegal and ordered the reinstatement of those dismissed without loss of pay and that this ruling became final after the employer exhausted all appellate procedures without success. The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of*

trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organization shall have the right to elect their representatives in full freedom [see *Digest*, op. cit., para. 799].

- 747.** *The Committee notes the complainant's allegation that the court decision ordering the reinstatement of TEAM leaders has not been enforced despite the dismissed workers' multiple attempts to obtain enforcement through the judicial system; and that even though the employer paid the back wages of the dismissed workers when a court ordered the freezing of its bank account in case of failure to pay in full those wages it still refused to reinstate the workers, despite a court order requiring that the passports of the board of directors be held in judicial custody for failure to attend a court hearing on the issue of reinstatement. The Committee observes that according to the allegations, more than six years have elapsed since the Employment Tribunal first declared the dismissals illegal and ordered the reinstatement of TEAM leaders. Recalling that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government [see *Digest*, op. cit., para. 17], the Committee urges the Government to take all the necessary steps for the immediate enforcement of the sentence ordering the reinstatement of TEAM leaders and the payment of the remaining back wages that have accumulated since the last payment following the measure of enforcement adopted on 25 November 2012, and to keep it informed of the steps taken in this regard.*
- 748.** *The Committee notes the complainant's allegation that in the course of the arrests of 1 December 2008 (that occurred during the strike) the police resorted to excessive force and used truncheons and pepper spray to disperse the workers. The Committee recalls in this regard 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 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 peace [see *Digest*, op. cit., para. 140]. The Committee therefore urges the Government to conduct an independent inquiry into the allegations of excessive force used by the police in this case, and ensure that adequate instructions are given so that such situations do not occur in the future. The Committee requests the Government to keep it informed of developments.*
- 749.** *The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprise concerned, on the questions at issue.*

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

- 750.** *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 the complaint was presented in April 2014, the Government has still not replied to the complainant's allegations, despite having been invited on several occasions to do so, including by means of an urgent appeal [see 375th Report, para. 8]. The Committee urges the Government to provide its observations on the complainant's allegations without further delay.*
- (b) *The Committee urges the Government to conduct an independent investigation as to the grounds for the arrest and detention of TEAM*

*members on the three abovementioned occasions, and, should it appear that they have been arrested because of their trade union activities, to hold those responsible into account and take the necessary measures to ensure that the competent authorities receive adequate instructions not to resort to arrest and detention of trade unionists for reasons connected to their union activities in the future. The Committee requests the Government to keep it informed of the measures taken in this regard.*

- (c) *The Committee urges the Government to take all the necessary steps for the immediate enforcement of the sentence ordering the reinstatement of TEAM leaders and the payment of the remaining back wages, and to keep it informed of the steps taken in this regard.*
- (d) *The Committee urges the Government to conduct an independent inquiry into the allegations of excessive force used by the police in this case, and ensure that adequate instructions are given so that such situations do not occur in the future. The Committee requests the Government to keep it informed of developments.*
- (e) *The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprise concerned, on the questions at issue.*

CASE No. 3086

DEFINITIVE REPORT

**Complaint against the Government of Mauritius  
presented by  
the Fédération des Travailleurs Unis (FTU)**

*Allegations: The complainant organization alleges the infringement of the right of the workers of Crystal Beach Hotel to organize and join a trade union through threats, acts of intimidation and anti-union dismissals and obstruction of contacts between the trade union representatives and the workers prior to a vote held to determine the representativeness of the union*

- 751.** The complaint is contained in a communication dated 16 June 2014 from the Fédération des Travailleurs Unis (FTU).
- 752.** The Government transmitted its observations in a communication dated 8 July 2015.
- 753.** Mauritius has ratified both 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

- 754.** The complainant organization indicates that Crystal Beach Hotel (hereinafter the hotel), located in the east coast region of Mauritius, has a workforce of 193 employees of manual grade. The hotel is under the administration of Maritim Mauritius Ltd. As background information to the complaint, the FTU indicates that Mr Pardip Pursun, the HR manager of the hotel, was dismissed on 15 December 2013 for regular use of abusive language towards workers, particularly female workers, only to be reinstated in his position on 28 January 2014 for reasons unknown to employees. On the same day of 28 January, the CEO and the general manager of the hotel resigned in protest of the decision of the company to reinstate Mr Pursun.
- 755.** According to the complainant, in these circumstances, all workers decided to organize themselves by joining the Organization of Hotel, Private Club and Catering Workers Unity (OHPCCWU) which is affiliated to the FTU. The HR manager reacted to the decision of workers to organize themselves with harassment and verbal abuse. On 9 February 2014, the employees addressed a letter to the Prime Minister, the Minister of Labour, Industrial Relations, Employment and Training and the Minister of Gender Equality, Child Development and Family Welfare to complain about the HR manager's harassment and maltreating of housekeeping employees of the hotel. The letter indicated that during a briefing on 5 February, the HR manager called the employees thieves, illiterate, lazy and cheap people and told them they did not have any alternatives as he could sack them all at any time as he did with the CEO and the general manager. The letter further stated that the employees had reported the incident to the Belle-Mare police station. The FTU also addressed a letter dated 13 February 2013 to the Minister of Labour in which it reported that on 12 February a floor supervisor was summarily dismissed without any justification. The letter indicated that while handing him his letter of dismissal, the HR manager told the dismissed worker that others might follow him. The complainant alleges that the Ministry ignored this communication.
- 756.** The complainant indicates that the situation got worse after the OHPCCWU addressed an application for recognition to the management (a copy of which was attached to the complaint) in accordance with section 36 of the Employment Relations Act (2008). In this application, dated 17 February 2014, the trade union informed the employer that more than 50 per cent of employees are members of the trade union and requested recognition in this regard. On 6 March 2014, a group of employees addressed a collective letter to the secretary of the OHPCCWU declaring that as members of the trade union they informed him that the HR manager was intimidating them in order to make them give up their membership in the OHPCCWU and that, in particular, on 6 March 2014, the assistant HR manager and the Executive Chef circulated forms of resignation from the trade union to put pressure on the union members. The signatories of the letter requested the trade union to take urgent appropriate measures while signifying their determination to remain affiliated.
- 757.** The FTU indicates that as the OHPCCWU's application for recognition was rejected by the employer, it filed an application for an Order for recognition under section 38(1) of the Employment Relations Act (2008) before the Employment Relations Tribunal (ERT), affirming in the application that it was supported by more than 50 per cent of the workers in the bargaining unit. A copy of the application dated 18 April 2014 is attached to the complaint. The first hearing on the case was scheduled on 6 May 2014. The complainant indicates that, in a meeting in the morning of 6 May, the HR manager stated that the "occupancy rate is not good therefore I shall lay off 50 workers". On 13 May, the date of the second hearing before the ERT, the same HR manager declared that "in the afternoon after attending the Tribunal I shall take drastic measures particularly against trade union members". On the same day of 13 May, the OHPCCWU addressed a letter to the Minister

of Labour, expressing concern about the abovementioned statements of the HR manager, affirming that this attempt to attack employment is directly linked with the decision of workers to organize themselves and join a trade union. The letter further stated that several complaints against the HR manager had been previously registered at the Belle-Mare police station. The OHPCCWU concluded its communication by requesting the urgent intervention of the Ministry to put an end to the repressive practices of the employer.

**758.** The complainant further indicates that the HR manager executed his threats of laying off trade union members on the eve of another hearing of the ERT that took place on 21 May 2014. Around 45 workers, including all workplace trade union representatives, were laid off. In the hearing of 21 May, the HR manager was seen in the company of two bouncers.

**759.** The FTU indicates that the ERT decided to conduct a secret ballot under section 38 of the Employment Relations Act (2008) to determine the representativeness of the OHPCCWU. The secret ballot was scheduled on Thursday, 12 June 2014 at 2.30 p.m. within the company premises. On 4 June, the OHPCCWU requested through the Tribunal to hold a meeting with its members within the premises of the hotel, which request was rejected by the company's counsel. On 9 June, at around 2.30 p.m., the negotiator and two representatives of the trade union approached the hotel in order to distribute a leaflet, targeting evening and morning shift employees outside working hours. In a few minutes the two bouncers rushed out of the hotel premises and said "this is a private road, you cannot stay there, go back with all your belongings". They further added that "Mr Pursun says you have no right to come here tomorrow, otherwise he shall cancel the ballot". The employer called the police to intervene, but the police could not arrest the union representatives as their actions were lawful. Simultaneously and unusually, all the vans that transported the workers on a daily basis were firmly instructed to collect the workers inside the hotel premises after working hours. The vans were released one by one so as to prevent the trade union representatives from meeting the workers. The OHPCCWU reported this incident to the president of the ERT in a letter dated 10 June 2014. The letter further reported that in a formal statement Mr Pursun informed the Belle-Mare police station that hotel security officers would ensure security during the ballot exercise and they did not need police assistance, although the tribunal had initially rejected this stand.

**760.** The complainant indicates that on 12 June, the day of the ballot, the president, vice-president, all assessors and staff of the ERT were all present. Some 148 workers were on the formal list to participate in the voting. Trade union representatives observed the regular coming and going of the HR manager between the place of ballot and different departments. At 1.15 p.m., the Tribunal decided to call the ballot off before the time scheduled, that is 2.30 p.m. This decision was due to the fact that not a single worker turned up in the conference room to express his/her vote. The complainant alleges that on the hearing of the Tribunal that was held on the following day, the president of the ERT expressed his great concern about the role of Crystal Beach Resort Ltd in these events. The FTU affirms that this result is unique in the history of Mauritius and expresses its belief that the acts of the employer are clear infringements of Conventions Nos 87 and 98 of the ILO.

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

**761.** In its 8 July 2015 communication, the Government conveys the employer's version of the facts in addition to its own observations. According to the employer, the Crystal Beach Resort & Spa has been operating since October 2012 with a total workforce of 250 employees. In December 2013, the management decided to reduce 20 per cent of its personnel due to the fact that the business operation was being negatively affected by the ongoing decline in revenue owing to substantial downfall in the hotel occupancy. In 2014, the management was compelled to review its business operation and implement severe cost

containment and resource optimization policies which entailed the reduction of personnel costs and overheads. Formal notification was made to the Ministry of Labour on 3 March, 7 April and 15 May 2014 regarding the management's intention to reduce its labour force as a result of the economic and financial crisis and the substantial downfall in the hotel revenue. The reduction of the labour force was therefore not related to the intention of the workers to become trade union members.

- 762.** The employer further indicates that in February 2014, it effectively received an application for recognition from the OHPCCWU. However, it deemed appropriate to reject this application since after inquiry into the matter it was found out that more than 80 per cent of the employees had no intention to join the OHPCCWU or any other union. The hotel communicated this decision to the union on 16 April 2014. The employer adds that following this rejection, the OHPCCWU addressed an application to the ERT for an Order for recognition and the ERT organized and supervised a secret ballot on the premises of the hotel. The employer states that prior to the voting, notices were affixed on boards, and banners were fixed in the vicinity of the hotel and surrounding villages in order to sensitize workers. The OHPCCWU also distributed flyers to the employees. Special arrangements were made by the hotel at the request of the president of the ERT for the provision of a room for ballot taking, and transport was provided to staff that were off duty on that day. The employer indicates that in spite of all these measures, not a single employee voted. On 13 June 2014, the management informed the ERT that it had no objection to the organization of a second voting, but the OHPCCWU withdrew its application, according to the employer out of fear of a second massive defeat.
- 763.** The employer further indicates that in September 2014, the OHPCCWU lodged a new application for recognition before the ERT, only to withdraw it on 7 October, due to some technical issues. The management did not object to this withdrawal. On 5 November, the OHPCCWU applied anew to the management for recognition, claiming that more than 30 per cent of the workers were its affiliates. This correspondence was copied to the Ministry of Labour, Industrial Relations, Employment and Training (MLIRET) which enquired into the matter. On 1 December, the management informed the union of its rejection of the application for recognition. The employer emphasized that on several occasions, officers of the Ministry of Labour investigated the complaints made by the negotiator of the union and in the course of those investigations they also met with workers on the premises of the hotel.
- 764.** The Government provides background information according to which enforcement officers of the Ministry of Labour carried out routine inspections at the hotel in May 2013, in the course of which they also met with workers. The inspections showed that good industrial relations prevailed. With regard to the conflict within management which allegedly compelled the CEO and the general manager to resign, the Government declares that it has no information as the intervention of the Ministry of Labour was not sought with regard to such events and it adds that there is no evidence to substantiate the claim that those resignations could be attributed to the HR manager's attitude.
- 765.** The Government indicates that an inquiry carried out by officers of the Ministry of Labour revealed that since the end of 2013, the company was undergoing much hardship as a result of low occupancy rate and the subsequent financial problems and it could not respect the statutory time limits for payment of wages to workers. At the same time, the management started to adopt strict measures to manage its employees and ensure adherence to its internal rules and regulations, which meant that workers suspected of misconduct had to face disciplinary action. However, the management complied with labour legislation as regards payment of dues to workers.

- 766.** The Government further indicates that on 13 February 2014, an inquiry was carried out following a stoppage of work in protest against the dismissal of a worker. The worker was reinstated upon the intervention of the Ministry.
- 767.** As regards the issue of recognition, the Government indicates that on 17 February 2014, the union made a first application to the Tribunal for an order directing the employer to recognize the trade union. The employer refused to grant recognition as it contended that the union did not have the support “of not less than 30 per cent of workers in the bargaining unit” as prescribed in section 37 of the Employment Relations Act.
- 768.** The Government states that on 20 May a new routine inspection was carried out with a view to investigating the claims of an anonymous letter, dated 9 February 2014, that denounced cases of harassment by the HR manager, and also with a view to conduct an inquiry into the termination of employment of 53 workers on economic grounds on 16, 19 and 20 May. Workers were met individually. They made no complaint and denied having ever been ill-treated or harassed by the HR manager, but they contended that management was very strict regarding discipline. The HR manager was warned that harassment constitutes an offence under section 54 of the Employment Rights Act. All the 53 workers whose employment was terminated in May 2014 reported to the Ministry of Labour and opted to join the Workfare Programme under Part IX of the Employment Rights Act. They did not challenge the declared grounds for the termination nor did they complain that they were dismissed because of unionization.
- 769.** Further on the issue of recognition, the Government indicates that on 12 June 2014, the ERT organized and supervised a secret ballot at the premises of the hotel under section 38(2)(b) of the Employment Relations Act. However, no employee turned up to vote and as the trade union had not produced evidence that it was eligible for recognition, the Tribunal set aside the application.
- 770.** The Government indicates that, on 8 August 2014, the Ministry conducted another inquiry upon receipt of new complaints made by workers referring to acts of harassment on the part of the HR manager. Workers met, admitted that they had signed the letter of 9 February, but asserted that they had done so against their free will and recanted the allegations according to which the HR management had committed acts of harassment. The officers of the Ministry recorded their collective statement to that effect. No other complaint regarding the attitude of the HR manager or any other hotel employee was registered at the Ministry of Labour. Besides, a ministerial inquiry into allegations of the abovementioned letter dated 9 February revealed that no complaint was registered at the Belle-Mare police station. In fact, the workers of the housekeeping section of the hotel had just given a statement as a precautionary measure against the HR manager.
- 771.** The Government indicates that, in September 2014, the union presented a second recognition application to the ERT, only to withdraw it on 7 October for technical reasons. Subsequently on 5 November, the union submitted a new application for recognition to the management of the hotel. On 1 December, the employer turned down this application, contending that the union did not have the support of “not less than 30 per cent of the workers in the bargaining unit” as prescribed by law.
- 772.** The Government informs the Committee that, on 27 January 2015, officers of the conciliation and mediation section of the Ministry of Labour conducted an inspection as to the state of industrial relations at the hotel during which the workers met did not voice any complaint. Finally, the Government indicates that, on 8 May 2015, the union negotiator informed an official of the Ministry of Labour over the phone that he did not wish to proceed further with the matter as he did not have the support of the workers concerned.



### C. The Committee's conclusions

773. *The Committee notes that this case concerns alleged acts of intimidation and anti-union discrimination aiming at forcing affiliated workers to withdraw from the trade union of their choice and alleged acts of obstruction, preventing the union representatives from meeting with affiliates within the enterprise to distribute electoral material prior to the vote held to determine the representativeness of the trade union.*
774. *The Committee notes the complainant's allegation that workers of manual grade at the hotel decided to organize by joining the OHPCCWU after an HR manager, who was dismissed on 15 December 2013 for regular use of abusive language against workers, particularly female workers, was reinstated on the 28th of the same month, provoking the immediate resignation of the CEO and general manager of the hotel. The Committee also notes the Government's statement in this regard, that it has no information on such events, as the intervention of the Ministry of Labour has not been sought. The Government further indicates the absence of any evidence supporting the claim that the abovementioned resignations were due to the HR manager's attitude.*
775. *The Committee notes that the complainant, the employer and the Government concur on the fact that, on 17 February 2014, the OHPCCWU addressed an application for recognition to the employer asserting that it represented more than 50 per cent of the employees. The Committee further notes that the employer rejected this application on 16 April 2014, allegedly after an inquiry showed that more than 80 per cent of the employees had no intention of joining the OHPCCWU or any other trade union. On 18 April, the union applied to the ERT for an Order of recognition in accordance with section 38(1) of the Employment Relations Act (2008), once again affirming in its application that it represented more than 50 per cent of the workers in the bargaining unit. Hearings before the Tribunal took place on 6, 13 and 21 May. The ERT decided to organize a secret ballot on the premises of the hotel in order to determine the representativeness of the trade union in accordance with section 38 of the Employment Relations Act. The voting was scheduled for 12 June 2014.*
776. *The Committee notes that the complainant alleges the occurrence of acts of harassment and verbal abuse in reaction to the workers' intention to organize already before 17 February 2014, the date of the application for recognition addressed to the employer, but that, according to the complainant, these acts intensified significantly after this date, with recourse to threats and acts of intimidation including dismissal of the OHPCCWU workplace representatives while the procedure before the ERT was ongoing.*
777. *The Committee notes that the earliest acts of harassment referred to in the complaint, date back to 5 February 2014, when it is alleged that the HR manager verbally abused the workers during a briefing and stated that he could sack them all. This incident was reported in letters dated 9 February to the authorities including the MLIRET. The Government confirms that an anonymous letter dated 9 February 2014 containing claims of harassment by the HR manager was sent to the authorities and indicates that an inquiry into those claims was conducted during a routine inspection carried out on 20 May 2014. Workers met with individually denied having ever been ill-treated or harassed by the HR manager. The Government indicates that on this occasion the HR manager was warned that harassment constituted an offence under the Employment Rights Act. The Committee also notes the Government's indication that during another MLIRET inquiry conducted on 8 August 2014, workers met with stated that they signed the letter of 9 February against their free will and denied allegations of harassment made against the HR manager and that a ministerial allegation into the claims of the letter revealed that no complaint was registered at the Belle-Mare police station.*

- 778.** *The Committee further notes the complainant's allegation that in another incident, a worker was summarily dismissed on 12 February without any justification, and that the HR manager allegedly told the dismissed worker that others might follow him. The incident was reported to the MLIRET in a letter dated 13 February, which the complainant alleges was ignored by the authorities. The Committee notes, however, the Government's contrary indication that on 13 February an inquiry was conducted following a stoppage of work in protest of the dismissal of a worker, and that the worker was reinstated upon the intervention of the MLIRET.*
- 779.** *With regard to acts of intimidation and threats occurring after 17 February 2014, the Committee notes the complainant's allegation that on 6 March 2014, a number of affiliated workers addressed a letter to the secretary of the OHPCCWU reporting acts of intimidation aiming at forcing them to give up their trade union membership, and particularly mentioning that forms of resignation from the union were circulated among workers. The Committee notes, however, that although the signatory workers requested the trade union to take urgent appropriate measures, no information was provided by the complainant as to any actions taken to complain to the authorities.*
- 780.** *The Committee notes the complainant's allegation that on 6 May 2014, the day of the first hearing before the ERT, the HR manager declared that since the occupancy rate was not good, he would lay off 50 workers; and on 13 May, the date of the second hearing before the Tribunal, he allegedly declared in the afternoon after attending the Tribunal, that he would take drastic measures, "particularly against trade union members". The complainant indicates that on 13 May, the OHPCCWU immediately informed the MLIRET by letter of the threat of dismissal against trade union members and requested the urgent intervention of the Ministry in this regard. According to the complainant, the threats of dismissal were executed on 20 May, when around 45 workers, including all workplace trade union representatives, were laid off. The Committee notes the Government's indication according to which on 20 May, in the framework of a routine inspection, an inquiry was conducted into the termination of employment on 16, 19 and 20 May of 53 workers on economic grounds. The Government states that the workers, who were met individually, made no complaint. The dismissed workers did not challenge the declared grounds for the termination nor did they complain that they were dismissed because of unionization and opted to join the Workfare Programme under Part IX of the Employment Rights Act.*
- 781.** *With regard to the dismissals, the Committee also notes the indication of the employer, transmitted by the Government, according to which already in December 2013, the management decided to reduce its personnel by 20 per cent for economic reasons, and in 2014 it was compelled to implement severe cost containment and resource optimization policies which entailed reduction of personnel costs and that formal notification in this regard was made to the Ministry of Labour on 3 March, 7 April and 15 May 2014. The employer emphasizes in this regard that the reduction of the labour force that ensued was therefore unrelated to the intention of the workers to join a trade union. The Committee further notes the Government's statement to the effect that an inquiry carried out by the officers of the MLIRET revealed that since the end of 2013 the company was undergoing much economic hardship and could not respect the statutory time limits for payment of wages to workers, although the management finally complied with the law as regards payments due to workers. The Government further indicates that simultaneously the management started to implement its internal rules and regulations strictly, which meant that workers suspected of misconduct had to face disciplinary action.*
- 782.** *The Committee notes that, according to the complainant, the HR manager first clearly expressed his intention of particularly targeting trade union members in the upcoming dismissals, which were basically due to economic necessity; and then put these words into*

action, by dismissing all workplace trade union representatives on the eve of an ERT hearing, all these events taking place in the context of a dispute concerning the recognition of the trade union by the employer. However, the Committee understands from the indications of the Government that the dismissed workers did not challenge the declared – economic – grounds for their termination and instead opted to join the Workfare Programme under the Employment Rights Act that gives right to a transitional unemployment benefit and assistance in job placement, retraining or starting a small business.

- 783.** *The Committee recalls that 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 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 1079]. The Committee observes that especially at the initial stages of unionization in a workplace, dismissal of trade union representatives might fatally compromise incipient attempts at exercising the right to organize, as it not only deprives the workers of their representatives, but also has an intimidating effect on other workers who could have envisaged assuming trade union functions or simply join the union. The Committee also recalls that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest**, op. cit., para. 771]. In this particular case, however, the Committee notes that the Government has promptly conducted an inquiry into the termination of employment of the workers, that the dismissed workers have been met with individually, and that they have not challenged the declared grounds for their dismissal and, consequently, have not sought reinstatement or compensation. In these circumstances, the Committee does not have sufficient elements at its disposal to determine that these dismissals were of an anti-union nature.*
- 784.** *With regard to the issue of recognition, the Committee notes that according to the concurring indications of the complainant, the employer and the Government, the ERT decided to conduct a secret ballot to determine the representativeness of the OHPCCWU. The vote was organized and supervised by the ERT within the premises of the hotel on 12 June 2014. The Committee notes that the complainant alleges that trade union representatives were not able to inform the workers of their rights with regard to the elections as the employer refused to grant them access to the workplace and took measures to prevent them from approaching the workers on the eve of the elections. The Committee also notes the employer's assertion that notices and banners were affixed in the hotel and in surrounding villages and the trade union distributed flyers among workers. The employer also indicates that at the request of the president of the ERT it provided a room for ballot taking and means of transportation for the staff that were off-duty on the day of the vote. However, parties concur on the fact that not a single worker turned up to vote. The Committee notes that according to the minutes of the ERT session held on 13 June that are appended to the complaint, the Tribunal expressed concern about the fact that no one had turned up to vote and invited the employer to reconsider certain issues and attitude towards the workers, including access of the trade union leader to the workplace. The Committee notes that according to the same minutes, the trade union withdrew its application before the ERT, the employer did not object to this withdrawal and the Tribunal set aside the application while affirming that the union can make a fresh application as and when they wish in accordance with the law.*
- 785.** *As regards the question of access to the enterprise, the Committee recalls that governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can*

communicate with workers in order to apprise them of the potential advantages of unionization [see *Digest*, op. cit., para. 1103] and expects that the Government will ensure respect for this principle. Further on the issue of recognition, the Committee notes the concurring indications of the Government and the employer according to which in September 2014 the trade union lodged a new application for an Order of recognition before the ERT, only to withdraw it on 7 October for technical reasons. The Government and the employer indicate that, on 5 November, the union addressed its second application for recognition to the employer, who rejected it on 1 December on the grounds that the trade union did not enjoy the support of at least 30 per cent of the workers as required by law. Finally the Committee notes the Government's indication that on 8 May 2015 the negotiator of the OHPCCWU informed the MLIRET that he did not wish to proceed further, as he did not have the support of the workers concerned. While certain acts of the employer have given rise to concerns by the Tribunal as regards the climate in which the union was able to carry out its activities, in view of the investigations carried out by the Government and the efforts to organize a secret ballot, as well as the complainant's own withdrawal of its case before the ERT and the ultimate decision not to pursue representation of the workers at the hotel, the Committee considers that it does not have sufficient elements available to it to determine that the Government has failed in its duty to ensure respect for the workers' freedom of association in this case.

### The Committee's recommendation

**786.** *In the light of its foregoing conclusions, and as it does not have sufficient elements available to it to determine that the Government has failed in its duty to ensure respect for freedom of association in this case, the Committee invites the Governing Body to consider that this case does not call for further examination.*

CASE NO. 3060

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

### **Complaint against the Government of Mexico presented by the “Don Napoleón Gómez Sada” National Mining and Metalworking Union (SNMM)**

***Allegations: The complainant organization alleges irregularities, interference by public authorities and the enterprises concerned, as well as acts of violence and threats by another trade union during a procedure to award the rights to collective agreements***

**787.** The complaint is contained in communications dated 28 October 2013 and 28 April 2014 from the “Don Napoleón Gómez Sada” National Mining and Metalworking Union (SNMM).

**788.** The Government sent its observations in communications dated 23 May 2014 and 21 October 2015.

789. Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

#### A. The complainant's allegations

790. In its communications dated 28 October 2013 and 28 April 2014, the “Don Napoleón Gómez Sada” National Mining and Metalworking Union (SNMM) alleges that a procedure to award the rights to collective agreements gave rise to irregularities, interference by public authorities and the enterprises concerned, as well as acts of violence and threats by another trade union. The complainant organization states that workers from the enterprises Servicios Minera Real de Ángeles and Minera Real de Ángeles de la Mina el Coronel discovered that they had unknowingly become members of the Union of Miners and Allied Workers of the Republic of Mexico (STIMS), which held the rights to two collective protection agreements. The complainant organization indicates that, in response to a strike in April 2012, the SNMM successfully intervened in the labour dispute, and obtained the payment of due dividends and other improvements in pay and working conditions, including the revision of the collective labour agreement. Between May 2012 and May 2013, the SNMM held multiple discussions with enterprises and the STIMS to determine their respective representation, as it considered that the STIMS did not represent the workers. After failing to reach an agreement, on 28 May 2013, the complainant organization submitted a request to the Federal Council for Conciliation and Arbitration to obtain the rights to the collective agreements.

791. The complainant organization states that, as from 29 May 2013, a third trade union, the National Union of Miners, Metalworkers and Allied Workers of the Republic of Mexico (SNTMMSS), launched a campaign of attacks on the SNMM and its members, in order to take over the rights to the collective agreements, with the support of the enterprises and the competent authorities. The SNMM indicates that on 29 May 2013, the SNTMMSS itself called an illegal strike which lasted 79 days, in response to which the enterprise sent its workers on training courses. The complainant organization alleges that, during the strike, the Secretariat of Labour and Social Insurance met with the enterprises, the SNTMMSS and the STIMS, without the SNMM, and that in the media, it was announced that the Secretariat of Labour and Social Insurance had recognized SNTMMSS as holder of the rights to the collective agreements. This action was illegal, as the request submitted by the complainant organization to the Federal Council for Conciliation and Arbitration on the issue was still pending. The complainant organization alleges that during the discussions aimed at ending the strike, the Secretariat of Labour and Social Insurance reached an agreement with the enterprises, the SNTMMSS and STIMS that, in order to limit the representation of the SNMM and prevent it from obtaining the rights to collective contracts, SNMM representatives should not be allowed to return to work. The SNMM alleges that when work was resumed on 16 August 2013, 30 SNMM workers and several members of the local executive committee, who are named by the complainant organization, were prevented from returning to the workplace, on the pretext that workers would continue to attend training courses for an indefinite period of time, and with the agreement of the Secretariat of Labour and Social Insurance.

792. The complainant organization furthermore claims that the SNMM's members and supporters, including several of the 30 workers referred to in the above paragraph, have been assaulted by and have received threats, including death threats, from SNMM members and associates and hired thugs, with the aim of preventing them from entering the workplace and discouraging them from supporting the SNMM. The SNMM underscores the following allegations of violence, in relation to which complaints were filed with the Agency of the Public Prosecutor's Office: (a) the physical assault of Ms Ana Gabriela Ruíz González by five members of the SNTMMSS; (b) acts of intimidation and violence to prevent access to the workplace, and death threats by a hired thug from the SNTMMSS

against a group of 29 workers named by the complainant; (c) the assault, in the workplace, of Mr Mauricio Alberto Sustaita López, a SNMM trade union leader, who was forced to leave under threats, as ordered by the representative of the SNTMMSS; and (d) harassment, threats and deprivation of liberty in order to stop Ms Norma Ibarra Torres, sister of a worker and SNMM member, entering the workplace. The complainant organization considers that these incidents of abuse and harassment were permitted by the Secretariat of Labour and Social Insurance and by the enterprises, which did nothing to prevent them and, with regard to the events that occurred in the workplace, it states that the security services did not intervene to defend the rights of those affected.

**793.** In its communication of 28 April 2014, the complainant organization reports irregularities in the procedure to award the rights to collective agreements, and believes that the ballot held on 21 February 2014 to determine the most representative trade union organization was not conducted in a free, direct, personal, non-transferrable or secret manner, as confidentiality was not guaranteed, voting workers were allowed to display SNTMMSS emblems on their clothing, and individuals who had no connections with the ballot were allowed to influence the decisions of the voters (in this regard, the complainant organization provides an information leaflet issued by the SNTMMSS, which accepts the participation of international observers, including unionists from the international trade unions, the United Steelworkers and the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)). The complainant organization adds that the 30 workers who were denied entry to the enterprise, on the pretext that they needed to attend training courses, had to access the premises in secret so as to vote, and only began to return to work from that time onwards. On 28 February 2014, the complainant organization raised objections to the balloting procedure before the Federal Council for Conciliation and Arbitration, which were dismissed, and the SNMM therefore lodged a judicial appeal. The complainant organization adds that the enterprises, with the authorization of the Secretariat of Labour and Social Insurance and the Federal Council for Conciliation and Arbitration, are negotiating, with the SNTMMSS, the revision of the collective agreement, although they do not have the right to do so, as the dispute concerning the rights to the agreement is pending before the courts. This is proof of interference by the enterprises and the public authorities.

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

**794.** In its communication of 23 May 2014, the Government states that the complaint stems from an inter-union dispute that was addressed in accordance with labour legislation and with the principles of freedom of association. The Government adds that the complainant organization was able to exercise its rights before the Federal Council for Conciliation and Arbitration in order to request the rights to the collective agreements, and was able to lodge an appeal before the Federal Council.

**795.** As regards the allegations relating to the illegal strike called on 29 May 2013 and the alleged interference of the labour authority, the Government states that the involvement of the authorities was consistent with their power to ensure balance between factors of production, pursuant to article 40 of the Federal Public Administration Organization Act. The Government indicates that the Secretariat of Labour and Social Insurance encouraged a rapprochement between the trade union that held the rights to the collective labour agreements, the other trade union organizations and the enterprise, and that as a result of helping to reconcile the interests of the parties, the strike was ended on 14 August 2013. The Government underscores that: (i) the strike was initiated by dissatisfied workers, with the backing of the SNTMMSS, and with the participation of workers who supported the SNMM and the STIMS; (ii) in June 2013, the mining enterprise implemented training courses for all workers, with paid wages; (iii) thanks to mediation by the state and federal authorities, which continuously observed the full freedom and the trade union autonomy of

all workers, in August 2013, the parties reached an agreement and activities were resumed; (iv) based on the agreements adopted, it was established that all workers would decide democratically and through formal legal channels before the Federal Council for Conciliation and Arbitration, whether they would continue to be members of the trade union, which until then, held the rights to their collective agreements, or whether they would join another union involved in the inter-union dispute; (v) the workers agreed for the labour authority to verify whether dividends had been paid in accordance with the law, while the enterprise undertook not to dismiss or file charges against the strikers, and to pay 50 per cent of wages when the strike had been lifted and the other half when a specific training course had been completed; and (vi) the workers highlighted the positive attitude of the mining enterprise during the negotiations.

- 796.** With regard to the process carried out by the STIMS to award the rights to collective agreements, the Government encloses information from the Federal Council for Conciliation and Arbitration. It states that the rights to collective agreements were requested by the secretary-general of the SNMM on 28 May 2013, and by the secretary-general of the SNTMMSS on 6 June 2013 (a third trade union also requested the rights but later withdrew its request). The Government affirms that, after a voting list of the 776 trade union workers concerned was displayed, a ballot was held on 21 February 2014, which began at 7 a.m. and ended at 3 p.m. upon the agreement of the three participating trade unions and after 740 persons had voted. The results were as follows: 309 votes for the SNMM, 425 votes for the SNTMMSS, zero votes for the STIMS and six invalid ballot papers.
- 797.** In its communication dated 21 October 2015 the Government states, in response to the allegations of procedural irregularities in the ballot, requirements set out in the legislation and case law of the Supreme Court of Justice of the Nation (150/2008) were fully met. The Government states that in accordance with these requirements the authorities: (a) ensured that the workers entitled to participate were fully identified, through the prior elaboration of voting list; (b) verified that the conditions for the ballot were those necessary for its orderly, swift and peaceful realization, having ensured that the location met the minimum physical and security requirements; (c) ensured that the voting took place in accordance with the principles of freedom, security and secrecy; (d) verified the identity of workers through their official valid credentials; (e) verified that the final counting of the votes was conducted in a public and transparent manner, with the presence of trade union and employer representatives, including representatives of the complainant organization; and (f) with regard to the objections to the ballot procedure and in conformity with the Federal Labour Law, on 28 February 2014 a hearing took place to examine the objections of the SNMM, which were deemed unfounded. The Government indicates that on 11 March 2014, in accordance with the results of the ballot, an award was issued, which awarded the rights to the collective labour agreement to the SNTMMSS. Finally, the Government informs that the SNMM lodged an *amparo* (remedy for the protection of constitutional rights) appeal alleging procedural violations and that the First District Labour Court of the Federal District decided to dismiss the *amparo* appeal on 30 April 2014, as a result of which the matter concluded, confirming the award of the collective bargaining rights in favour of the SNTMMSS.
- 798.** As regards the allegations of assault and threats against members of the SNMM by members of the SNTMMSS, the Government indicates that in the event that workers and representatives of the enterprises had experienced acts of violence, they had access to legal means and resources in order to report the acts to the competent authorities.

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

- 799.** *The Committee notes the complainant organization's allegations that a dispute among trade unions over a procedure to award the rights to collective agreements gave rise to irregularities, interference by public authorities and the enterprises concerned, and acts of violence and threats by another trade union. The Committee takes note of the Government's indication that the authorities addressed the inter-union dispute in accordance with the law and the principles of freedom of association, by acting as mediators in order to facilitate the resolution of a collective dispute and to grant, in a democratic manner, the rights to collective agreements.*
- 800.** *With respect to the allegations of irregularities in the procedure to award the rights to collective agreements and, particularly, in the balloting process (allegations of non-confidentiality in the voting, display of emblems on clothing, and the presence of individuals who had no connection to the vote), the Committee duly notes the explanations of the Government as to compliance with the requirements set out in the legislation and the case law for the ballot procedures and observes that the complainant organization raised its objections before the competent authorities and that its judicial amparo appeal was dismissed, the award of the collective bargaining rights in favour of the SNTMMSS thus being confirmed. Furthermore, regarding the allegations on the presence of other individuals during the ballot, the Committee observes, from the documentation provided by the complainant union, that several of these people were international observers from foreign and international trade unions (AFL-CIO and United Steelworkers), and would like to recall that the presence of international observers in a disputed voting procedure is not contrary to the principles of freedom of association.*
- 801.** *Concerning the allegations of violence (assault and threats, including death threats, in order to prevent the entry into the workplace of members and supporters of the complainant organization, and to intimidate them so that they would not support the SNMM), the Committee takes note that, out of the various alleged acts of violence and threats, the complainant union draws attention to four episodes, in relation to which a complaint has been filed. Moreover, the Committee observes that, although the Government refers to the possibility of lodging appeals, it has not sent specific information on these allegations of violence and threats. While regretting the seriousness of the claims, recalling that trade unions should respect the law of the land, and underlining the importance of the peaceful exercise of trade union rights, the Committee invites the complainant organization to indicate whether it has filed other criminal charges relating to its allegations of threats and acts of violence, and to keep the Committee informed of any decisions handed down by the court.*
- 802.** *As regards the allegations of interference by the Government and the enterprises concerned, the Committee notes the Government's statements that its actions were in line with legislation. Nevertheless, taking into account the divergence between the allegations of the complainant organization and the response of the Government, the Committee invites the complainant organization to provide additional information to support its allegations, including on any judicial actions undertaken in this respect.*
- 803.** *Lastly, the Committee requests the Government to obtain and send the observations of the enterprises in question regarding this case, via the employers' organization concerned.*

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

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



- (a) *Regarding the allegations of violence, while regretting the seriousness of the claims, recalling that trade unions should respect the law of the land, and underlining the importance of the peaceful exercise of trade union rights, the Committee invites the complainant organization to indicate whether it has filed other criminal charges relating to its allegations of threats and acts of violence, and to keep the Committee informed of the court decisions.*
- (b) *As regards the allegations of interference by the Government and the enterprises concerned, the Committee notes the Government's statements that its actions were in line with legislation, and invites the complainant organization to provide additional information to support its allegations, including on any judicial actions undertaken in this respect.*
- (c) *The Committee requests the Government to obtain and send the observations of the enterprises in question regarding this case, via the employers' organization concerned.*

CASE No. 3055

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

**Complaint against the Government of Panama  
presented by  
the Confederation of Workers of the Republic of Panama (CTRP)**

*Allegations: Dismissal of trade unionists, detention of trade unionists and fines for participation in a trade union protest, filing of a criminal complaint for trade union activities, and break-in at the headquarters of the Firefighters' Association of the Republic of Panama*

- 805.** The complaint is contained in a communication dated 19 November 2013 from the Confederation of Workers of the Republic of Panama (CTRP).
- 806.** The Government sent its observations in communications dated 15 May 2014 and 30 January 2015.
- 807.** Panama has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 808.** In its communication dated 19 November 2013, the CTRP alleges that in December 2012 and January and February 2013 the permanent staff of the Fire Service of the Republic of Panama, who are members of the Firefighters' Association of the Republic of Panama, held a number of protests to demand better conditions of work and wage increases which

had been established by law but not implemented by the administration. The protests culminated in agreements signed by the parties concerning observance of the law with regard to wages and the promise by the administration to seek to improve conditions of work for the protestors.

- 809.** The complainant organization indicates that, as part of the protests, over a dozen firefighters announced a hunger strike and took up positions outside a number of fire stations. The administration dismissed all of them. As a result of the pressure of the protest and further to mediation by the Catholic Church, nearly all the firefighters were reinstated, the exceptions being two union members, Mr Cruz Gómez and Mr Raúl Marshall, who were not reinstated on account of being the most belligerent participants in the protest.
- 810.** The CTRP adds that in February 2013, as a result of the protests, the director-general of the Fire Service of the Republic of Panama filed a criminal complaint against the protesters, claiming improper use of institutional property, which was dismissed by the judicial authorities.
- 811.** Furthermore, according to the allegations, in February 2013 the peaceful protest held by the firefighters outside certain stations was dispersed by the national police, which arrested 18 of them and brought them before the administrative police authorities (Corregidor de California), which ultimately fined them for causing public disorder. The fines had to be paid in order to secure their release.
- 812.** The CTRP also adds that the headquarters of the Firefighters' Association was broken into by the administration of the fire service, without any justification and in the absence of its leaders, the doors being forced. As a result of this offence, it was necessary to file a complaint with the competent authorities.
- 813.** The CTRP emphasizes that no regulations have been adopted in the Republic of Panama indicating that firefighters are excluded from exercising freedom of association or engaging in protests. On the contrary, section 192 of the Administrative Careers Act (No. 9 of 1994) includes the fire service among the institutions which are obliged to provide a minimum service during a strike, which implies that the right to strike and hence to freedom of association is recognized for these public servants under the law.
- 814.** The CTRP requests the ILO Committee on Freedom of Association to call on the Government to put an end to the harassment of trade union officials in the public sector and to respect the freedom of association of permanent fire service staff, who are members of the Firefighters' Association of the Republic of Panama, by dropping the measures taken in reprisal against their leaders.

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

- 815.** In its communications dated 15 May 2014 and 30 January 2015, the Government states that when the protests by the Firefighters' Association of the Republic of Panama began in December 2012, the Fire Service of the Republic of Panama was not paying the wage increases prescribed in Act No. 10 of 16 March 2010 since they did not have the budget resources to do so. The Government states that at the end of October 2012 the firefighters announced the submission of a list of 13 points, which received a reply on 29 November 2012, with various acts of protest and demonstration being carried out both previously and subsequently. The Government adds that the protests culminated in the signature of agreements by the parties designed to ensure compliance with the legislation relating to wages and improvements in conditions of work, uniforms, firefighting equipment, vehicles and training, which took effect in 2013 and 2014, as well as improvements regarding promotion, changes of category for candidates, wage standardization – which took effect

according to rank –, bonuses and discounts for operators. The Government also states that seven of the nine individuals dismissed in the wake of the protests of 9 January 2013 were reinstated in their posts after a review by the fire service at the request of the persons concerned, and two trade unionists (Mr Cruz Enrique Gómez and Mr Raúl Marshall) were reinstated later, without any interruption to their period of service.

- 816.** The Government states, in relation to these dismissals, that a number of firefighters announced as part of the trade union protests and demonstrations that they were on hunger strike, taking up positions outside a number of fire stations, and that the demonstrators used firefighting vehicles in an unauthorized manner, grouping all the vehicles together at one depot, using sirens for lengthy periods, holding placards with degrading messages and shouting slogans against the authorities of the institution. During the second wave of protests, there were marches, stoppages, strikes, calls for anarchy and contempt of the authorities, which culminated in the protest of 13 March 2013. This was not a peaceful protest: masked individuals carrying blunt objects made use of service vehicles and blocked the public highway, as a result of which the police were obliged to intervene to restore public tranquillity.
- 817.** The Government adds that the complainant's statement that the criminal complaint filed by the director-general of the fire service against the protestors for unauthorized use of the vehicles of the institution was dismissed by the authorities is only partially accurate, since the competent authorities conducted inquiries of their own in the wake of the complaint and in some cases the prosecutor's office requested a temporary stay of proceedings, so the complaint cannot be considered to have been dismissed by the authorities. On the contrary, the complaint continues to be under investigation, having given rise to the temporary detention of 18 demonstrators and fines for public disorder.
- 818.** As regards the allegation that the Firefighters' Association headquarters was broken into by the fire service administration, with no justification, in the absence of its leaders and with entry having been forced, as a result of which it was necessary to file the criminal complaint, the Government disputes the accuracy of this statement, since the premises were transferred to the National Directorate for Firefighting, Search and Rescue Operations at the request of its director on grounds of insufficient physical space, and this arrangement was duly communicated to the Firefighters' Association, even though its leaders failed to comply with it. The Government adds that the fire service administration knew that the Association had filed a complaint when staff from the Public Prosecution Service came to conduct an on-the-spot inspection; nevertheless, to date no charges have been brought against the fire service administration.
- 819.** In conclusion, the Government points out that it is committed to respecting, promoting and fully applying Conventions Nos 87 and 98 and is striving to strengthen tripartite dialogue mechanisms. Accordingly, it has submitted the present case to the Committee for the rapid handling of complaints relating to freedom of association and collective bargaining with a view to reaching agreement by consensus.

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

- 820.** *The Committee observes that the complainant organization alleges that in the present case anti-union reprisals occurred in the context of a dispute that started in 2012 owing to non-payment of wage increases established by law (a point acknowledged by the Government) and a number of trade union demands relating to conditions of work. The Committee observes that both the complainant and the Government concur that the parties reached agreements which settled the demands from which the dispute had arisen and that the trade unionists who had been dismissed were reinstated in their posts. The Government points out that the dismissals and the temporary detention of 18 demonstrators with the*

*imposition of fines were due to excesses committed by the demonstrators, including the use and accumulation of official vehicles at one station, calls to anarchy, blocking of the public highway, the carrying of blunt objects by masked individuals and various instances of public disorder.*

- 821.** *The Committee notes the complainant's statement that the judicial authorities dismissed the criminal complaint filed by the director-general of the fire service for unauthorized use of official vehicles, while the Government maintains that the complaint is still under investigation and that in some cases the prosecution service requested a temporary stay of proceedings. In view of the fact that the vast majority of the points of dispute were settled through agreements between the parties and taking account of the situation involving a requested temporary stay of proceedings by the prosecution service, the Committee, while acknowledging that there should be no unauthorized use of official vehicles in the context of the exercise of freedom of association, welcomes the submission of the case to the Committee for the rapid handling of complaints relating to freedom of association and collective bargaining (which the Committee recalls is a mechanism that was the result of ILO technical assistance and a tripartite agreement) and suggests, with a view to the full restoration of harmony in labour relations, that, to the extent possible, recourse is had to dialogue, rather than penal action.*
- 822.** *As regards the alleged break-in at the headquarters of the Firefighters' Association of the Republic of Panama, the Committee notes the Government's statement that the transfer of the premises to the National Directorate for Firefighting, Search and Rescue Operations as decided by its director was due to the fact that the directorate had insufficient physical space and that the Association was duly notified of this decision. The Committee observes that, according to the Government's reply, the Association filed a complaint with the prosecution service in relation to the break-in at its headquarters.*
- 823.** *The Committee requests the complainant organization and the Government to inform it of any ruling handed down in this respect and, in view of the damage caused to the Firefighters' Association as a result of the administrative decision which deprived it of its headquarters, invites the Government to take steps, pending the judicial ruling, to provide the Association with premises to facilitate the exercise of its activities.*

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

- 824.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee welcomes the submission of the case to the Committee for the rapid handling of complaints relating to freedom of association and collective bargaining, and suggests, with a view to the full restoration of harmony in labour relations, that, to the extent possible, recourse is had to dialogue rather than penal action.*
  - (b) The Committee requests the complainant organization and the Government to inform it of any ruling handed down with regard to the alleged break-in at the headquarters of the Firefighters' Association and the deprivation of the use thereof to the detriment of the Association, and invites the Government to take steps, pending the judicial ruling, to provide the Association with premises to facilitate the exercise of its activities.*

CASE No. 3019

INTERIM REPORT

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

- **the National Confederation of Workers (CNT)**
- **the Single Authentic Confederation of Workers (CUT–A) and**
- **the Trade Union Confederation of Workers of the Americas (CSA)**

***Allegations: Deficiencies in sanctions procedures of the labour inspectorate in relation to corruption practices, barriers to the creation of trade unions, dismissals of union leaders and members, and obstacles to collective bargaining***

**825.** The complaint is contained in a communication by the National Confederation of Workers (CNT), the Single Authentic Confederation of Workers (CUT–A) and the Trade Union Confederation of Workers of the Americas (CSA) dated 27 December 2012. These organizations presented fresh allegations in a communication dated 17 May 2013.

**826.** The Government sent its partial observations in a communication dated 1 October 2014.

**827.** Paraguay 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**

**828.** In a communication dated 27 December 2012 (received by the Office on 14 March 2013), the CNT, the CUT–A and the CSA allege that the registration of the following trade unions was cancelled: (1) the Union of Workers of the Don Remigio Bakery (SITRAPAN); (2) the Union of Workers of the Paraguayan Glass Factory, SA (SINPAFAVI); (3) the Union of Health Workers of the Maternity and Paediatric Hospital of Limpio (SITRASALIM), a hospital under the responsibility of the Ministry of Public Health; and (4) the Union of Workers of the MAEHARA Enterprise (SINTRAMAE). In all cases, the Ministry of Labour refused the final registration of the unions in response to objections from the employer.

**829.** The complainants further allege that various enterprises dismissed a large number of union leaders and members or carried out other anti-union practices or obstructed collective bargaining: (1) the MAEHARA SA enterprise dismissed union leaders and members simply because they founded the union; the union members were detained by the police for protesting outside the enterprise's premises; (2) the refrigeration enterprise IPFSA does not recognize the union, dismissed its leaders and members, and refuses to negotiate a collective agreement; the dismissals, which resulted from demands to amend the collective agreement in force for workers of the Union of Workers of the Refrigeration Company (SITRAFIASA), affected all the union leaders and members, resulting in the disappearance of the trade union; (3) the PROSEGUR enterprise dismissed 325 workers for setting up a trade union and for demanding the right to bargain collectively; (4) the Grupo La Victoria enterprise dismissed the leaders and members simply because they founded a trade union; (5) the SAECA regional bank disregards freedom of association and refuses to sign the collective agreement; (6) the Social Action Secretariat (SAS) dismissed eight members of

the executive committee of the Union of SAS Workers (SITRASAS); and (7) the multinational ESSO is seeking to destroy the union.

- 830.** The complainants add that, in the public service, over 90 per cent of collective agreements are not registered in practice, owing to the refusal of the Vice-Ministry of Labour to register them.
- 831.** In their communication dated 17 May 2013, the complainants allege that, on repeated occasions, the labour administration of Paraguay has, through the General Directorate of Labour and the Department of Legal Affairs, required participants in union assemblies to attend in person to prove the validity of the signatures of those present, thereby completely undermining the union's autonomy. The Vice-Ministry of Labour and Social Security thus places in doubt the signatures of the participants in union assemblies. In many cases, those concerned have to travel from remote areas of the country to the capital, where the Vice-Ministry's headquarters are located.
- 832.** The complainants state that the Union of Workers of the DORAM SA Enterprise obtained provisional registration by Resolution No. 10 of the administrative authority of the Vice-Ministry of Labour and Social Security on 3 April 2012. In violation of the prohibition on interference by employers in trade union organizations, the employer submitted objections to the labour administration and sought to cancel the union's registration, and the Ministry granted the request in an arbitrary manner. According to the allegations, the Minister of Labour has not yet provided any information on the issue, but workers have been dismissed.
- 833.** With regard to the right to strike, the complainants allege that the Vice-Ministry of Labour does not prevent the entry of workers to replace striking workers, hence employers hire replacements at will and strikes have no effect whatsoever. This is in violation of articles 368 and 369 of the Labour Code and the right to strike guaranteed by the national Constitution. In the event of a strike, the Vice-Ministry should guarantee that only formalized workers who are not participating in the strike are allowed to enter the workplace. The strikes called by the Union of Workers of the ALAMBRA SA Enterprise and the Union of Drivers of the Ciudad Villeta Enterprise illustrate this problem.
- 834.** Lastly, the complainants allege that, when labour inspectors inspect workplaces, they fail to verify the complaints made by union members concerning violations of labour or union rights, or they delay them arbitrarily in the Ministry's offices. Furthermore, procedures for administrative sanctions last one year and are subject to a high level of corruption.

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

- 835.** In its communication dated 1 October 2014, the Government provides a partial reply to the complainants' allegations and transmits the replies of various enterprises concerned.

### ***Denial of final registration of various unions***

- 836.** On the subject of the denial of various unions' final registration, the Government reports that applications for registration are submitted for a period of 30 days, during which time objections may be made, and the labour administration subsequently decides whether to grant final registration. In the case of SITRAPAN, the owner of the enterprise submitted an objection to the provisional registration on the grounds that no employer-employee relationship existed. The trade union was founded on 14 January 2011 but, as a result of a public tendering process, all of the workers were on fixed-term contracts, which had ended on 31 November 2010. The labour administration had notified the applicants of the

objection but had not received any reply from them. Consequently, it decided not to approve the final registration of the trade union. In the case of SINFAPAVI, the enterprise objected that there had been irregularities in the establishment of the union. Having received no reply from the union, the labour administration considered that the legal requirements for the establishment of the union had not been fulfilled. In the case of SITRASALIM, the Government notes that the objections to its final registration were submitted not by the management, but by another trade union of the same institution, the Union of Workers of the District Hospital of Limpio (SITRALIMP), which alleged that documents had been submitted out of time and that some members were ineligible to join the union because they were civil servants who held positions of trust. Although the labour administration considered that SITRALIMP's objections could not form the basis of a challenge, it rejected the final registration of the union on the grounds that SITRASALIM did not comply with the legal requirements because: the articles of incorporation did not state the names of the founding members; the required minimum 20 per cent founding members in a public sector union in institutions of up to 500 employees was not met (only 18 persons of a total of 417 civil servants were recorded as having attended); and the documents submitted were wholly unclear as to the name of the union and used various formulations and acronyms. In the case of SINTREMAE, the MAEHARA enterprise objected that the union did not have the minimum number of members required by article 292 of the Labour Code (20 members for enterprise trade unions). The labour administration had notified the applicant trade union of the objection and, as it had not received a reply, it considered that final registration should not be granted. The union's appeal was denied, as the administration's decision was final.

### ***Allegations of dismissals of trade unionists and other anti-union practices***

837. As to the allegations of dismissals of trade union leaders and members by various enterprises for having established unions and conducted other union activities (the MAEHARA, Grupo La Victoria, PROSEGUR and SAS enterprises), the Government states that the administrative authorities are addressing all of the complaints received and are holding meetings to mediate between the parties. The Government transmits the information provided by the competent administrative authorities in relation to the cases and indicates the meetings and mediation attempts that have taken place. It appears from the documentation provided that an agreement was reached on two individual complaints made against the MAEHARA enterprise, with the offer of payment of accrued wages and of welfare benefits for unfair dismissal sought by the workers concerned. In most of the other cases reviewed by the administrative authorities, the meetings did not result in the resolution of the complaints. The Government also transmits information provided by some of the enterprises concerned. The Grupo La Victoria enterprise states that the reduction in workers as a result of shortages of raw materials had been communicated to the regional labour directorate and that at no point were trade unionists dismissed, given that the four workers who were dismissed were not unionized at the time and only joined the union after the fact. As to the allegations of anti-union dismissals by the SAS, the SAS states that the workers were not dismissed; instead, it had been decided that the contracts of a large number of workers would not be renewed and those affected received notice in accordance with the contract. The SAS also states that the majority of those workers were rehired, in particular the union leaders who enjoyed trade union immunity, and their status was applied. The SAS considers that the labour dispute was resolved as a result. With regard to the PROSEGUR enterprise, the Government states that the enterprise signed a collective agreement that was approved and registered by decision of 10 December 2012, and that the alleged dismissal was the subject of legal proceedings and is before the Committee under Case No. 3010.

838. With regard to the alleged detention of trade unionists for protesting outside the premises of the MAEHARA enterprise, the Government requested a report from the national police force, and states that the leaders of the group of employees blocking the main entrance to the enterprise with pieces of wood were detained. The Government states that the police asked them to go with them to the police station, where they were informed of their detention order in compliance with all legal safeguards, including communication with their lawyers. They were subsequently transferred to another police station, where they continued to communicate freely and were under the responsibility of the Public Prosecutor's Office.

### ***Allegations of enterprises' obstructing collective bargaining***

839. With regard to the allegations of obstructions to the signing of collective agreements, the Government provides information on the outcome of collective bargaining in certain enterprises. The SAECA regional bank, which had a collective agreement that was approved and registered in 2006, negotiated a new collective agreement that was approved and registered by an administrative resolution of 5 January 2012. The ESSO enterprise indicates in a communication dated 26 September 2012 that it has always shown complete willingness to engage in negotiations, that there has never been any obstacles to negotiating a collective agreement with the union and that consensus was reached on a preliminary collective agreement on 20 September 2012. The refrigeration enterprise IPFSA states that it has not reviewed the draft collective agreement submitted by the union because it has, for several years, had fewer than 20 employees (with only 11 at the present time) and consequently does not meet the conditions of article 334 of the Labour Code for a collective agreement to be mandatory. In addition, this enterprise states that not one labour law violation has been determined in any of the inspections carried out in the enterprise.

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

### ***Denial of final registration of various unions***

840. *The Committee observes that the complainants allege that the labour administration denied the final registration of various trade unions without justification. The Committee notes that, according to the Government, in the case of the SITRAPAN union, the denial resulted from an objection from the owner, who alleged that there was no employment relationship as the contract of all of the workers had ended two months prior to the preliminary registration, that they were fixed-term workers as a result of a public tendering process, and that they had not challenged the objection when they had the opportunity to do so. In the case of SITRASALIM, the Committee notes that, according to the Government, the labour administration denied the union's final registration owing to its non-compliance with the legal requirements concerning the inclusion of the names of the founding members, a lack of clarity as to the name of the trade union in the documents submitted, and non-compliance with the minimum number of members – established in section 292 of the Labour Code as 20 per cent for the public sector in institutions of up to 500 employees. In this respect, the Committee wishes to recall the principle whereby “while a minimum membership requirement is not in itself incompatible with Convention No. 87, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered” and “what constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 287]. In the light of this principle, and taking into account the fact that section 292 of the Labour Code, by requiring 20 per cent of workers to be affiliated in public sector institutions of up to 500 employees, could result in a requirement of up to*



100 workers to establish a trade union, the Committee requests the Government to review this provision in consultation with the social partners concerned in order to not, in effect, undermine the right of public sector employees to establish and join organizations of their own choosing. In the case of SINTRAMAE, the Committee observes that its final registration was denied because it did not have the minimum of 20 members required by section 292 of the Labour Code for enterprise trade unions. In the case of SINFAPAVI, the Committee notes that the Government indicates that registration was denied as a result of an objection from the enterprise, which alleged that there had been irregularities in the establishment of the union, but that it has not provided further details. The Committee therefore urges the Government to provide detailed information on the alleged legal irregularities in the establishment of SINFAPAVI which led it to deny the union its final registration. In the light of the numerous allegations of interference by management relying on legal provisions to object to the final registration of trade unions, the Committee invites the Government to review on a tripartite basis without delay the use of employers' powers to contest the registration of unions.

### **Allegations of dismissals of trade unionists and other anti-union practices**

- 841.** *The Committee observes that the complainants make various allegations of dismissals of trade union leaders and members as a result of their having established unions and conducted other trade union activities. The Committee observes that the complainant provided a list of the trade unionists purportedly dismissed by the SAS, but did not provide names or other precise information concerning the other alleged dismissals in the other enterprises. Furthermore, the Committee notes that the Government has provided information on various complaints made against some of those enterprises, and indicates that the administrative authorities are handling the complaints and holding meetings to mediate between the parties. In this connection, recalling that the Committee of Experts on the Application of Conventions and Recommendations has for many years been observing the need to strengthen legal provisions against anti-union discrimination, and that this Committee has in the past requested “the Government, in consultation with the social partners, to ensure effective national procedures for the prevention and sanctioning of anti-union discrimination” [see Case No. 2648, 355th Report, para. 963], the Committee invites the Government to hold consultations with the social partners to establish mechanisms to guarantee effective protection against acts of anti-union discrimination, including rapid and impartial procedures, with provision for appeals and sufficiently dissuasive sanctions. The Committee requests the Government to keep it informed in this respect.*
- 842.** *The Committee also notes in relation to the alleged dismissals by Grupo La Victoria that the enterprise states that the dismissals resulted from a shortage of raw materials, that the regional labour directorate had been informed, and that no trade unionists were dismissed, but that the dismissed workers had joined the union subsequently. With regard to the allegations of anti-union dismissals by the SAS, the Committee notes the explanations of the SAS that the situation was one of expiry and non-renewal of contracts and that the contracts of all union leaders enjoying trade union immunity were later renewed, as were the contracts of most of the workers affected by the non-renewal. With regard to the allegations of anti-union dismissals by the PROSEGUR enterprise, the Committee refers to its examination of the allegations in Case No. 3010 [see 375th Report, paras 438–459]. With regard to the allegations of anti-union dismissals by the IPFSA and MAEHARA enterprises, the Committee observes that the Government refers to the dismissal cases of two employees of the MAEHARA enterprise, who reportedly reached an agreement including compensation, but it is not possible to determine whether those workers were trade union members. As to the IPFSA enterprise, it merely states that no labour law violations have been established in any of the inspections conducted at the*

*request of the union. In the light of the foregoing, the Committee requests the Government to provide further information on the allegations of anti-union dismissals made against the MAEHARA and IPFSA enterprises. In this regard, and taking into account the general nature of the allegations of anti-union discrimination it has received, the Committee invites the complainants to provide additional information so that it may examine those and other allegations of anti-union dismissals and discrimination in greater detail, and to seek the relevant additional observations from the Government.*

**843.** *With regard to the allegation that the ESSO enterprise is seeking to destroy the union, the Committee observes that the complainants do not provide precise information or evidence to substantiate the allegation. The Committee further observes that the enterprise states that it has always shown complete willingness to engage in negotiations and that consensus has been reached on a preliminary collective agreement.*

**844.** *With regard to the allegations of the detention of trade unionists protesting outside the premises of the MAEHARA enterprise, the Committee notes that the Government states that their detention complied with all procedural guarantees, but does not state the grounds for the order to detain them. The Committee firmly expects the Government to provide more information on the grounds for the detention and to keep it informed of the outcome of the resultant proceedings.*

### **Allegations of enterprises' obstructing collective bargaining**

**845.** *With regard to the allegations of obstructions to collective bargaining, the Committee observes that the complainants have not provided precise arguments or evidence concerning the alleged violations of the right to bargain collectively, and notes the information provided by the Government on the outcomes of negotiations in specific enterprises. The Committee notes that the Banco Regional SA negotiated and registered a new collective agreement in 2012; that the ESSO enterprise provides information on progress in the negotiation of a collective agreement; and that the refrigeration enterprise IPFSA has not engaged in collective bargaining because it has fewer employees than the statutory minimum of 20 employees as of which a collective agreement becomes mandatory.*

### **Allegations to which the Government has not replied**

**846.** *The Committee notes with regret that the Government has not sent its observations on the allegation concerning the Ministry of Labour's refusal to register more than 90 per cent of the collective agreements in the public service, or on the complainants' additional allegations dated 17 May 2013 (see paras 7–10 above). Consequently, the Committee requests the Government to provide its observations on the following allegations to which it has yet to reply: (1) procedures of the labour authorities in the event of violations of labour or union rights involving a high degree of corruption and which last one year, failure to deal with complaints made by trade unions, and the labour inspectorate's conducting inspections without the participation of the unions; (2) the Ministry of Labour's refusal to register more than 90 per cent of the collective agreements in the public service; (3) the passive attitude of the labour authorities to the illegal replacement of striking workers by other workers; and (4) the cancellation of the registration of the Union of Workers of the DORAM SA Enterprise. Furthermore, the Committee invites the Government to address these issues in tripartite dialogue with the most representative organizations of employers and workers, and to keep the Committee informed in this regard.*

## The Committee's recommendations

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

- (a) Taking into account the fact that section 292 of the Labour Code, by requiring 20 per cent of workers to be affiliated in public sector institutions of up to 500 employees, could result in a requirement of up to 100 workers to establish a trade union, the Committee requests the Government to review this provision in consultation with the social partners concerned in order to not, in effect, undermine the right of public sector employees to establish and join organizations of their own choosing.*
- (b) The Committee urges the Government to provide detailed information on the alleged legal irregularities in the establishment of SINFAPAVI which led it to deny the union its final registration. Furthermore, in the light of the existence of numerous allegations of interference by management relying on legal provisions to challenge the final registration of unions, the Committee invites the Government to review on a tripartite basis without delay the use of employers' powers to contest the registration of unions.*
- (c) The Committee requests the Government to provide additional information on the allegations of anti-union dismissals made against the MAEHARA and IPFSA enterprises. In this regard, taking account of the general nature of the allegations of anti-union discrimination it has received, the Committee invites the complainants to provide additional information so that it may examine those and other allegations of anti-union dismissals and discrimination in greater detail, and to seek the relevant additional observations from the Government.*
- (d) The Committee invites the Government to hold consultations with the social partners, to establish mechanisms to guarantee effective protection against acts of anti-union discrimination, including rapid and impartial procedures, with provision for appeals and sufficiently dissuasive sanctions. The Committee requests the Government to keep it informed in this respect.*
- (e) The Committee firmly expects the Government to provide more information on the grounds for the detention of trade unionists protesting outside the premises of the MAEHARA enterprise, and to keep it informed of the outcome of the resultant proceedings.*
- (f) The Committee requests the Government to provide its observations on the following allegations to which it has yet to reply: (1) procedures of the labour authorities in the event of violations of labour or union rights involving a high degree of corruption and which last one year; failure to deal with complaints made by trade unions; and the labour inspectorate's conducting inspections without the participation of the unions; (2) the Ministry of Labour's refusal to register more than 90 per cent of the collective agreements in the public service; (3) the passive attitude of the labour authorities to the illegal replacement of striking workers by other workers; and (4) the cancellation of the registration of the Union of Workers of the DORAM SA Enterprise. Furthermore, the Committee invites the*

*Government to address these issues in tripartite dialogue with the most representative organizations of employers and workers, and to keep the Committee informed in this regard.*

CASE No. 3101

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

### **Complaint against the Government of Paraguay**

presented by

- **the National Union of Teachers – National Trade Union (UNE–SN) and**
- **the Central Confederation of Workers Authentic (CUT–A)**

supported by

**Education International (EI)**

*Allegations: Termination of paid trade union leave for trade union leaders and suspension of the deduction of trade union dues for workers who are members of more than one trade union in the education sector*

**848.** The complaint is contained in communications from the National Union of Teachers–National Trade Union (UNE–SN), dated 19 and 30 September 2014, and 29 April 2015, and in a communication from the Central Confederation of Workers Authentic (CUT–A), dated 30 September 2014. In its communication of 19 September 2014, the organization Education International (EI) expressed its support for the claim lodged by UNE–SN, which is affiliated to EI.

**849.** In the absence of observations from the Government, the Committee was obliged to postpone its examination of the case. At its session in June 2015 [see 375th Report, para. 8], 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, 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.

**850.** Paraguay 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**

**851.** In its communication dated 28 August 2014, UNE–SN alleges that, by means of Resolution No. 9726 of 13 June 2014, the Paraguayan Ministry of Education and Culture terminated, in an arbitrary, non-consultative and unilateral manner, the granting of paid trade union leave to teachers with leadership positions in official trade union organizations. The UNE–SN considers that the Resolution undermines the principles of freedom of association and the possibility of performing trade union duties: (i) by granting leave only to teachers who have been registered for five years (Article 2), thus contradicting the provisions of the Labour Code which establish that the status of trade union officials is

subject solely to the decisions made at trade union meetings and to trade union regulations; and (ii) by establishing that leave is granted “without prejudice to the duties performed” (Article 3), which, according to the UNE–SN, allows the employer or higher authority full discretion to grant leave. The UNE–SN also alleges that Circular No. 7/14 of the Ministry of Education and Culture required workers who were on trade union leave when Resolution No. 9726 was enacted to return to their posts at the corresponding educational institutions, and established that workers who did not comply with the orders would be subjected to administrative proceedings for dereliction of duty. Consequently, the majority of the UNE–SN leaders who had been granted union leave returned to their workplaces and two officials (Mr Julio Rafael Benítez González and Mr Juan Carlos Vera Sánchez) were subjected to administrative proceedings, which the UNE–SN considers is proof of the persecution of trade union officials. As a result of Resolution No. 9726, the UNE–SN believes that its organization does not have access to paid trade union leave, which is the only support for trade union organizations provided by the State. The UNE–SN furthermore states that Resolution No. 9726 violated agreements on the granting of leave which had been adopted since 1993 between the Ministry and trade unions, in addition to various ministerial resolutions through which leave had been granted since that time. The UNE–SN adds that, although the most recent leave granted was to expire on 31 December 2013, it had been agreed that this leave would remain in effect until a consensus had been reached, which did not happen as the Ministry adopted Resolution No. 9726 instead.

- 852.** In its communication of 30 September 2014, the UNE–SN includes as further proof of the violation of the principles of freedom of association Ministry of Education and Culture Resolution No. 14787 of 18 September 2014, which establishes that the staff at educational institutions attached to the Ministry would not be paid for the days and hours not worked during a strike that took place on 27–28 August 2014.
- 853.** In its communication of 30 September 2014, the CUT–A, which alleges the continued persecution of trade union leaders in the national education sector, states that the Government has reaffirmed the suspension of current trade union leave, and has demanded, under the threat of sanctions, that leaders come forward within 72 hours for job reassignment.
- 854.** In its communication of 29 April 2015, the UNE–SN alleges that Decision No. 84 of 30 March 2015 of the Legal Advisory Service of the Ministry of Education and Culture establishes that the deduction of trade union dues is not feasible in cases where workers are members of multiple unions, which is against the law. This decision recommends that workers belonging to several trade unions be required to notify their membership of one trade union, and that the aforementioned deductions be suspended throughout the entire duration of the necessary procedures. The UNE–SN considers that the decision violates the obligation of the authorities to refrain from any interference that may circumscribe the right to, and exercise of, freedom of association. The UNE–SN underscores that, instead of seeking a solution with the affected trade unions and applying other criteria such as the most recent trade union membership, the Decision proposes an arbitrary solution which does not take into account time limits and procedures to be followed. The UNE–SN concludes that the Ministry does not have the authority to suspend the deduction of periodical trade union dues without the involvement and consent of the affected parties.

## **B. The Committee’s conclusions**

- 855.** *The Committee deeply regrets that, despite the time that has elapsed since the complaint was presented in 2014, the Government has still not replied to the complainant organizations’ allegations despite having been invited on several occasions to do so, including by means of an urgent appeal [see 375th Report, para. 8]. In these circumstances and in accordance with the applicable procedural rules [see 127th Report,*

para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee finds itself obliged to present, once again, a report on the substance of the case without being able to take into account the information it hoped to receive from the Government. The Committee 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 promote respect for this freedom in law and in practice. The Committee remains confident that, while the procedure protects governments from unreasonable accusations, governments, on their side, will recognize the importance of presenting, for objective examination, detailed replies concerning allegations made against them [see First Report, para. 31].

- 856.** *The Committee notes the complainant organizations' allegations that Ministry of Education and Culture Resolution No. 9726 unilaterally nullifies the right of teachers to trade union leave by requiring them to have been registered for five years and, by stating that leave is granted "without prejudice to the (work) duties performed", it affords employers or higher authorities full discretion when granting leave. The Committee furthermore notes UNE-SN's allegation that Decision No. 84 of 30 March 2015 issued by the Legal Advisory Service of the Ministry of Education and Culture unilaterally establishes the suspension of deductions of trade union dues for workers who are members of more than one trade union.*
- 857.** *In the absence of any response from the Government to the allegations, the Committee wishes to stress that any changes to the scope and exercise of trade union rights should, as a matter of importance, be subject to in-depth consultations with the most representative organizations, in order to find, as far as possible, shared solutions. As regards the substantive issues highlighted in the allegations, the Committee considers that the content of the Resolution raises problems of conformity with the principles of freedom of association by establishing that teachers must have been registered for five years in order to obtain trade union leave and by apparently allowing the authorities excessive discretion when deciding whether to grant such leave. The Committee notes that the restrictions contained in Decision No. 84 of the Ministry's Legal Advisory Service on the deduction of union dues in cases of multiple membership are based on the impossibility, established in section 293(c) of the Labour Code, for workers, even if they have more than one employment contract, to become members of more than one trade union, in either their enterprise, industry, occupation or trade, or institution. This does not comply with the principles of freedom of association, as it unduly impedes the right of workers to join organizations of their own choosing. The Committee recalls that the Committee of Experts on the Application of Conventions and Recommendations has made the same point when examining the application of Convention No. 87 by Paraguay.*
- 858.** *In this context, with regard to the issues raised in this complaint which relate to the aforementioned Resolution and Decision, the Committee requests the Government to initiate dialogue with the most representative organizations affected with a view to finding satisfactory solutions for both parties in terms of trade union leave and the deduction of trade union dues. The Committee requests the Government to keep it informed in this respect.*
- 859.** *As regards the allegations concerning the decision not to pay wages for the days and hours not worked during a strike in 2014, the Committee recalls that "salary reductions for days of strike give rise to no objection from the point of view of the principles of freedom of association" [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 654].*

## The Committee's recommendations

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

- (a) *The Committee deeply regrets that the Government has not replied to the complainant organizations' allegations, despite having been invited on several occasions to do so and despite an urgent appeal in that respect. It therefore requests the Government to be more cooperative in the future.*
- (b) *Observing that the content of the Resolution and the Decision, which are the subject of this complaint, raise problems of conformity with the principles of freedom of association, by establishing that teachers must have been registered for five years in order to obtain trade union leave, by apparently allowing for excessive discretion when granting such leave, and by suspending the deduction of trade union dues in cases of multiple trade union membership, the Committee requests the Government to initiate a dialogue with the most representative organizations affected, with a view to finding satisfactory solutions for both parties concerning trade union leave and the deduction of union dues. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 3096

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

### **Complaint against the Government of Peru presented by the National Union of State Health Service Nurses (SINESSS)**

*Allegations: Restrictions imposed by the State Health Service (ESSALUD) on the exercise of the right to strike by nurses*

**861.** The complaint is contained in a communication from the National Union of State Health Service Nurses (SINESSS) dated 25 July 2014. The union sent new allegations in a communication dated 4 November 2014.

**862.** The Government sent its observations in a communication dated 6 January 2015.

**863.** 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**

**864.** In its communication dated 25 July 2014, SINESSS states that the right to strike is recognized in the National Constitution and that on 21, 22 and 23 May 2014 the launch of a national strike of indefinite duration from 10 June 2014 was unanimously approved and was duly notified to the Ministry of Labour and Employment Promotion on 26 May 2014.

On 10 June 2014, the employer (the State Health Service (ESSALUD)) ordered its various administrative bodies, by Circular No. 22-GC-ESSALUD-2014, not to recognize the pickets and special working days scheduled by the SINESSS action committees under section 82 of the Collective Labour Relations Act (Supreme Decree No. 010-2003-TR), which provides as follows: “When the strike affects essential public services or there is a need to ensure the performance of essential activities, the workers involved in the dispute must guarantee the presence of the necessary staff to prevent a total stoppage and ensure the continuity of services and activities required. On an annual basis and during the first quarter, the enterprises that provide the said essential services shall notify their workers, the trade unions representing them and the labour authority of the number and duties of the workers needed for maintaining the services, hours of work and shifts that they are obliged to perform, and also the intervals at which the respective replacements must be made. The purpose of the present communication is to ensure that the workers or trade unions representing them meet their obligation to provide the respective workforce when the strike takes place.”

- 865.** SINESSS states that the employer failed to duly specify the essential areas in accordance with the law and, in view of the due planning of strike pickets by the trade union for the coverage of crucial services, the authority, failing to act in good faith, ordered its directors and administrative managers to undertake the following anti-union activities:
- (a) provision to be made by chiefs of department and nursing services for external consultations, surgery and general hospital treatment, including minimum services, without due account taken of the fact that those services are not crucial areas or focuses of immediate care whose omission could endanger the lives, health or physical or psychological integrity of patients;
  - (b) the designation of overtime up to a maximum of 108 hours per month per worker, only in the areas of external consultation, surgery and general hospital treatment; the obligation to work extra hours, RPCT, ordinary hospital shifts of more than six and up to 12 hours for ordinary staff covered by the 728/276 labour regulations.
- 866.** The health administration has thus wilfully and arbitrarily circumvented the administrative competencies of the chiefs of department and duty nurses by obliging union members to provide ordinary services, in total disregard of the fact that the latter only have the legal obligation to provide essential services and not ordinary services such as external consultations, surgery and general hospital treatment.
- 867.** The present decision stemmed from the application of Circular No. 022-DEGRAR-ESSALUD-2014 (based on Circular No. 152-GCGP-ESSALUD-2014 applicable to medical and nursing strikes, Executive Decision No. 995-GC-ESSALUD-2013), whereby ESSALUD seeks to redefine all areas of ESSALUD activity as crucial areas contrary to the rules established in previous years on the basis of Executive Decision No. 725-GC-ESSALUD-2002; in other words, union members have been called upon to be present in their ordinary services without observing the strike pickets.
- 868.** The Second Provincial Prosecutor’s Office for Crime Prevention of Lima Judicial District declared that nurses belonging to SINESSS were taking care of crucial areas according to the urgency and gravity of patients’ situations.
- 869.** In the abovementioned Circular No. 022, the ESSALUD administration stated that the management hire duty staff as replacements or through other contractual arrangements such as subcontracting to bridge the labour gap in certain areas. This is a further example of violation of freedom of association inasmuch as the national legislation clearly states in section 25 of the regulations implementing the General Labour Inspection Act (Supreme



Decree No. 019-2006-TR) that any acts shall be null and void that impede the free exercise of the right to strike, where the aim is to replace workers on strike – by hiring or scheduling, either direct hire using contracts of unlimited duration or subject to specific conditions, or indirect hire through agencies or via contracting or subcontracting of works or services – without the authorization of the labour administrative authority.

- 870.** SINESSS adds that it is therefore contradictory that the aim is to hire staff from outside the institution to work in ordinary services, inasmuch as it is well known that in order for the unit to function legally and efficiently the participation of professional nursing staff hired and appointed prior to the strike is required.
- 871.** The complainant organization indicates that on 11 June 2014 the administrator of the Ucayali health-care network, by Letter No. 122-OA-DRAUC-ESSALUD-2014, imposed a ban, without any explanation, on the entry and exit of staff taking part in strike pickets and of all union members who had joined the strike.
- 872.** In view of the intransigence of the authorities with regard to recognizing the restriction on entry of the nurses to the pickets, SINESSS Ucayali filed a criminal complaint with the Second Provincial Prosecutor's Office for Corporate Affairs of Coronel Portillo (Ucayali) on 16 June 2014.
- 873.** On 17 June 2014, the ESSALUD General Manager for Health Benefits ordered scheduling for residents in surgical specialities or sub-specialities and specialist doctors with a view to performing nursing activities in ordinary services without duly providing for the fact that the General Health Act (No. 26842) itself specifies the competencies of each professional, drawing attention to civil liability in the event of failure to perform duties.
- 874.** SINESSS also objects that on 18 and 20 June 2014, by Circulars Nos 1767-GRALA-JAV-ESSALUD and 024-GC-ESSALUD-2014, instructions were given to deduct wages for absenteeism from workplaces on the basis of the declaration of illegality of the strike issued by the Ministry of Labour and Employment Promotion.
- 875.** In its communication of 4 November 2014, the complainant union alleges the rejection of the application for trade union leave from Ms Marcela Guevara González, the union's Social Welfare Secretary, in breach of the rules on trade union leave for health professionals. According to SINESSS, the administration claims that it seeks to avoid conflicts of interest since Ms Guevara González holds the post of Chief Nurse of the Adult Emergency Services, which is a position of trust within ESSALUD and hence it is not appropriate for her to hold a post as a SINESSS official at the same time.

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

- 876.** In its communication dated 6 January 2015, the Government refers to the statements by the Management Board of ESSALUD, indicating that: on 26 May 2014, SINESSS notified the Ministry of Labour and Employment Promotion [Ministry of Labour] of its intention to call a strike. The labour authority, by Executive Decision No. 80-2014-MTPE/2/14 of 27 May 2014, declared that the strike call, which covered all SINESSS members who were subject to the private labour regulations, was unauthorized since it had not met all the requirements laid down in section 72 of the single consolidated text of the Collective Labour Relations Act (Supreme Decree No. 010-2003-TR), a decision which was not appealed against and was therefore valid. Subsequently, after verification that the announced stoppage actually took place, the Ministry of Labour, by Executive Decision No. 89-2014-MTPE/2/14 of 12 June 2014, declared the indefinite national strike of SINESSS to be illegal "for employees subject to the public labour regulations".

- 877.** By Executive Decision No. 92-2014-MTPE/14 of 24 June 2014, the labour authority dismissed the appeal submitted by SINESSS against Executive Decision No. 89-2014-MTPE/2/14 of 12 June 2014, whereby the labour authority had declared the union's strike to be illegal. Furthermore, it declared the administrative channels for these procedures to be exhausted, in accordance with section 218 of the General Administrative Proceedings Act (No. 27444). ESSALUD adds that by Letter No. 188-GCGP-ESSALUD-2014 of 3 June 2013, the representatives of SINESSS were urged to comply with Executive Decision No. 980-GG-ESSALUD-2013 of 18 July 2013, which contains the operational contingency plan for use in the event of a work stoppage by ESSALUD workers. The contingency plan covers all crucial areas of ESSALUD, which must function 100 per cent at national level for the duration of any strike or stoppage called by the unions.
- 878.** The claim made by SINESSS, to the effect that ESSALUD did not notify the labour authority of the number and duties of the workers needed for maintaining services, timetables and shifts, omits the fact that SINESSS was obliged to cater for the crucial areas of the institution; the union was fully aware of that from the abovementioned letter, even before the start of the indefinite national strike. ESSALUD points out that Supreme Decree No. 012-2014-SA of 23 June 2014 approved the arrangements to ensure the provision of health services during the strike.
- 879.** The statements made by SINESSS in its complaint are at odds with the legal standards in force, since the crucial areas established in the contingency plan for work stoppages by ESSALUD workers were approved by Executive Decision No. 980-GG-ESSALUD-2013 of 18 July 2013, which was communicated to all ESSALUD representative bodies and, by Letter No. 188-GCGP-ESSALUD-2014 of 3 June 2014, to the SINESSS General Secretary.
- 880.** In accordance with the legal standards in force, the Management Board, by Circulars Nos 177 and 189-GCGP-ESSALUD-2014 of 9 June 2014 and 26 June 2014, respectively, announced the adoption of essential measures in response to the abovementioned industrial action, to prevent the health services provided by the institution from being substantially affected. Furthermore, it indicated the actions to be taken by staff during the strike, stating, inter alia, that strike pickets did not form part of the health-care programme and were not counted as actual hours worked, and that the crucial areas established in the contingency plan for work stoppages by ESSALUD workers, approved by Executive Decision No. 980-GG-ESSALUD-2013 of 18 July 2013, had to be covered by the staff who were scheduled to work there.
- 881.** Report No. 83-GCGP-ESSALUD-2014 of 29 August 2014 to the Management Board states that after verifying the documentation submitted, in relation to the facts indicated by SINESSS Ucayali, it was concluded that the Ucayali health-care network had taken administrative action in accordance with the regulations in force, with a view to optimizing existing resources and thereby meet the requirements of the said health-care network during the indefinite national strike launched by SINESSS on 10 June 2014.
- 882.** As regards the wage deductions for nurses who participated in the indefinite national strike launched by SINESSS, this does not contravene any legal standards in force, since, according to the law, if no actual work is done, no payment is applicable, especially if the strike has been declared unauthorized and illegal by the labour authority.
- 883.** In the light of the above, ESSALUD took administrative action in line with the legal and administrative regulations in force and did not commit any violation of freedom of association or the right to strike. Nor was there any violation of the right to strike or any harassment of any representative of the unions, especially SINESSS.

- 884.** Articles 7, 10 and 11 of the Constitution of Peru state that Peruvian citizens have the right to protection of their health; that the State recognizes the universal and progressive right of all persons to social security, aimed at ensuring their protection against contingencies specified by the law and improving their quality of life; and that the State guarantees free access to health benefits and pensions through public, private and mixed entities. Moreover, the fundamental rights established in section 51 of the Peruvian Civil Code must be observed, including the right to life, physical integrity, freedom and honour, inherent human rights that are irrevocable, inalienable and protected by law.
- 885.** ESSALUD highlights the fact that through an agreement reached further to an extraordinary meeting between ESSALUD and SINESSS, the indefinite national strike launched on 10 June 2014 was suspended and it was arranged for the workers to be reinstated in their posts as from the first shift on 3 August 2014. ESSALUD observed the fundamental rights established in the abovementioned articles 7, 10 and 11 of the Peruvian Constitution and all fundamental rights as a whole, including trade union rights and the right to collective bargaining.

### C. The Committee's conclusions

- 886.** *The Committee observes that in the present case SINESSS alleges that despite the fact that the Constitution of Peru recognizes the right to strike, the labour administrative authority declared as unauthorized and illegal the indefinite national strike called by the complainant union as from 10 June 2014 on account of non-observance of the 2013 collective agreement by ESSALUD, which took measures to restrict strike pickets, authorize the recruitment of workers to replace the strikers and deduct wages from striking staff members. The Committee observes that, according to ESSALUD and the administrative decisions communicated by the Government, the labour administrative authority claimed that the trade union, apart from failing to meet the formal requirements relating to the strike, did not make the necessary arrangements for the workers needed to prevent a total stoppage and ensure the continuity of services.*
- 887.** *The Committee observes that the complainant organization, for its part, maintains that ESSALUD did not specify at the appropriate time – contrary to the legislation in force – the number and duties of the workers needed or the essential areas concerned; furthermore, according to the complainant, the extension of minimum services went beyond “crucial areas and focuses of immediate care” to include ordinary services; the complainant also indicates that the ESSALUD circulars of 2013 and 2014 conflict with a (higher-ranking) decision of 2002 of the ESSALUD Management Board which limited the services to be maintained in the event of a strike to “crucial areas”. The Committee notes ESSALUD’s statement that: (1) the union was notified in 2013 of the contingency plan for minimum services during work stoppages and ESSALUD, faced with the strike call, adopted and communicated the necessary measures, specifically notifying the parties that the strike pickets did not form part of the health-care schedule and were not recognized as actual hours worked; (2) no representative of the complainant union was harassed; (3) the legislation provides that no wages are payable in the event of a strike; (4) the State is obliged by constitutional mandate to ensure health benefits and, under the Civil Code, to guarantee the right to life and physical integrity. The Committee observes that the nurses’ strike ended with an agreement signed between the parties on 3 August 2014 (which the Government attached to its reply), covering substantive issues which gave rise to the dispute and including the reinstatement of the strikers in their posts.*
- 888.** *The Committee concludes, from the allegations and the reply from ESSALUD, that the parties disagree on the actual observance of the national regulations applicable to minimum services and the extension and scope thereof, and also on whether or not the*

strike was legal. The Committee notes that the strike did not give rise to the initiation of disciplinary proceedings.

- 889.** *The Committee wishes to recall that on numerous occasions [for example, at its March 2014 meeting, see 375th Report, Case No. 3033, para. 763] it has reminded the Government of Peru that responsibility for declaring a strike illegal should not lie with the government but with an impartial and independent body. The Committee again requests the Government, as it has done on previous occasions, to take steps to amend the legislation so that it takes account of this principle.*
- 890.** *Furthermore, as regards the disagreements concerning the content of minimum services, the Committee draws the Government's attention to its decision in a previous case relating to strikes in essential services where authorized under national law: "As regards the legal requirement that a minimum service must be maintained in the event of a strike in essential public services, and that any disagreement as to the number and duties of the workers concerned shall be settled by the labour authority, the Committee is of the opinion that the legislation should provide for any such disagreement to be settled by an independent body and not by the ministry of labour or the ministry or public enterprise concerned" [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 613].*
- 891.** *As regards the issue raised by the complainant regarding the (in its opinion, excessive) scope of the minimum services specified in ESSALUD circulars, the Committee wishes to point out that it is unable to adopt a position on this matter. The Committee recalls as follows: "A definitive ruling on whether the level of minimum services was indispensable or not – made in full knowledge of the facts – can be pronounced only by the judicial authorities, in so far as it depends, in particular, upon a thorough knowledge of the structure and functioning of the enterprises and establishments concerned and of the real impact of the strike action" [see **Digest**, op. cit., para. 614]. The Committee suggests that the disagreements between the parties as to the number and duties of the workers should be settled by an independent body, such as, for example, the judicial authority.*
- 892.** *As regards the allegations concerning wage deductions from strikers for the time not worked, the Committee recalls that "salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles" [see **Digest**, op. cit., para. 654].*
- 893.** *As regards the allegation concerning the hire of non-striking workers, the Committee recalls that it is permitted in the case of essential services such as the health service [see **Digest**, op. cit., para. 632].*
- 894.** *As regards the allegations concerning strike pickets, the Committee is unable to determine from the complaint and the Government's reply whether the expression "strike pickets" refers to pickets providing information at the workplace entrance or to groups of strikers seeking to gain entry into the workplace. The Committee therefore merely recalls its general comments on pickets providing information, as follows: "The action of pickets organized in accordance with the law should not be subject to interference by the public authorities"; "the prohibition of strike pickets is justified only if the strike ceases to be peaceful"; and "the Committee has considered legitimate a legal provision that prohibited pickets from disturbing public order and threatening workers who continued work" [see **Digest**, op. cit., paras 648–650].*
- 895.** *The Committee requests the Government to send its observations on the allegation concerning the refusal to grant trade union leave to union official Ms Marcela Guevara González.*

## The Committee's recommendations

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

- (a) The Committee again requests the Government to take steps to amend the legislation so that responsibility for declaring a strike illegal does not lie with the Government but with an impartial and independent body.*
- (b) Furthermore, the Committee suggests that the disagreements between the parties as to the number and duties of the public service workers in a minimum service should be settled by an independent body, such as, for example, the judicial authority.*
- (c) The Committee requests the Government to send its observations on the allegation concerning the refusal to grant trade union leave to union official Ms Marcela Guevara González.*

CASE No. 3072

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

**Complaint against the Government of Portugal  
presented by  
the General Confederation of Portuguese Workers–  
National Inter-Union Body (CGTP–IN)**

*Allegations: The complainant alleges that various legislative provisions violate the principles of free and voluntary collective bargaining and freedom of association, enshrined in ILO Conventions Nos 87, 98 and 151*

**897.** The complaint is contained in a communication dated 20 March 2014 of the General Confederation of Portuguese Workers–National Inter-Union Body (CGTP–IN).

**898.** The Government sent its observations in a communication dated 10 March 2015.

**899.** Portugal 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

### ***Legislative provisions requiring cuts to wages and other allowances and benefits in the private sector, in the public corporate sector and in the public service***

**900.** *Labour Code.* In its communication of 20 March 2014, the complainant alleges that section 7 of Act No. 23/2012, of 25 June 2012, introduced amendments to the Labour Code that violate the principles of collective bargaining and the provisions of Convention No. 98 by: (i) removing provisions in collective agreements that were in force prior to the Act and established amounts exceeding those in the Labour Code for compensation in the event of collective dismissals and for values and criteria used to determine compensation in the event of contract termination; (ii) cancelling the provisions of collective agreements regarding compensatory leave for overtime on working days, additional weekly days off or public holidays; (iii) reducing by three days the extension of annual leave established under collective agreements signed after 1 December 2003; and (iv) introducing a two-year suspension of overtime pay exceeding the amounts established in the Labour Code and the pay or compensatory leave established in collective agreements for normal work on public holidays in enterprises not required to close on those days, furthermore halving those provisions, up to the limit established in the Labour Code, where they have not been amended during the suspension period. The complainant alleges that, by amending the regulatory provisions of freely agreed collective agreements, declaring them null and void, reducing or suspending them, and indirectly forcing through their renegotiation, section 7 of Act No. 23/2012 violates the principle of free and voluntary bargaining set out in Article 4 of Convention No. 98. The CGTP-IN considers that, with these measures, the public authorities are seeking to make collective bargaining subordinate to the interests and objectives of government policy, against the wishes of the collective parties. Referring to the principles of the Committee on Freedom of Association, it argues that the public authorities cannot impose their decisions unilaterally in collective bargaining. The complainant considers that it has not been demonstrated that restrictive collective bargaining measures are necessary, appropriate or proportional to the crisis that Portugal is going through. It also alleges that those measures do not have the temporary nature required of restrictions on collective bargaining. In relation to overtime, the Act definitively annuls agreement provisions on compensatory leave and reduces, without time restrictions, the increases established in agreements. The provisions in the agreements on compensation for collective dismissal that were in force prior to Act No. 23/2012, granting amounts exceeding those provided in the Labour Code, are also annulled. This is also the case for values and criteria established by collective agreement to determine compensation in the event of contract termination. Likewise, without providing any kind of time restriction, the three-day increase in annual leave established in agreements concluded after December 2003, is annulled. The definitive removal of these collective bargaining provisions through legislation indicates that the restrictions do not relate to the exceptional and transitional situation arising from the economic and social crisis, but that these difficulties are being used as a pretext to erode the provisions of agreements that have been consolidated over decades.

**901.** *Public corporate sector.* The complainant also alleges that Acts Nos 55-A/2010, 64-B/2011 and 66-N/2012, approving the State Budget for the years 2011, 2012 and 2013, respectively, violate the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98, in so far as they apply to workers in public enterprises that are exclusively or mainly constituted with public capital, in public corporate bodies and bodies that are part of the regional or municipal corporate sector. The CGTP-IN indicates that the workers in these enterprises are provided for under the Labour Code and that the budgetary provisions resulted in the reduction of their pay and economic benefits, taking precedence over the provisions established under collective agreement. As regards Act

No. 55-A/2010, the complainant alleges that: (i) section 19 imposed cuts of 3.5 to 10 per cent on the overall gross income of workers earning more than €1,500 a month; (ii) section 28 prohibited fixing and updating the food subsidy above the level established for public service workers; (iii) section 30 provided for the establishment in law of exceptional and temporary provisions relating to the system of remuneration of enterprise employees and workers, and section 31 confirmed this by applying the provisions for public servants concerning food subsidies, daily subsistence allowances, overtime and night work; and (iv) section 32 applied the provisions for public servants concerning overtime and night work, along with the respective cuts, to workers in public foundations or establishments. As regards Act No. 64-B/2011, the complainant alleges that: (i) section 20 maintained the pay cuts and freezes established in Act No. 55-A/2010; (ii) section 21 suspended the payment of annual leave and Christmas allowances or the amounts corresponding to 13th or 14th salaries; (iii) section 30 suspended the provisions on overtime and night work, along with the corresponding cuts, for workers in public foundations or establishments as per provisions for public servants; (iv) section 32 reduced overtime pay (the complainant adds that section 25 of Act No. 23/2012 amended section 268 of the Labour Code, setting the same overtime pay rates, whereby it cannot be considered an exceptional measure); (v) section 33 suspended, during the Economic Adjustment Programme, the right to compensatory leave established in section 229 of the Labour Code and replaced it with less favourable provisions (the complainant also adds that section 25 of Act No. 23/2012 introduced these provisions in section 229 of the Labour Code, whereby they cannot be considered to be an exceptional measure); and (vi) section 34, in relation to National Health Service establishments, which hold the status of public corporate entities, prohibited setting wages exceeding the wages of public servants. As regards Act No. 66-B/2012: (i) section 27 maintained in 2013 the pay cuts already established in section 19 of Act No. 55-A/2010; (ii) section 28 imposed the payment in 12 instalments of Christmas bonuses or allowances corresponding to 13th month pay; (iii) section 29 suspended the payment of annual leave or equivalent allowances for workers with monthly wages exceeding €1,100 and reduced the allowance for those earning €600–€1,100 a month; (iv) section 35 prohibited all pay rises; (v) section 39 maintained the freeze on the food subsidy allowance; (vi) section 40 continued to apply the provisions on overtime and night work, along with the corresponding cuts, to workers in public foundations and establishments, as per the provisions for public servants; and (vii) section 45 again reduced overtime pay for workers whose normal working hours do not exceed seven hours a day and 35 hours a week.

**902.** The complainant highlights that these provisions take precedent over the provisions established in collective agreements and alleges that the public authorities have used the financial crisis as a pretext to limit compliance with freely negotiated collective agreements, violating the principle of free collective bargaining. The CGTP-IN adds that the repetitive way in which these restrictions have been introduced points to a clear intention to erode working conditions and demonstrates that the purported exceptional conditions are lacking, aggravating the violation of the principle of free collective bargaining. The complainant alleges that the pay cuts resulting from these restrictions on collective bargaining coincide with the generalized impoverishment of the Portuguese population and rising precariousness, unemployment and worker vulnerability. It adds that the lack of respect for collective bargaining reduces the scope of trade union action and violates freedom of association, undermining the obligations established under Article 3 of Convention No. 87, by weakening the power and importance of trade unions and by preventing trade unions from organizing their programmes of action freely in order to defend the interests of workers.

**903. *Public service.*** The complainant alleges that, on the pretext of the financial crisis, the aforementioned Acts Nos 55-A/2010, 64-B/2011 and 66-N/2012, approving the State Budget, run counter to the principle of collective bargaining established under Article 7 of

Convention No. 151, by repeatedly using the law to prevent or limit its exercise. The statutory measures amended the provisions established by collective agreement, even though section 353 of the Framework for Collective Bargaining in the Public Service confers precedence, among others, to issues relating to wage supplements. As regards Act No. 55 A/2010 (State Budget for 2011), the complainant alleges that: (i) section 19 introduced cuts to the overall gross wages of public servants exceeding €1,500 a month, and sections 20 and 21 introduced pay cuts for court judges and judges attached to the Public Prosecution Department (and a 20 per cent cut to the benefits established in its statutes); (ii) section 24 prohibited all pay rises, including when related to promotions and career progression, and the allocation of performance incentives; and (iii) section 28 prohibited updates to the food subsidy, which has not been updated since 2008. As regards Act No. 64-B/2011 (State Budget for 2012), the complainant alleges that: (i) section 20 maintained the pay cuts and freezes established under Act No. 55-A/2010; (ii) section 21 suspended the payment of annual leave and Christmas allowances and the amounts corresponding to 13th and 14th month allowances; (iii) section 32 reduced overtime pay; and (iv) section 33 suspended the right to compensatory leave during the Economic Adjustment Programme and replaced it with less favourable provisions. As regards Act No. 66-N/2012 (State Budget for 2013), the complainant alleges that: (i) section 27 maintained the pay cuts under Acts Nos 55-A/2010 and 64-B/2011; (ii) section 28 imposed the payment in 12 instalments of Christmas bonuses or allowances corresponding to the 13th salary; (iii) section 29 suspended the payment of annual leave or equivalent allowances to workers with monthly wages exceeding €1,100 and reduced the allowance for those earning between €600 and €1,100 a month; (iv) section 35 prohibited all pay rises; (v) section 39 maintained the freeze on the food subsidy allowance; and (vi) section 45 again reduced overtime pay in the case of workers whose normal working hours do not exceed seven hours a day and 35 hours a week.

### ***Expiry of collective agreements***

**904.** The complainant alleges that the provisions for the expiry of collective agreements introduced under section 501 of the Labour Code violate the principles enshrined in Convention No. 98. The section provides that the clause in the agreement, which makes the period of its validity dependent on its replacement by another collective agreement, will cease to be effective five years after the contestation of the agreement, the presentation of a proposal for the revision of the agreement containing said clause, or the presentation of a proposal for the revision of the agreement containing the revision of said clause. Where this clause does not exist or has ceased to be effective, when the agreement is contested, it shall remain in force during the subsequent negotiation period or for a minimum period of 18 months (subsequently the agreement will expire 60 days after the notification by one of the parties of the end of negotiations without an agreement). The complainant alleges that, contrary to its duty to adopt measures that are appropriate to the national circumstances to stimulate and promote the full development and use of the voluntary collective bargaining procedures set out in Article 4 of Convention No. 98, the adoption of section 501 of the Labour Code unlawfully interfered in the collective bargaining system, removing clauses which had been freely negotiated in accordance with existing regulatory frameworks. The CGTP-IN considers that the artificial termination, through legislation, of the validity period of clauses or agreements without the support of the parties, violates Article 4 of Convention No. 98.

### ***Choice of the applicable collective agreement by non-member workers***

**905.** The complainant alleges that section 497 of the Labour Code, approved by Act No. 7/2009, introduces an anti-union provision by allowing workers who are not union members to



choose an applicable collective agreement, in violation of the principle of membership established in section 496 of the Labour Code. The CGTP-IN considers that this provision: (i) enables workers who are not union members to benefit from the outcome of collective bargaining while denying this possibility to workers who are members of trade unions that have not signed an agreement; (ii) it allows workers who are not union members to choose the agreement that most benefits them, while union members are automatically bound by the agreement signed by their organization; and (iii) it allows the employer to influence workers' choices and even encourage them to leave their trade unions. Such interference is prohibited under Article 1 of Convention No. 98. The complainant also highlights that under the principle of union membership, the collective agreement does not apply to workers who are members of trade unions that have signed the agreement but work for enterprises that have not signed the agreement or are not members of an employers' association that has signed the agreement. It considers that section 497 of the Labour Code, by treating similar situations differently – in other words, situations in which the principle of union membership is not applied – leads to anti-union discrimination. Accordingly, the complainant considers that this is an anti-union provision that dissuades workers from joining or encourages them to leave trade unions, in violation of Article 8(1) of Convention No. 87.

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

### ***Legal provisions resulting in cuts in wages and other allowances and benefits in the private sector, in the public corporate sector and in the public service***

**906. Labour Code.** In its communication of 10 March 2015, the Government denies that the legislative measures in question are at odds with the principles of freedom of association and collective bargaining. The Government considers that the amendments to the Labour Code, introduced under section 7 of Act No. 23/2012, do not in any way violate Article 4 of Convention No. 98 or the views of the experts in relation to that Article. It explains that Act No. 23/2012 is part of the set of new policies that are needed to generate employment, foster economic growth, quickly overcome the crisis in the country and sustain the national public debt. The Government indicates that the measures introduced under this section not only complied with the Memorandum of Understanding on economic policy conditionality (MoU), of 17 May 2011, between Portugal, the International Monetary Fund (IMF), the European Commission and the European Central Bank, but were also the outcome of an important process of social dialogue that resulted in the Commitment to Growth, Competitiveness and Employment, signed on 18 January 2012, between the Government and most of the social partners on the Standing Committee on Social Dialogue. Moreover, the Government indicates that section 7 of Act No. 23/2012 was the subject of a constitutional review, which led to Decision No. 602/2013 of the Constitutional Court, with the corrections contained in Decision No. 635/2013, in which paragraphs 2, 3 and 5 of section 7 of Act No. 23/2012 were declared unconstitutional, while paragraphs 1 and 4 were declared constitutional. The Government indicates that the right to collective bargaining is a fundamental right of workers enshrined in the Constitution as provided for by the law. According to the information provided by the Government in relation to Decision No. 602/2013, the constitutional review consisted in examining whether the law guaranteed the collective agreement clause (essential content) established by the Constitution and in assessing the level of interference in the scope of protection of the fundamental right to collective bargaining, analysing the compliance of the rights-restricting laws with the Constitution. The Government provides specific comments on each of the paragraphs from section 7.

- 907.** With regard to section 7(1) (removing provisions in collective agreements that were in force prior to Act No. 23/2012 which provided for amounts exceeding those established in the Labour Code for compensation in the event of collective dismissals and for values and criteria used to determine compensation in the event of contract termination), the Government indicates that the Commitment to Growth, Competitiveness and Employment established the terms for reviewing the legal framework governing compensation in the event of employment contract termination in order to bring due compensation into line with the European Union average, stipulating that the legal framework governing compensation would take precedence over collective agreements and employment contracts. Moreover, by not declaring section 7(1) unconstitutional, Decision No. 602/2013 established that “as regards, in particular, the amounts of compensation to award, the framework does not preclude in any way collective bargaining, but rather, limits it according to constitutionally relevant interests”, that section 7(1) sought to “limit the scope of the relevant right, not to interfere with the so-called collective agreement clause” and, therefore, did not infringe upon the right to collective bargaining. In conclusion, the Government considers that section 7(1) did not violate Article 4 of Convention No. 98 or the principles of collective bargaining, as the workers’ and employers’ organizations had been duly consulted and the settlement reached had been the result of agreements between the Government and most of the social partners on the Standing Committee on Social Dialogue, namely, the aforementioned Commitment to Growth, Competitiveness and Employment and the Tripartite Agreement on Competitiveness and Employment.
- 908.** With respect to section 7(4) (suspending for two years overtime (additional hours) pay exceeding the amounts established in the Labour Code and the compensation or compensatory rest established in collective agreements for normal work on public holidays in enterprises not required to close on such days), the Government indicates that the Commitment to Growth, Competitiveness and Employment states that its signatories agree “to halve the current amounts owed for overtime laid down in employment collective regulatory instruments or employment contracts” and that “for two years, as from the entry into force of the law that provides for these reductions; the legal limits, with the reduction included, take absolute precedence over any type of employment collective regulatory instrument or employment contract”. The Government also indicates that Decision No. 602/2013 established that section 7(4) was not unconstitutional, by finding that “this suspension, in the light of its purpose and temporary nature, also appeared to be appropriate, necessary and balanced, as it safeguarded constitutionally relevant interests such as the fulfilment of the goals and commitments made internationally in the framework of the MoU and the very competitiveness of the national economy during a particularly difficult period for national enterprises”. The Government therefore considers that section 7(4), the outcome of a broad consensus from a social dialogue reached by most of the social partners, obeys both the letter and spirit of Article 4 of Convention No. 98.
- 909.** With regard to section 7(2) (cancelling the provisions of collective agreements concluded before the entry into force of the law, which relate to compensatory rest for overtime on business days, additional weekly days off or public holidays), section 7(3) (reducing by three days the increases in annual leave established under collective agreements concluded after 1 December 2003) and section 7(5) (halving, up to the limit established in the Code, the values for overtime pay and compensation or compensatory rest, where the provisions have not been amended during the two-year period of suspension), the Government indicates that while these provisions found support in the Commitment to Growth, Competitiveness and Employment, Decision No. 602/2013, with the corrections contained in Decision No. 635/2013, declared them unconstitutional, and they were expressly repealed under Act No. 48-A/2014.
- 910.** *Public corporate sector.* With regard to the allegations that Acts Nos 55-A/2010, 64-B/2011 and 66-N/2012, approving the State Budget for the years 2011, 2012 and 2013,

respectively, violate the principle of free and voluntary collective bargaining and threaten freedom of association, the Government refers to the reports on Convention No. 98 presented to the ILO, particularly to the fact that the pay cuts to wages exceeding €1,500 a month affect the public sector in general and that the Government considered it of the utmost importance to align the public corporate sector with the public administration when cutting costs, maximizing operational efficiency and optimization, and reducing cost structures. The Government also indicates that the Constitutional Court decided not to declare sections 19–21 of Act No. 55 A/2010 (State Budget for 2011) unconstitutional. The Government states that Decision No. 396/2011 recognized that it “was acceptable for this to be a legitimate and necessary way, in the current context, of cutting public expenses, with a view to rebalancing the budget” and that “those who are paid with public funds are not in the same position as other citizens, and thus the additional sacrifice required of such persons ... does not constitute unjustifiably unequal treatment”. As regards Act No. 64-B/2011 (State Budget for 2012), the Government indicates that the Constitutional Court ruled in Decision No. 353/2012 that sections 21 and 25 (suspending the payment of annual leave and Christmas allowances of, inter alia, workers in the public corporate sector) were unconstitutional, but that the effects of their unconstitutionality were not applicable to the suspension of payment of allowances for the year 2012, so as to avoid jeopardizing the solvency of the State. With regard to Act No. 66-N/2012 (State Budget for 2013), the Government indicates that Decision No. 187/2013 of the Constitutional Court declared section 29 (suspending, above a certain amount, under the Economic Adjustment Programme, the payment of annual leave and 14th salary allowances) unconstitutional since it violated the principle of equality. The Government indicates, however, that the Constitutional Court did not find sections 27 (maintaining pay cuts) or 45 (on compensation for overtime) unconstitutional and that, with regard to a possible violation of the right to collective bargaining, in relation to other legal provisions, it ruled that, given the public interest pursued “it does not appear from the obligation imposed on the ordinary legislator always to leave a set of minimally significant areas open to collective bargaining, that an argument can be made for the mandatory constitutional annulment of the budgetary laws which, based on this public interest, establish an exceptional and temporary decrease in the annual remuneration of workers in the public sector”. The Government considers that, given the temporary and exceptional nature of the measures taken, which do not affect the remuneration of workers who earn below a certain amount, such measures cannot be considered to violate Article 4 of Convention No. 98.

- 911.** *Public service.* With regard to the complainant’s allegations that Acts Nos 55-A/2010, 64-B/2011 and 66-N/2012, approving the State Budget, run counter to the principle of collective bargaining established under Article 7 of Convention No. 151, the Government recalls that these laws were reviewed by the Constitutional Court. The Government states that Decision No. 396/2011 found that “the pay cuts seek to protect the public interest, which should prevail” and that they were “essentially circumstantial financial policy measures to combat an emergency situation, adopted by the legislative body that was duly elected according to the democratic principle of popular representation”. The Government considers that the temporary and exceptional measures established in the budgetary laws relating to working conditions in the public service addressed a set of circumstances without violating the principle established in Article 7 of Convention No. 151.

### ***Expiry of collective agreements***

- 912.** In relation to the allegations that the provisions on the expiry of collective agreements introduced by section 501 of the Labour Code violate the principles enshrined in Article 4 of Convention No. 98, the Government states that in Portugal collective autonomy is the governing principle, without prejudice to the obligation to negotiate or the principle of good faith. It indicates that the revision of the Labour Code under Act No. 7/2009 was preceded by proposals included in the White Paper on Labour Relations, which argued that

there was a need for expiry provisions, as the possible imposition of an agreement extension on one of the parties against their will would undermine the autonomy of the parties. Reiterating information provided in its report to the ILO on Convention No. 98 for the period 2009–12, the Government indicates that the Constitutional Court, in its Decision No. 338/2010, found that the expiry provisions were not unconstitutional and did not violate the right to collective bargaining. The Court found that the legislative body could legitimately impose limits or restrictions on the duration of collective agreements, provided it could be justified without undermining the basic core of the right, and that it was necessary to consider the arguments for the expiry provisions and against the alternative system, which was unilateral perpetuity. The Government therefore considers that, once a certain period has elapsed, regardless of the existence of a clause which makes the termination of the agreement conditional on replacement by another collective regulatory instrument, the expiry of the collective agreement should respect the negotiating autonomy of the parties and comply with the provisions of Article 4 of Convention No. 98. Moreover, the Government states that these expiry provisions were adopted by tripartite agreement on the basis of social dialogue (the Tripartite Agreement on a New System of Labour Regulations, Social Protection and Employment) concluded on 25 June 2008 between the Government and most of the social partners.

### ***Choice of the applicable collective agreement by non-member workers***

- 913.** With regard to the complainant's allegations that section 497 of the Labour Code is an anti-union provision in that it allows workers who are not union members to choose the applicable collective agreement, the Government indicates that this individual membership option was put forward by the White Paper on Labour Relations Committee. Furthermore, the Government states that the Tripartite Agreement on a New System to Regulate Labour Relations, Employment and Social Protection Policies, concluded on 25 June 2008 between the Government and most of the social partners, in relation to the revision of the Labour Code, made explicit provision for individual membership of existing collective agreements for non-member workers, as well as for regulating, through collective bargaining, the payment of contributions for signatory trade unions in the event of individual membership of collective agreements. The Government also refers to the report it presented to the ILO on Convention No. 98 for the period 2009–12, in which it indicated that the provision was declared constitutional in Decision No. 338/2010 of the Constitutional Court. This decision, in response to allegations that section 497 promoted non-membership and weakened trade unions, found that the provision did not violate trade union rights or the right to collective bargaining. The Government highlights that in the decision, the Court reiterated the fact that collective agreements are often applicable through extension regulations to non-member workers and that collective agreements may require workers who have signed them to pay a fee to the trade unions, which can make membership more beneficial. As to the allegations of discriminatory effects, the Government states that the principle of collective autonomy applies, which includes the right to sign agreements, and that the trade unions know how duly to represent the interests of their members. With regard to the allegations that employers may influence workers' choice of agreement or their resignation from trade unions, the Government considers that any effort to influence workers by an employer would constitute a violation of the provisions of the Constitution and the Labour Code and would be punishable. The Government therefore does not consider that section 497 introduces an anti-union provision that violates Article 8 of Convention No. 87.

## C. The Committee's conclusions

- 914.** *The Committee observes that in this case the complainant alleges the introduction of a series of legislative provisions, in the context of serious economic crisis, which impinge upon the exercise of the right to collective bargaining in the private and public sectors, furthermore preventing the application of clauses of collective agreements currently in force. According to the complainant, it has not been demonstrated that the restrictive measures on collective bargaining are necessary, appropriate or proportional to the crisis.*
- 915.** *The Committee takes note of the declarations made by the Government regarding the need to react urgently and adopt relevant measures to deal with a very serious economic crisis, and of its declarations in which it considers that the measures adopted do not violate the provisions of Conventions Nos 87, 98 and 151. The Committee also takes note of the declarations of the Government according to which these measures were taken to generate employment, foster economic growth and sustain national public debt, in compliance with the MoU signed by Portugal, the IMF, the European Commission and the European Central Bank.*
- 916.** *The Committee understands that several of the measures to deal with the crisis raised in this complaint have been submitted to tripartite consultation and discussion in the Standing Committee on Social Dialogue of the Economic and Social Council. The Committee observes that, as indicated by the documentation on social dialogue referred to by the Government, while one of the two trade union confederations represented on this Committee supported many of these measures by signing up to the Commitment to Growth, Competitiveness and Employment and the Tripartite Agreement on a New System of Labour Regulations, Social Protection and Employment, the complainant, which is the other trade union confederation on the Standing Committee, did not support these tripartite agreements and raises several objections to them in its complaint. However, the Committee observes that the Government does not refer to consultations with the trade union confederations regarding the legal provisions that significantly reduce wages and other benefits in the public corporate sector and in the public service. The Committee wishes to highlight the importance of social dialogue in the process of adopting legislation, which may have an effect on workers' rights, including those intended to alleviate a serious crisis situation. The Committee encourages the Government to continue promoting social dialogue in relation to the measures taken to deal with the crisis and other issues relating to workers' rights outlined in the complaint, with a view to finding, to the fullest possible extent, solutions agreed by the most representative organizations. The Committee requests the Government to keep it informed in this regard.*
- 917.** *As it has done in recent cases of restrictions on collective bargaining as a consequence of economic crises, the Committee should recall that: "While it is not its role to express a view on the soundness of the economic arguments invoked to justify government intervention to restrict collective bargaining, the Committee must recall that measures that might be taken to confront exceptional circumstances ought to be temporary in nature having regard to the severe negative consequences on workers' terms and conditions of employment and their particular impact on vulnerable workers." [See 365th Report, Case No. 2820, para. 995 and 317th Report, Case No. 2947, para. 464.]*
- 918.** *The Committee observes that some of the legal provisions to which the complainant has taken objection have been declared unconstitutional and expressly repealed by the Government, in particular: paragraph 2 (cancelling compensatory or supplementary leave), paragraph 3 (reducing annual leave), and paragraph 5 (halving, up to the legal limit, overtime pay and compensatory allowance or leave) of section 7 of Act No. 23/2012; sections 21 and 25 of Act No. 64-B/2011 (suspending the payment of annual leave and*

*Christmas allowances; and section 29 of Act No. 66-N/2012 (temporary suspension of annual leave and 14th salary).*

- 919.** *The legal provisions that have not been declared unconstitutional by the Constitutional Court are examined in the three sections below.*

**Legal provisions that have not been declared unconstitutional involving cuts to wages and other allowances and benefits**

- 920. Labour Code.** *The complainant alleges that Act No. 23/2012 introduced amendments to the Labour Code that violate the principles of collective bargaining. The Committee notes that the Government denies the allegations and highlights that these provisions were discussed in consultation with the trade unions and are based on a national tripartite agreement which was signed by one of the two trade union confederations represented on the Standing Committee on Social Dialogue, where the complainant is the other represented confederation, and that they were declared constitutional by the Constitutional Court. The Committee notes that the Government declares more specifically that: (i) the review of the provisions for compensation in the event of the termination of an employment contract introduced under section 7, paragraph 1 (removing provisions in collective agreements, in force prior to the Act, which provided amounts exceeding those established in the Labour Code for compensation in the event of collective dismissal, and the values and criteria used to determine compensation in the event of the termination of the contract, which are less favourable to the workers, according to the complainant) was agreed with the majority of the social partners participating in the Standing Committee on Social Dialogue, with the objective of aligning due compensation with the European Union average; and (ii) that the suspension established in section 7, paragraph 4 (two-year suspension of overtime pay exceeding the provisions in the Labour Code and the compensatory payment or leave provided in collective agreements for normal work on public holidays in enterprises not required to close on those days) resulted from broad consensus based on social dialogue, having been agreed on by the majority of the social partners and being limited to a period of two years. The Committee observes that these legislative provisions annul provisions of collective agreements on compensation for collective dismissal and termination of contracts, and they suspend for a period of two years certain provisions regarding overtime pay and compensatory payments or leave for work.*

- 921. Public corporate sector.** *The Committee notes that the complainant alleges the use of legislation to impose cuts in wages and other allowances and benefits (for example cuts of 3.5 to 10 per cent in the overall gross remuneration of workers earning more than €1,500 a month under the acts approving the budgets for 2011, 2012 and 2013) of workers in publicly-owned enterprises where the capital is exclusively or mainly public, public corporate entities and entities which are part of the regional or municipal corporate sector. The complainant alleges that these provisions limit the negotiating capacity of the parties and annul clauses of collective agreements currently in force. The complainant also alleges that these legislative provisions apply to the public corporate sector, which is governed by the Labour Code, some of provisions of the public service framework, which are less favourable than those set out under collective agreement. The Committee notes that the Government considered that it was of utmost importance to align the public corporate sector with the public service in terms of cutting expenses, maximizing operational efficiency, and reducing cost structures, and that the Constitutional Court recognized that those who were paid with public funds were not in the same position as other citizens. In this regard, the Committee highlights the importance of making these changes to working conditions the subject of in-depth consultation with the most representative organizations in the sector. The Committee also notes that the Government*

highlights the temporary and exceptional nature of the measures taken and that some of them do not affect workers with lower wages (cuts to overall gross wages do not affect workers earning less than €1,500 a month), whereby they cannot be considered to be in violation of Article 4 of Convention No. 98.

**922. Public service.** As regards public servants, the complainant alleges that the Acts approving the State Budget for 2011 to 2013, violate the principle of collective bargaining established under Article 7 of Convention No. 151 by amending the agreements regarding wages and other allowances and benefits provided under collective agreement (the budget Acts provide for cuts of 3.5 to 10 per cent to the overall gross income of workers earning more than €1,500 a month). In response to these allegations, the Government considers that the temporary and exceptional measures established in the budget acts in relation to working conditions in the public service sought to address a particular set of circumstances and therefore did not violate the principle established in Article 7 of Convention No. 151.

**923.** In general, and while it recognizes that governments are entitled to adopt emergency measures to address situations of serious economic crisis, the Committee highlights that the measures taken included the suspension, removal or amendment of provisions in force under collective agreements. The results of these measures include cuts to wages and other allowances and benefits. In this regard, the Committee wishes to recall, as it has done in recent cases relating to measures taken in the context of economic crisis [see 365th Report, Case No. 2820, para. 990, and 317th Report, Case No. 2947, para. 463], the following principles: that “state bodies should refrain from intervening to alter the content of freely concluded collective agreements”, that “[collective] agreements should be binding on the parties” and, in relation to the measures affecting workers’ wages, that “if, 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 workers’ living standards” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 1001, 939 and 1024]. Finally, the Committee recalls that, if a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force [see 365th Report, Case No. 2820, para. 995].

**924.** In these circumstances, and considering that the measures reported in this complaint are challenged by a part of the trade union movement and involve cuts to wages and other allowances and benefits, in the light of the aforementioned principles, the Committee invites the Government to carry out a joint evaluation with the most representative employers’ and workers’ organizations to determine the impact that the legislative provisions adopted, regarding wages and other allowances and benefits, have on the exercise of trade union rights and in particular the right to collective bargaining, with a view to ensuring that exceptional measures adopted in the context of a crisis are not perpetuated. The Committee requests the Government to keep it informed in this regard.

### **Expiry of collective agreements**

**925.** The complainant alleges that the provisions for the expiry of collective agreements introduced by section 501 of the Labour Code interfere unlawfully with the legal framework on collective bargaining in that they affect the validity of collective agreements, providing that, after a certain amount of time, the clauses that make the period of validity of an agreement dependent on its replacement by another collective agreement cease to be

effective. The Committee observes that under section 501: (i) these agreement clauses cease to be effective five years after the last full publication of the agreement, the contestation of the agreement or the presentation of a proposal for the revision of the agreement, including a revision of the clause in question; and (ii) where no such clause exists or if it has ceased to be effective, when the agreement is contested it shall remain in force during the subsequent negotiation period, or for a minimum period of 18 months (subsequently the agreement will expire 60 days after the notification by one the parties of the end of negotiations without an agreement). The Committee notes that the Government reports that the new provisions were adopted by tripartite agreement achieved through social dialogue with the support of the majority of the social partners, and that the purpose of that section is to ensure respect for the negotiating autonomy of the parties and avoid unilateral systems which would enable one of the parties to impose an agreement indefinitely. The Committee also takes due note of the decision by the Constitutional Court which did not consider the legislative provisions unconstitutional.

### **Choice of the applicable collective agreement by non-member workers**

**926.** *The Committee notes that the complainant considers that section 497 of the Labour Code, in that it allows workers who are not union members to choose applicable collective agreements, is an anti-union provision which dissuades people from becoming union members, encourages them to leave trade unions, introduces discrimination between workers and allows the employer to influence the workers' choice of applicable agreement and to encourage them to leave trade unions. The Committee notes that in its reply the Government indicates that: (i) this option of individual accession, suggested by the White Paper on Labour Relations Committee and approved by a tripartite agreement with the majority of the social partners, was declared constitutional by the Constitutional Court, which ruled that the section did not violate trade union rights or collective bargaining; (ii) the Constitution and the Labour Code safeguard against any attempt at anti-union discrimination; (iii) this is not a case of discrimination among workers but of the application of the principle of autonomy; and (iv) there is nothing stopping collective agreements from providing for payments to non-member workers who sign up to a particular collective agreement.*

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

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

- (a) Recognizing the social dialogue efforts made by the Government and, at the same time, observing the disagreement of one of the trade union confederations on the Standing Committee on Social Dialogue of the Economic and Social Council, the Committee encourages the Government to continue promoting social dialogue in relation to the measures taken to deal with the crisis and other issues relating to workers' rights outlined in the complaint, with a view to finding, to the fullest possible extent, solutions agreed by the most representative employers' and workers' organizations. The Committee requests the Government to keep it informed in this regard.*
- (b) Taking into consideration that the measures referred to in this complaint are challenged by a part of the trade union movement and involve cuts to wages and other allowances and benefits, in the light of the principles outlined in the conclusions, the Committee invites the Government to carry out a joint*



*evaluation with the most representative employers' and workers' organizations on the impact of the legislative provisions adopted, regarding wages and other allowances and benefits, on the exercise of trade union rights and in particular the right to collective bargaining, with a view to ensuring that exceptional measures adopted in the context of a crisis are not perpetuated. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 3067

INTERIM REPORT

**Complaint against the Government of the Democratic Republic of the Congo presented by**

- **the Congolese Labour Confederation (CCT)**
- **the Union Espoir (ESPOIR)**
- **the National Union of Teachers in Registered Schools (SYNECAT)**
- **the Union of State Agents and Civil Servants (SYAPE)**
- **the National Trade Union for the Mobilization of Agents and Civil Servants of the Congolese State (SYNAMAFEC)**
- **the Union of Workers – State Agents and Civil Servants (UTAFE)**
- **the National Union of Agents and Civil Servants in the Public Sector (SYNAFAR)**
- **the General Trade Union of the State and Para-State Finance Administration, and Banks (SYGEMIFIN)**
- **the Trade Union of Congo Workers (SYNTRACO)**
- **the State Civil Servants and Public Agents Trade Union (SYFAP) and**
- **the National Board of State Agents and Civil Servants (DINAFET)**

*Allegations: The complainants denounce government interference in union elections in the public administration, intimidation, and the suspension and detention of trade union officials with the backing of the Ministry of Public Service*

**928.** The complaint from 16 trade unions, namely the Congolese Labour Confederation (CCT), the Union Espoir (ESPOIR), the National Union of Teachers in Registered Schools (SYNECAT), the Union of State Agents and Civil Servants (SYAPE), the National Trade Union for the Mobilization of Agents and Civil Servants of the Congolese State (SYNAMAFEC), the Union of Workers – State Agents and Civil Servants (UTAFE), the National Union of Agents and Civil Servants in the Public Sector (SYNAFAR), the General Trade Union of the State and Para-State Finance Administration, and Banks (SYGEMIFIN), the Trade Union of Congo Workers (SYNTRACO), the State Civil Servants and Public Agents Trade Union (SYFAP), and the National Board of State Agents and Civil Servants (DINAFET) is attached to the communications dated 15 April 2014 and 6 February 2015.

- 929.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case on two occasions. At its June 2015 meeting [see 375th Report, para. 8], the Committee issued 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, 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 due time. To date, the Government has not sent any information.
- 930.** 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 Workers' Representatives Convention, 1971 (No. 135).

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

- 931.** In their communications dated 15 April 2014 and 6 February 2015, the complainants denounce the interference, with impunity, of the Government as employer, in trade union activities, particularly intimidation and disciplinary measures against trade union officials, and the adoption of contentious regulations concerning the organization of trade union elections in the public administration aimed at the establishment of an inter-union association under the control of the Government as the sole representative.
- 932.** The complainants state that the trade unions active in the public administration fall into two inter-union associations: the national inter-union body for the public sector (INSP) and the independent trade unions of the public administration (SIAP). The Government and the two trade union associations in question signed a Memorandum of Understanding on 2 February 2011 on the decisions and recommendations of the joint Government–trade union commission for the reform of the public administration. In 2013, however, negotiations were blocked owing to disagreement over several issues (working conditions of staff and officials, readjustment of specific allowances for staff and officials of the Ministry, standardization of allowances for specific functions to the disadvantage of Ministry staff, etc.) in an atmosphere in which the trade unions present faced intimidation and trade union meetings were prohibited. The complainants denounce the fact that the Ministry of Public Service had issued several communications aimed at agents and officials, as well as trade unions, prohibiting trade union meetings in front of the Ministry, under penalty of sanctions, even though trade union elections were planned for the near future.
- 933.** According to the complainants, the Government intended to take advantage of the elections in the public administration to limit the freedom of association of state agents and civil servants and stifle the INSP and the SIAP activities by specifically supporting the trade unions under its control. To that end, throughout 2013, the Ministry of Public Service adopted, without consultation, a series of regulatory texts on trade union activities in the public administration, which restricted trade union action. Those texts include the decree of 8 March 2013 on the favourable opinion and registration of various trade unions in the public sector, the decree of 19 April 2013 on the provisional regulation of trade union activities in the public administration, the decree of 1 July 2013 supplementing the decree of 19 April 2013, and the decree of 1 July 2013 on the Electoral Code regarding trade union elections in the public administration.
- 934.** The complainants denounce in particular the decree of 1 July 2013, article 44 of which provides for the establishment, following trade union elections, of a national public administration inter-union association (INAP), whose members are appointed by the heads of the central and provincial services units. The complainants allege that in practice the texts adopted by the Ministry of Public Service were designed to place trade unions under

the control of the Ministry in order to influence the appointment of the INAP members. The ultimate objective was to set up the INAP as the sole representative of the administration in collective bargaining and to stamp out the voice of the inter-union associations already established (note of 22 March 2014 from the Secretary-General responsible for the assets of general secretaries of the public administration and general directors of public services).

- 935.** The trade union elections in the public administration took place between August and September 2013, but only within central services and despite the complaints concerning irregularities lodged by the complainants on 2 and 19 August 2013 before the General Labour Inspectorate. The results of the elections were published through the decree of 24 October 2013. The INAP members were therefore appointed by the elected members of the central services who represent a minority in the public administration, all of which is in violation of the Electoral Code. Furthermore, only 23 of the 64 trade unions which won seats during the elections make up the new inter-union association, which is not therefore representative of the functions performed by all state employees, let alone their numbers.
- 936.** Furthermore, according to the complainants, the leaders of the INAP are neither state agents nor civil servants but rather members of the majority political party in power. The complainants express surprise at the fact that, when the INAP was established, the leaders were given special badges by the Minister for Public Service carrying his signature as employer. This demonstrates that the Ministry considers that these elected representatives are not under the authority of their respective trade unions. Furthermore, the complainants allege that the Ministry of Public Service has not provided the founding document of the INAP and also note that there is no document concerning handover arrangements between the INSP and the INAP as the representative association for collective bargaining.
- 937.** The complainants denounce the fact that, as a result of the restriction on trade union activities, the trade union officials, Mr Nkugi Masewu, Mr Ghislain Embusa Endole Yalele, President of the Espoir Union and the INSP General Rapporteur, and Mr Joseph Zagabe Muhimanyi, the UTAFE Secretary-General and the Deputy General Rapporteur of the SIAP, have been subjected to disciplinary proceedings and unfair suspensions by the Minister for Public Service on grounds of, inter alia, carrying out irregular trade union activities within the INSP in violation of the decrees adopted in 2013. The organizations state that the real reason for these suspensions is the fact that complaints were lodged with the Office of the Prime Minister concerning violations of freedom of association by the Ministry of Public Service. Mr Muhimanyi and Mr Endole Yalele, after having received three months' suspension without pay in a disciplinary case, filed a complaint before the Court of Appeal for violation of the statutory period for a decision on a disciplinary case.
- 938.** Furthermore, the complainants denounce the intimidation and harassment of trade union members throughout 2013, particularly the abduction and detention of four trade union officials in the Lufungula national police camp on the grounds of inciting rebellion and disturbing public order on 12 and 13 July 2013. The officials involved were Mr Modeste Kayombo-Rashidi, CCT Secretary-General, spokesperson of the SIAP and rapporteur of the standing committee for follow-up on the decisions and recommendations of the joint Government–trade union commission; Mr Jean Bosco Puna Nsasa, SYNECAT Secretary-General and deputy spokesperson of the SIAP; Mr Pierre Patrice Mwembo Lumumba, head of the SYNTRACO, and Mr Sébastien Dagobert Nkungi Masewu, SYAPE Secretary-General and rapporteur of the SIAP.
- 939.** The complainants add that Mr Jean Bosco Puna Nsasa was once again arrested on 26 November 2014, along with Mr Sylvain Kabuya Mwamba, a UTAFE member and public servant, during the SIAP general assembly in Golgotha square in front of the public

service building (a usual meeting point for trade unions), a meeting which was prohibited by the Minister for Public Service.

- 940.** Lastly, according to the complainants, Mr Modeste Kayombo-Rashidi, CCT Secretary-General, received death threats from the INAP Secretary, Mr Constant Lueteta. Mr Kayombo-Rashidi filed a complaint with the Kinshasa/Gombe prosecution authorities but it was not followed up.
- 941.** The complainants state that the administrative and judicial remedies they used to report and remedy the widespread trade union rights' violations have been ignored. The remedies included: (i) a hierarchical appeal before the Prime Minister against the transitional regulation orders on trade union activities and other related regulations issued by the Minister for Public Service (14 July 2013); (ii) a complaint before the Attorney-General's Office against the Minister for Public Service, particularly for the abduction of trade union members and violation of articles 56, 62, 64, 66 and 122 of the Constitution (14 July 2013, 14 February and 3 March 2014); (iii) a complaint against the trade union elections in the public service before the General Labour Inspectorate (2 and 19 August 2013); (iv) an application before the Supreme Court of Justice to annul the transitional regulation orders on trade union activities and other related regulations issued by the Minister for Public Service (25 February 2014); and (v) an administrative appeal before the Prime Minister relating to the restriction on freedom of association and the right to organize (13 April 2014).
- 942.** Overall, the complainants denounce the Government's refusal to engage in sustainable social dialogue on the reform of the public administration provided for in the Memorandum of Understanding of 2 February 2011 freely signed by the Government and the trade unions of the public administration.

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

- 943.** *The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the complainants' allegations, even though it has been requested several times to present its comments and observations on this case, including through an urgent appeal. The Committee urges the Government to be more cooperative in the future.*
- 944.** *Under these circumstances, and in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without being able to take account of the information which it had hoped to receive from the Government.*
- 945.** *The Committee recalls that the purpose of the whole procedure instituted by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for those rights in law and in practice. The Committee is confident that, while the 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].*
- 946.** *The Committee notes that this case concerns the interference, with impunity, of the Government as employer, in trade unions activities, particularly intimidation of, and disciplinary measures against, trade union officials, and the adoption of contentious regulations concerning the organization of trade union elections in the public*

administration aimed at the establishment of an inter-union association under the control of the Government as its sole representative.

**(i) Interference by the authorities in trade union activities**

947. The Committee notes the indication that the trade unions active in the public administration fall into two inter-union associations: the INSP and the SIAP. The Government and the two trade union associations in question signed a Memorandum of Understanding on 2 February 2011 on the decisions and recommendations of the joint Government–trade union committee for the reform of the public administration. In 2013, however, negotiations were blocked owing to disagreement over several issues. According to the complainants, the atmosphere was also tense because of harassment of trade union members and the prohibition of trade union meetings ordered by the Ministry of Public Service (communications by the Ministry provided with the complaint).
948. According to the complainants, the Government wanted to profit from the public administration elections in order to restrict the freedom of association of state agents and civil servants and stifle the INSP and the SIAP action by openly supporting trade unions under its control. To that end, throughout 2013, the Ministry of Public Service is alleged to have adopted, without consultation, a series of regulatory texts on trade union activities in public administration in order to restrict trade union action. Those texts included the decree of 8 March 2013 on the favourable opinion and registration of various public sector trade unions (according to the allegations, these trade unions were in fact controlled by the Government (copy of the decree was not provided with the complaint)), the decree of 19 April 2013 concerning the provisional regulations on trade union activities in the public administration, the decree of 1 July 2013 supplementing the decree of 19 April 2013 and the decree of 1 July 2013 concerning the Electoral Code on trade union elections in the public administration. The Committee recognizes the different nature of the professional relationships in the public sector due to the State playing the role of both the employer and the legislator, which could potentially cause difficulties. It is all the more important for the State to be aware of criticism that questions its subjectivity. One of the ways to avoid such criticism is to consult with employers' and workers' organizations during the drafting and implementation of legislation that affects their interests. The Committee also underlined that full and frank consultations should take place on all issues or drafts related to legislative provisions that affect trade union rights [see **Digest of decisions of the Committee on Freedom of Association**, fifth (revised) edition, 2006, para. 1079]. Where it is alleged that the aforementioned successive decrees of the Ministry of Public Service were adopted without consulting the relevant workers' organizations despite having a fundamental impact on trade union activities and the exercise of collective bargaining in the public service, and in the absence of a reply from the Government, the Committee urges the Government to take without delay the necessary steps so that these texts are reviewed in consultation with the relevant workers' organizations. The Committee requests the Government to keep it informed in this regard.
949. The Committee observes that the complainants specifically denounce the decree of 1 July 2013 concerning the Electoral Code on trade union elections in the public administration, in which article 44 provides for the creation of a "national public administration inter-union association" (INAP) following trade union elections where "members are appointed by the presidents of the central and provincial services units". The complainants allege that the Ministry of Public Service registered trade unions that were under its control through the decree of 8 March 2013 so that their elected members could influence the appointment of INAP members as provided for by the Electoral Code. The ultimate objective was to make the INAP the sole administrative representative for collective bargaining and to silence the existing inter-unions associations, which was made official

by a note dated 22 March 2014 from the Secretary-General responsible for the assets of the general secretaries of the public administration and general directors of public services (copy of the note was provided with the complaint).

- 950.** *The Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element of freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those they represent. Public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and formulate their programmes. Furthermore, employers, including public authorities playing the role of employers, should recognize relevant representative workers' organizations for collective bargaining purposes [see **Digest**, op. cit., paras 881 and 952]. The Committee believes that in order to maintain harmonious professional relationships in the public sector, respect of the principles of non-interference, the recognition of the most representative organizations and party autonomy in negotiations is required. The Committee therefore expresses concern that a provision, adopted without consulting the relevant organizations, imposes a unique structure of representation of workers' interests for sharing and negotiating with the administration. Such a situation does not ensure peaceful professional relationships. Consequently, the Committee urges the Government, in addition to reviewing the 2013 decrees, to hold, without delay, consultations with all the relevant representative workers' organizations, particularly the INSP and the SIAP, on ways of representing workers' interests in terms of collective bargaining in public administration. The Committee requests the Government to keep it informed in this regard.*
- 951.** *Furthermore, noting the allegations of the complainants that the Ministry of Public Service did not provide the INAP's founding document nor the handover document between the INSP and the INAP as representative association for collective bargaining, the Committee requests the Government to report its observations on this matter and provide the aforementioned documents.*
- 952.** *Finally, the Committee notes with concern allegations related to the disciplinary action aimed at the trade union leaders Mr Nkugi Masewu, Mr Ghislain Embusa Endole Yalele, President of the Espoir Union and the INSP General Rapporteur, and Mr Joseph Zagabe Muhimanyi, Secretary-General of the UTAFE trade union and SIAP Deputy General Rapporteur, for having taken part in unlawful trade union activities within the INSP, which is in violation of the 2013 decrees. In this regard, the Committee emphasizes that one of the fundamental principles of freedom of association is that workers must enjoy adequate protection against all acts of anti-union discrimination in respect of their employment – dismissal, transfer, demotion or other prejudicial measures – and that this protection is particularly desirable for trade union representatives, seeing as they must have a guarantee that they will not be subjected to prejudice on account of their trade union positions in order to be able to fulfil their trade union duties completely autonomously. The Committee believes that guaranteeing similar protection for trade union leaders is therefore necessary to ensure the respect of the fundamental principle according to which workers' organizations have the right to freely elect their representatives [see **Digest**, op. cit., para. 799]. Besides other reasons which may warrant disciplinary sanctions being imposed, the Committee is concerned by the fact that the Ministry documents provided in the complaint state that one of the reasons for taking disciplinary action against Mr Ghislain Embusa Endole Yalele and Mr Joseph Zagabe Muhimanyi was simply that they were carrying out their trade union mandates. The Committee expects the Government to issue immediate instructions so that trade union members who are exercising their rightful trade union duties in public administration cannot be subjected to prejudice in the workplace and so that those responsible for these*

acts are punished. Furthermore, the Committee urges the Government to conduct investigations on the disciplinary action cases against the aforementioned trade union leaders in order to determine if they were punished for carrying out the lawful exercise of their trade union activities and, if appropriate, to award compensation that sufficiently discourages further unlawful disciplinary action. Furthermore, noting that Mr Muhimanyi and Mr Endole Yalele filed a complaint before the court of appeal for the violation of the legal time limit for concluding a disciplinary case, the Committee urges the Government to keep it informed of the result of this complaint.

**(ii) Intimidation and harassment measures against trade union leaders**

- 953.** *The Committee notes with deep concern the allegations related to intimidation and harassment against several trade union leaders in 2013, particularly the arrests and detention of Mr Modeste Kayombo-Rashidi, CCT Secretary-General, SIAP spokesperson and rapporteur of the standing committee for follow-up on the decisions and recommendations of the joint Government–trade union commission; Mr Jean Bosco Puna Nsasa, SYNECAT Secretary-General and SIAP deputy spokesperson; Mr Pierre Patrice Mwembo Lumumba, head of SYNTRACO; and Mr Sébastien Dagobert Nkungi Masewu, SYAPE Secretary-General and SIAP rapporteur, at the Lufungula national police camp on the grounds of inciting rebellion and disturbing public order on 12 and 13 July 2013. The Committee notes with concern the indication that Mr Jean Bosco Puna Nsasa was arrested once again on 26 November 2014, along with Mr Sylvain Kabuya Mwamba, UTAFE member and public servant, during the SIAP general assembly held in Golgotha square in front of the public service building (a usual meeting point for trade unions), a meeting which was prohibited by the Minister for Public Service. The Committee, recalling that workers’ and employers’ rights can only be exercised in an environment free of violence, pressure or threats of any kind against organization leaders and members and that the Government must guarantee the respect of this principle [see **Digest**, op. cit., para. 44], urges the Government to conduct without delay an investigation into these serious allegations in order to determine the circumstances behind the arrests and detention of trade union leaders in July 2013 and November 2014, and to keep it informed of the findings and follow-up action.*
- 954.** *The Committee notes that Mr Modeste Kayombo-Rashidi, CCT Secretary-General, allegedly received death threats from Mr Constant Lueteta, INAP Secretary, and that the subsequent complaint that he filed with the Kinshasa/Gombe prosecution authorities was not followed up on. The Committee cannot understand why the authorities did not address the particularly serious complaints and urges the Government to keep it informed of the status of the complaint.*
- 955.** *Further noting with concern that the complainants denounce the fact that the administrative and judicial remedies they used to report and remedy the widespread violations of trade union rights have been ignored, the Committee underlines that excessively long administrative procedures can create an environment of insecurity and influence the exercise of trade union rights. The Committee requests the Government to inform it of the follow-up given to the following remedies: (i) the hierarchical appeal before the Prime Minister against the transitional regulation decrees on trade union activities and other related legislation issued by the Minister for Public Service (14 July 2013); (ii) a complaint before the Attorney-General’s Office against the Minister for Public Service, in particular the abduction of trade union members and violation of articles 56, 62, 64, 66 and 122 of the Constitution (14 July 2013, 14 February and 3 March 2014); (iii) a complaint against trade union elections in the public service before the General Labour Inspectorate (2 and 19 August 2013); (iv) an application before the Supreme Court of Justice to annul the transitional regulation decrees on trade union*

activities and other related legislation issued by the Minister for Public Service (25 February 2014); and (v) an administrative remedy before the Prime Minister in relation to the restriction of freedom of association and the right to organize (13 April 2014).

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

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

- (a) The Committee regrets that the Government has not replied to the complainants' allegations, despite being requested several times, including through an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.*
- (b) The Committee urges the Government to take without delay the necessary steps related to the contested 2013 decrees adopted by the Ministry of Public Service in order to review them in consultation with the relevant workers' organizations. The Committee requests the Government to keep it informed in this regard.*
- (c) The Committee urges the Government, in addition to reviewing the 2013 decrees, to hold, without delay, consultations with all the relevant representative workers' organizations, particularly the INSP and the SIAP, on ways of representing workers' interests in terms of collective bargaining in public administration. The Committee requests the Government to keep it informed in this regard.*
- (d) The Committee requests the Government to provide the INAP's founding document and the handover document between the INSP and the INAP and to report its observations on the matter.*
- (e) The Committee expects the Government to issue immediate instructions so that trade union members who are exercising their rightful trade union duties in public administration cannot be subjected to prejudice in the workplace and so that those responsible for these acts are punished. Furthermore, the Committee urges the Government to conduct investigations on the aforementioned disciplinary action cases against trade union leaders in order to determine if they were punished for carrying out the lawful exercise of their trade union activities and, if appropriate, to award compensation that sufficiently discourages further disciplinary action.*
- (f) Noting that Mr Muhimanyi and Mr Endole Yalele filed a complaint before the appeals court for the violation of the legal time limit for concluding a disciplinary case, the Committee urges the Government to keep it informed of the result of this complaint.*
- (g) The Committee urges the Government to conduct without delay an investigation into the circumstances behind the arrest and detention of trade*



*union leaders in July 2013 and November 2014 and to keep it informed of the findings and follow-up action.*

- (h) The Committee urges the Government to keep it informed of the status of the complaint filed by Mr Modeste Kayombo-Rashidi with the Kinshasa/Gombe prosecution authorities against Mr Constant Lueteta, INAP Secretary, for having made death threats.*
- (i) The Committee urges the Government to inform it of the follow-up given to the administrative and judicial remedies brought by the complainants.*

CASE NO. 3113

INTERIM REPORT

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

- the Federation of Somali Trade Unions (FESTU)**
  - the National Union of Somali Journalists (NUSOJ)**
- supported by  
the International Trade Union Confederation (ITUC)**

*Allegations: the complainant organizations allege serious threats, acts of intimidation and reprisals against members and leaders of the National Union of Somali Journalists (NUSOJ) and the lack of adequate responses by the Federal Government of Somalia*

**957.** The complaint is contained in the joint communication of the Federation of Somali Trade Unions (FESTU) and the National Union of Somali Journalists (NUSOJ) dated 28 December 2014, supported by the International Trade Union Confederation (ITUC) in a communication of 17 February 2015.

**958.** The Government sent its observations in a communication dated 11 May 2015.

**959.** The Federal Republic of Somalia 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**

**960.** In their communications dated 28 December 2014, and 17 February 2015, the complainant organizations allege serious threats, acts of intimidation and reprisals against members and leaders and the lack of adequate responses by the Federal Government of Somalia.

**961.** By way of background, the complainants recall that Somalia joined the ILO in 1960 and therefore accepted the fundamental principles embodied in the ILO Constitution and the Declaration of Philadelphia, including the principles of freedom of association. In March 2014, the Federal Government of Somalia ratified Conventions Nos 87 and 98, and its

Prime Minister, Mr Abdiweli Sheikh Ahmed Mohamed, emphasized that the “Government is fully committed to institutionalizing tripartite dialogue” and that “trade unions aspire to participate in the social and economic policy-making processes. Their voices need to be heard in national social dialogue as they call for a fair environment where they enjoy equal opportunities.” The complainants also refer to article 16 of the Provisional Constitution of the Federal Republic of Somalia on freedom of association and article 24 of the same text on labour relations, including: (i) the right to fair labour relations; (ii) the right to form and join a trade union and to participate in the activities of a trade union; (iii) the right to strike; and (iv) the right of trade unions, employers’ organizations or employers to engage in collective bargaining regarding labour-related issues.

- 962.** The complainants explain that FESTU and NUSOJ leaders and officials as well as their members are facing regular abuses and violations of freedom of association and trade union rights by the Government. Freedom of association continues to be grossly, systemically and systematically violated in Somalia. As a result of this denial, workers in general and union members in particular, suffer the loss of voice and representation in workplaces and on issues affecting their interests and well-being. Government authorities have been undermining the independence, credibility, integrity and legitimacy of the trade union movement. Somali union members and leaders, in particular those of FESTU and the NUSOJ, have suffered varying degrees of persecution, harassment and intimidation by government agencies, including frequent arbitrary arrests and interrogations of trade unionists. FESTU and the NUSOJ are therefore demanding the respect and enjoyment of their right to freely organize, represent and associate.
- 963.** In particular, while documenting their allegations with various government letters, the complainants mention the following facts and legal obstacles.
- 964.** Trade union activities: The Ministry of Information, Posts and Telecommunications (referred to hereinafter as the Ministry of Information) has interfered in the NUSOJ’s right to carry out peaceful trade union activities with the legitimate purpose of defending the occupational interests of its members. In November 2014, the Ministry of Information stopped a two-day conference organized by the NUSOJ to mark the International Day to End Impunity for Crimes against Journalists. Just as participants reported and began registering for the conference, the Minister of Information, Mr Mustaf Sheikh Ali Dhuhulow, through the National Intelligence and Security Agency Mogadishu Branch, ordered an immediate halt to the activities, citing the presence of “foreigners” at the activities as a security threat and that the meeting had not been approved by the Ministry of Information. However, all procedures had been followed with regard to the attendance of two international representatives of the African Freedom of Expression Exchange (AFEX). Furthermore, the Ministry of National Security approved the arrival of the delegation, following the NUSOJ’s formal request, and wrote to the Directorate of Immigration and Nationalities, requesting that visas be issued for the two. On 1 November 2014, the Deputy Minister of Information, Mr Abdullahi Olad Roble, held a press conference in which he referred to the presence of the two AFEX representatives in Somalia as “illegal” and that they had instructed security authorities to investigate them.
- 965.** Arbitrary interrogation of trade unionists: On 7 September 2014, Mr Omar Faruk Osman, General Secretary of FESTU and the NUSOJ, was summoned by the Attorney General who informed him that he and other union officials would face charges under the Penal Code, including “supplying information to a foreign power” and “undermining the integrity and reputation of the government.” Ultimately, no charges were brought against the trade unionists, though the threat of prosecution had a chilling effect on the unions. Earlier in November 2011, armed police, without any warrant, raided the NUSOJ’s offices and arrested NUSOJ organizing secretary Abdiqani Sheik Mohamed. He was interrogated by police and the Criminal Investigations Directorate (CID), but was finally released and

warned that police would continue criminal investigations against the union without specifying any grounds. Trade unionists, members of Parliament and civil society protested at the CID against the systematic arbitrary interrogation of NUSOJ representatives in retaliation for exercising their legal and legitimate rights.

- 966.** Threats: The Government has not taken adequate measures to ensure that workers can exercise their rights in a climate that is free from violence, pressure or threats of any kind against union members. From 2 to 19 September 2013, death threats and intimidation against executive committee members of FESTU increased rapidly. Dates and times of the threats, names of targeted trade union officials and messages delivered to the union leaders were submitted to the CID, which failed to investigate the threats. FESTU believes that hired militias who use contract killings in the capital city were hired as mercenaries. On 28 September 2013, about three hours ahead of a meeting scheduled by FESTU with ten affiliated unions about the increase of intimidation and death threats, a bomb was found to be buried at the entrance of FESTU's office. This was reported to the police who came and removed the bomb but made no effort to investigate who may have planted it.
- 967.** Travel restrictions against trade unionists: Mr Omar Faruk Osman, General Secretary of the NUSOJ and FESTU, had been invited by the Ministry of Labour and Social Affairs to attend the Arab Labour Conference in Cairo as a Worker representative. However, Mr Omar Faruk Osman was stopped by immigration officials when he attempted to board the plane to Cairo on 12 September 2014. He was told that the Office of the Attorney General had issued an arrest warrant against him but could not be provided with written proof. Finally, the office denied issuing an arrest warrant and informed the immigration department that Mr Omar Faruk Osman was free to travel.
- 968.** Interference in internal union affairs: The Ministry of Information made defamatory statements about the democratically elected General Secretary of the NUSOJ in order to undermine the findings of the report "Lives and Rights of Journalists under Threat." On 24 January 2012, the Ministry of Information issued a press statement falsely claiming that Mr Omar Faruk Osman had been removed from his post "for mismanagement and misappropriation of funds" and that the interim leadership of the NUSOJ "brought a court case" against him. These accusations are unfounded in their entirety and are clearly intended to mislead the public and to undermine the credibility of the report. Mr Osman has been the General Secretary of the NUSOJ since 2006 and there has never been a court case against him for misappropriating union funds. In any case, the right to freedom of association implies that unions have the right to decide for themselves the rules which should govern their administration, including the rules concerning eligibility for union office. Any internal disputes should be resolved on the basis of the union's own constitution and without interference from public authorities.
- 969.** Recognition of NUSOJ union leaders: The Ministry of Information refuses to recognize the democratically elected leadership of the NUSOJ with Mr Omar Faruk Osman as its General Secretary and propels a puppet in order to undermine credibility and integrity of the union. The Ministry had written letters to legalize puppet leadership when it has no legal entitlements to do so. The NUSOJ, like any other trade union, shall receive such recognition as a legal trade union from the Ministry of Labour, according to the Labour Code, not from the Ministry of Information. The Ministry of Information must therefore refrain from interfering in the internal affairs of the NUSOJ, imposing someone outside as union leaders in particular when the objective is to trample on the right to freedom of speech.
- 970.** Inadequacy of Somalia legal framework: Somalia legal framework is extremely inadequate when it comes to the guarantee of the right to freedom of association. In fact, the labour law imposes serious obstacles on trade unions. The right to freedom of association is

entrusted in the Provisional Constitution of the Federal Republic of Somalia, and in Part II of the Labour Code of 1972, which imposes limitations on the freedom of choice of trade union structure, the right to draw up constitutions and rules, and the right to elect representatives in full freedom, the right to freely organize activities and formulate programmes as well as on the subjects covered by collective bargaining. The Labour Code also imposes excessive requirements for the establishment of unions and allows for the dissolution and suspension of trade unions.

- 971.** In particular, Somali legislation infringes workers' rights to freely determine the structure and composition of their union. Workers should have the right to form unions consisting of workers from different workplaces and cities. However, section 10 of the Labour Code provides that workers may establish unions "in the same occupation, trade or industry." Section 19 of the same text establishes that trade unions may appoint committees in accordance with the provisions of their constitutions or rules "Provided that persons so appointed shall ... be those who are actually working in the same occupation or trade or in related occupations or trades." These provisions imply that workers employed in different occupations and sectors may not establish and join the same union and therefore impede on the right of workers to decide on the composition of their union freely.
- 972.** The minimum legal requirement for the number of founding members of a union is excessively high and poses a considerable hindrance to the unionization of workers. Section 10 of the Labour Code provides that a union shall have a minimum of 50 members. At the same time, Somalia's economy is by and large informal and the majority of the population is engaged in small-scale businesses. Thus, large parts of the workforce are unable to meet this requirement given the structure of the Somali labour market and are therefore excluded from the right to freedom of association at their workplace.
- 973.** Legal provisions allow for interference in the internal administration of unions and exceed the obligation to submit periodic reports to public authorities. Section 13 of the Labour Code requires union rules to include a clause that would allow the inspection of the books and names of members by every person having an interest in its funds. This provision leaves a wide discretion to public authorities to carry out inspections and request information at any time constituting a risk for the guarantee of the right to organize their internal administrations without any constraints.
- 974.** The law allows the Government to interfere in the functions of trade unions. Section 17 of the Labour Code specifically provides that the functions of unions shall include, "facilitating the normal performance of state enterprises and participation of workers in the planning and management of such enterprises; and ensuring increase of production and labour discipline." This provision restricts workers' rights to freely organize activities as it imposes certain goals which can prevent unions from defending the interests of their members by obliging them to reinforce the country's political and economic systems.
- 975.** Section 27 of the Labour Code provides that the Government has the power to dissolve any trade union, the activities of which are considered to be detrimental to the interests of the workers or against the spirit of the revolution. This means that it is the Government that has the competence to dissolve a union instead of an independent and impartial judicial body and that unions are deprived of their right of defence through due process of law. By making the existence of unions conditional on their level of conformity with the broad concept of "the spirit of the revolution", the legislation prevents the development of free and independent trade unions that are able to challenge socio-economic policies without the threat of dissolution.
- 976.** Finally, the legislation provides restrictions on the scope of issues that can be negotiated through collective bargaining. Section 32(2) of the Labour Code provides that the contents

of a collective labour agreement shall take into account the State's revolutionary social policy, the role of trade unions and the responsibility of workers for increasing in every possible way the national production and their participation in the planning and management of national economy. Section 33(j) specifies that collective agreements shall specify measures promoting workers participation in the management of the undertaking. According to section 42(1), employment relationships governed by decisions of a public authority in accordance with law shall not be subject to regulation by collective labour agreement. The employment relationship can only be regulated through "special collective agreements" which are tripartite and it is the Ministry of Labour that has the right to take initiative and consult with workers and employers. The employment relationship can have serious implications on the working conditions of workers and thus the exclusion of this issue from collective bargaining negotiations seriously infringes the rights of workers.

- 977.** The Labour Code was adopted in 1972 during the military dictatorship of President Siad Barre. It is evidently largely insufficient to protect the right to freedom of association of workers and to establish sound industrial relations in Somalia. Numerous sections explicitly interfere in fundamental rights and must be amended.
- 978.** In conclusion, the complainants note that although the Government claims to be committed to tripartism and to recognize the importance of the right to freedom of association for the socio-economic development of Somalia, both practices and laws contradict these promises and perpetuate the systematic violation of the rights of Somali union members and leaders.
- 979.** They call the Committee to urge: (i) the Ministry of Information to recognize the democratically elected leadership of the NUSOJ, including current General Secretary Mr Omar Faruk Osman, and cease any interference in the internal affairs of the union; (ii) the Government to cease arbitrary travel restrictions against the NUSOJ and the FESTU leadership in order to exercise the right to freedom of movement, and to end halting of meetings organized by trade unions so that union members and leaders enjoy the right to freedom of assembly; (iii) the security authorities to end their practice of arbitrary arrests, intimidations and interrogations, and to ensure that trade unionists under investigation have access to their due process rights; and (iv) the Government to investigate and punish threats and attacks against trade unionists; and to amend the legislation in consultation with the social partners to guarantee that it provides adequate protection for the right to freedom of association.

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

- 980.** In its communication dated 11 May 2015, the Government indicates that certain government officials transgressed their duties, infringed freedom of association and assembly and interfered into internal trade union activities of the NUSOJ and FESTU, creating problems for union members and obstructing trade union work and independency. The Government is aware of obstruction of journalist union meetings by security agents and the Ministry of Information in November 2014.
- 981.** According to the Government, the ILO must be cognizant that for a labour union to exist lawfully in Somalia it must be allowed and approved by the line Federal Ministry. By this, the NUSOJ leadership must be approved by the Ministry of Information to operate officially. Anyone not accepted by the Ministry of Information is an illegal NUSOJ leader. In the same vein, FESTU top direction and operations must be allowed and approved by the Ministry of Labour and Social Affairs, without which it is an out of law organization and its actions are considered unlawful.

982. The Office of the Attorney General and the CID have been pursuing Mr Omar Faruk Osman and his team for rebuking officials at the Ministry of Information and publicly claiming that they are the true leaders of the NUSOJ whereas their leadership is not recognized by the Ministry of Information. Such investigations and interrogations occasioned immigration authorities to decline Mr Omar Faruk Osman occasionally to travel abroad.
983. Moreover, while the preceding Minister of Labour, Mr Luqman Ismail, and his Government had recognized FESTU under the leadership of Mr Omar Faruk Osman, the new Minister of Labour, Mr Abdiweli Ibrahim Sheikh, has decided to withdraw recognition and approval of Mr Osman's leadership. The Minister is a policy-maker and the Ministry follows his decision.

### C. The Committee's conclusions

984. *The Committee notes that the complainants in this case allege serious threats, acts of intimidation and reprisals against members and leaders of the NUSOJ and the lack of adequate responses by the Federal Government of Somalia. While mentioning that freedom of association continue to be grossly, systemically and systematically violated in Somalia, the complainants mainly allege the following violations of freedom of association: (i) on 24 January 2012, the Ministry of Information made a defamatory statement about the General Secretary of the NUSOJ and the General Secretary of FESTU, Mr Omar Faruk Osman – this interference in NUSOJ internal affairs is still continuing as the Ministry of Information is refusing to recognize its democratically elected leadership and Secretary-General, and writing letters to recognize puppet leadership when it has no legal entitlements to do so; (ii) in September 2013, the members of the FESTU Executive Committee were subject to increased death threats and intimidation, but the Government did not investigate; (iii) in September 2014, Mr Osman and other NUSOJ representatives were subject to systematic arbitrary interrogations by the Attorney General, the CID and the police, and the immigration officials attempted to impose travel restrictions on Mr Osman; (iv) in November 2014, the Ministry of Information interfered in the NUSOJ's right to carry out peaceful trade union activities, in particular by stopping a two-day conference organized by the NUSOJ to mark the International Day to End Impunity for Crimes against Journalists; and (v) as regards legal obstacles to freedom of association and collective bargaining, the complainants allege that Somali legislation imposes excessive requirements for the establishment of unions and allows for the dissolution and suspension of trade unions, and in particular to sections 10, 13, 17, 32(2), 33(j) and 42(1) of the Labour Code.*
985. *The Committee notes the observations sent by the Government mainly indicating that: (i) the Government is aware that certain government officials transgressed their duties, infringed freedom of association and assembly and interfered with the internal trade union activities of the NUSOJ and FESTU, creating problems for union members and obstructing trade union work and independency, in particular during the NUSOJ Conference of November 2014, which was obstructed by security agents and the Ministry of Information; (ii) given that labour unions must be allowed and approved by line federal ministries in order to exist lawfully in Somalia, the NUSOJ leadership must be approved by the Ministry of Information, while FESTU top direction and operations leadership must be allowed and approved by the Ministry of Labour and Social Affairs – otherwise they are considered illegal and their actions unlawful; (iii) in this regard, the Office of Attorney General and the CID have been pursuing Mr Osman and his team for rebuking officials at the Ministry of Information and publicly claiming that they are the true leaders of the NUSOJ whereas their leadership is not recognized by the Ministry of Information. Such investigations and interrogations occasioned immigration authorities to occasionally decline Mr Osman to travel abroad; and (iv) while the preceding Minister of Labour, Mr Luqman Ismail, and*

his Government had recognized FESTU under the leadership of Mr Osman, the new Minister of Labour, Mr Abdiweli Ibrahim Sheikh, in his policy-making, has decided to withdraw recognition and approval of Mr Osman's leadership.

986. As regards the allegations of interference in the operations of FESTU and the NUSOJ and the unilateral determination of the Government to no longer recognize FESTU under Mr Osman's leadership, the Committee observes that the Credentials Committee reviewed a complaint by FESTU that the Government had unilaterally revoked its representation on the delegation to the June 2015 International Labour Conference and had observed that "modifications in the credentials of the tripartite delegation emanated from various public authorities, which demonstrates that there was a lack of consultation", and "considered that this amounts to interference, in breach of the requirements set out in article 3(5) of the ILO Constitution, as the Government decided to unilaterally replace the nominated Worker representatives" (see ILO, International Labour Conference, 104th Session, Geneva, June 2015, Provisional Record 5C, paras 59–65). In the light of these observations and the limited information in the Government's reply regarding the allegations of interference, the Committee must emphasize the general principle that the right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct the elections themselves [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 391]. Deeply regretting that the Government restricts itself to saying that there was interference in the NUSOJ and FESTU activities in November 2014 by certain government officials who transgressed their duties without indicating the steps taken to redress the matter and further deploring the indication that the new Minister of Labour decided to withdraw recognition of the union leaders without providing any information on the basis for this decision or the legal action that was taken to legitimize such a critical decision which should only be made by a judicial body, the Committee urges the Government to: refrain from any further interference in the unions registered in Somalia with particular reference to the NUSOJ and FESTU; observe the right of the union to administer its own affairs and activities without let or hindrance and in line with the principles of freedom of association and democracy; ensure that the elected leaders of the union are free to exercise the mandate given to them by their members and to that extent enjoy the recognition of Government as a social partner. The Government must also ensure that the right to freedom of movement is fully respected and enjoyed by the union leaders.
987. In relation to the serious allegation of multiple intimidations and death threats against the leaders and members of FESTU and the NUSOJ, the Committee recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for the governments to ensure that this principle is respected and that an independent judicial inquiry body is instituted immediately with a view to fully clarifying the facts, determining responsibilities, punishing those responsible and preventing the repetition of such acts [see **Digest**, op. cit., paras 44 and 50]. The Committee deeply regrets that the Government's reply does not address these grave matters and urges it to take the necessary measures to ensure the protection and guarantee the security of the FESTU and NUSOJ leaders and members, and establish a full and independent judicial inquiry on the allegations of intimidations and death threats affecting them and to keep the Committee informed of the outcome of the investigations.
988. As regards travel restrictions against trade unionists, the Committee notes the Government's indication that Mr Osman was occasionally restricted in his travel abroad

*due to ongoing interrogations for rebuking ministry officials and claiming to be the true union leader. The Committee recalls that, under the Universal Declaration of Human Rights, everyone has the right to leave any country, including his/her own, and to return to his/her country. Thus, trade unionists, just like all persons, should enjoy the right to freedom of movement. In particular, they should enjoy the right, subject to national legislation, which should not be so as to violate freedom of association principles, to participate in trade union activities abroad [see **Digest**, op. cit., paras 121 and 122]. The Committee again requests the Government to refrain from interfering in trade union activities and ensure that the right to freedom of movement is fully respected.*

**989.** *Concerning the alleged government attack on Mr Osman's management of NUSOJ funds through a Ministry of Information press release while no court case had ever been brought, the Committee regrets that the Government has not replied to this allegation, expresses its deep concern at the issuance of this press statement without following due process to bring the matters before the judiciary and trusts that the Government will refrain from such acts in the future.*

**990.** *As regards the complainants' allegations in relation to section 10 of the Labour Code, the Committee recalls that the establishment of a trade union may be considerably hindered, or even rendered impossible, when legislation fixes the minimum number of members of a trade union at obviously too high a figure, as is the case, for example, where legislation requires that a trade union must have at least 50 founder members [see **Digest**, op. cit., para. 28]. Concerning the complainants' allegations regarding section 27 of the Labour Code, the Committee recalls that the dissolution of trade union organizations is a measure which should only occur in extremely serious cases; such dissolutions should only happen following a judicial decision so that the rights of defence are fully guaranteed [see **Digest**, op. cit., para. 699]. As concerns the complainants' allegations in relation to section 32(2), the Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes [see **Digest**, op. cit., para. 881]. The Committee observes that Somalia ratified Conventions Nos 87 and 98 in 2014 and its report for the Committee of Experts on the Application of Conventions and Recommendations (CEACR) is not due until 2016. The Committee requests the Government to review promptly the Somali Labour Code in consultation with the freely elected social partners with a view to ensuring its full conformity with Conventions Nos 87 and 98 and to provide a full report to the CEACR to which it refers the legislative aspects. In these circumstances, the Committee is bound to urge the Government to avail itself of all necessary ILO assistance in this regard.*

## **The Committee's recommendations**

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

- (a) *The Committee urges the Government to refrain from any further interference in the unions registered in Somalia with particular reference to the NUSOJ and FESTU, observe the right of the union to administer its own affairs and activities without let or hindrance and in line with the principles of freedom of association and democracy, ensure that the elected leaders of*



*the union are free to exercise the mandate given to them by their members and to that extent enjoy the recognition of the Government as a social partner. The Government must also ensure that the right to freedom of movement is fully respected and enjoyed by the union leaders.*

- (b) The Committee urges the Government to take the necessary measures to ensure the protection and guarantee the security of the FESTU and NUSOJ leaders and members and establish a full and independent judicial inquiry on the allegations of intimidations and death threats affecting them. The Committee requests the Government to keep it informed of the outcome of the investigations.*
- (c) The Committee requests the Government to review promptly the Somali Labour Code in consultation with the freely elected social partners with a view to ensuring its full conformity with Conventions Nos 87 and 98 and to provide a full report to the CEACR to which it refers the legislative aspects.*
- (d) In these circumstances, the Committee is bound to urge the Government to avail itself of all necessary ILO assistance in this regard.*
- (e) In light of the seriousness of the matters raised in this case and the apparent lack of understanding as to their fundamental importance, the Committee invites the Government, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, to come before the Committee at its next session in March 2016 so that it may obtain detailed information on the steps taken by the Government in relation to the pending matters.*

CASE NO. 2994

INTERIM REPORT

**Complaint against the Government of Tunisia  
presented by  
the Tunisian General Confederation of Labour (CGTT)**

*Allegations: The complainant organization denounces acts of interference in its internal affairs, the withholding of the dues paid by its members and its exclusion from tripartite consultations held with a view to drawing up a national social contract. Furthermore, it denounces acts of anti-union discrimination carried out against its members by the airline TUNIS AIR*

**992.** The Committee examined this case, in the absence of a response from the Government, at its October 2013 meeting and presented an interim report to the Governing Body [see 370th Report, paras 721–739, approved by the Governing Body at its 310th Session].

**993.** The Government sent some information in a communication dated 26 November 2013.

**994.** Tunisia 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**

**995.** At its October 2013 meeting, the Committee made the following recommendations [see 370th Report, para. 739]:

- (a) The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the complainant's allegations, even though it has been requested several times, including through an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.
- (b) The Committee requests the Government to send its observations on the strike that took place from 22 to 24 May 2012 in the company TUNIS AIR without delay; to indicate, in particular, the reasons for the suspension of the leaders of the CGTT following the strike (namely Belgacem Aouina, Adnane Jemaiel, Faouzi Belam, Imed Hannachi, Walid Ben Abdellatif and Nabil Ayed); and to report on the situation regarding the legal proceedings initiated and, in particular, on any decisions taken in these cases.
- (c) The Committee requests the Government to send, without delay, its observations on the allegations made by the CGTT concerning the union dues of its members in the public sector for the year 2012, which they allegedly never received.
- (d) Recalling that it is important for the determination of the representativeness of trade unions for the purposes of collective bargaining at all levels to be based on objective and pre-established criteria so as to avoid any opportunity for partiality or abuse, the Committee finds itself obliged to reiterate the recommendation that it made in 2010 in a previous case, which requested the Government to take all necessary measures to set these criteria in consultation with the social partners, and to keep it informed of any developments in that regard. The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.

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

**996.** The Government sent some information in response to the Committee's recommendations in a communication dated 26 November 2013. As regards recommendation (b) concerning the strike that took place from 22 to 24 May 2012 in the company TUNIS AIR, the Government states that, according to the company's management, a notice of strike had been issued for 22 and 23 May 2012 only. However, the strike continued until 24 May 2012 and thus became an illegal strike causing further serious damage to the company and its clients. As a result, the company had to compensate clients and provide them with accommodation in order to placate them. In the light of the impact of the strike on the company, the management penalized the strikers who had committed acts endangering aircraft safety (the technicians who refused to perform aircraft checks and those who confiscated documents that were crucial for such checks (CRM)). The disciplinary measures did not take into account the union membership of the workers concerned.

**997.** The Government indicates that three out of the six persons described as leaders of the Tunisian General Confederation of Labour (CGTT) by the complainant organization are not actually trade union officials. With regard to Mr Belgacem Aouina, director of audit and secretary-general of the CGTT, the Government states that he was moved to another management position, as he could not perform his duties in a totally neutral and independent manner as a union leader.

998. As regards the CGTT's allegations concerning the union dues of its members in the public sector for 2012 that were allegedly withheld (recommendation (c)), the Government recalls that the union dues were paid to the CGTT by virtue of a circular from the head of government for 2011. As no circular had been issued for 2012, the public servants' dues were not transmitted to the CGTT.
999. As to the establishment of criteria for representative status (recommendation (d)), the Government indicates that trade union pluralism is provided for in the law under the Labour Code and various implementing texts. However, the criteria for representative status have not yet been set, and the Government wishes to do so in consultation with the social partners in a calm setting conducive to dialogue and cooperation. In the meantime, the Government has determined that the Tunisian General Labour Union (UGTT) and the Tunisian Union of Industry, Trade and Handicrafts (UTICA) are the most representative workers' and employers' organizations, based on the number of members. Moreover, the Government recalls that it signed a social contract with the UGTT and UTICA in January 2013 with a view to the establishment of national social dialogue council to ensure an ongoing, regular and comprehensive social dialogue. The council would also be responsible for determining the most representative trade union, in accordance with international labour standards.

### C. The Committee's conclusions

1000. *The Committee recalls that, in the present case, the allegations of the CGTT refer to acts of interference in its affairs carried out by the authorities; to its exclusion from all national tripartite consultations; and to anti-union acts committed by certain enterprises against its leaders.*
1001. *When it first examined this case (October 2013), the Committee noted with regret that the CGTT seemed to face difficulties in carrying out its activities more than two years after its registration by the authorities. The Committee noted with concern the allegations made by the complainant organization concerning acts of interference in its affairs, particularly hostile statements made by the Government in the national media against it, and the withholding of the union dues of its members in the public sector for 2012 for no apparent reason, despite the fact that it had received the dues for 2011. The Committee notes that the Government merely indicates that union dues are paid by virtue of a circular from the head of government and that, as such a circular was not issued for 2012, the public servants' dues were not transmitted to the CGTT. Furthermore, according to the Government, the airline TUNIS AIR was therefore not obliged to deduct the union dues of the public servants who were members of the CGTT. In this regard, the Committee wishes to express its concern at the fact that the system for the collection of public servants' union dues for the CGTT, which was set up in 2011 following the union's registration by the authorities, was unilaterally cancelled one year later, without consultation of the organization concerned. Under these circumstances, the Committee urges the Government to restore the system for the collection of union dues of CGTT members in the public sector, in order to avoid any discrimination and to prevent any impact on the freedom of workers to form or join trade unions.*
1002. *The Committee takes note of the information provided in relation to the strike that took place from 22 to 24 May 2012 at the company TUNIS AIR. The Government states that, according to the company's management, a notice of strike had been issued for 22 and 23 May 2012 only. However, the strike is alleged to have continued until 24 May 2012 and thus became an illegal strike causing further serious damage to the company and its clients. The company is alleged to have penalized the strikers who had committed acts that allegedly endangered aircraft safety. According to the Government, the disciplinary actions did not take into account the union membership of the workers concerned. In this*

regard, the Committee wishes to recall that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests, and no one should be penalized for carrying out or attempting to carry out a legitimate strike [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 521 and 660]. While acknowledging that the obligation to give prior notice to the employer before calling a strike may be considered acceptable, the Committee must nevertheless express its concern at the imposition of a limit on the duration of a strike which, due to its nature as a last resort for the defence of workers' interests, cannot be predetermined.

- 1003.** *The Government indicates that three out of the six persons described as leaders of the CGTT by the complainant organization who were penalized following the strike are not actually trade union officials. In this regard, the Committee urges the Government to provide further information so that the complainant organization may respond to this assertion. More generally, the Committee requests the Government to review together with the CGTT the situation of the union leaders who were allegedly suspended in violation of the principles recalled above and, where appropriate, to ensure that they are provided with appropriate compensation. The Committee requests the Government to keep it informed in this regard.*
- 1004.** *With regard to the transfer of Mr Belgacem Aouina, director of audit and secretary-general of the CGTT, the Government states that he was moved from auditing to another management position, as he could not perform his duties in a totally neutral and independent manner as a union leader. The Committee expresses its concern at this type of generalization. It requests the Government and the complainant organization to provide further information regarding the transfer of Mr Aouina and to indicate whether he has appealed the decision to transfer him and the outcome, if any. In the meantime, the Committee wishes to recall that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties with full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest**, op. cit., para. 799].*
- 1005.** *Lastly, the Committee takes note of the information provided by the Government that the criteria for the representative status of trade unions have not yet been set. The Government explains that it wishes to do so in consultation with the social partners in a calm setting conducive to dialogue and cooperation. In the meantime, the Government has determined that the UGTT and UTICA are the most representative workers' and employers' organizations, based on the number of members. Moreover, the Government recalls that it signed a social contract with the UGTT and UTICA in January 2013 with a view to the establishment of national social dialogue council to ensure an ongoing, regular and comprehensive social dialogue. The council would also be responsible for determining the most representative trade union, in accordance with international labour standards.*
- 1006.** *The Committee considers that a number of issues that have been raised in this case may be settled more effectively in an environment where each trade union may carry out its activities without hindrance and where privileges potentially given to certain organizations vis-à-vis others are based on representative status that is clearly established. The Committee therefore once again reiterates to the Government its*

*long-standing recommendation to take all necessary measures to set clear and pre-established criteria for trade union representation in consultation with the social partners, and to keep it informed of any progress in this regard. The Committee expects all the organizations concerned to be consulted in this regard and once again reminds the Government that it may avail itself of the technical assistance of the Office if it so desires.*

- 1007.** *The Committee expects the Government to take all necessary measures to respond urgently and thoroughly to its recommendations and, in the event that, in the present case, the allegations refer to problems in a particular enterprise, the Committee urges the Government to make efforts to obtain the comments of the enterprise, via the employers' organization concerned, so that the Committee may examine the case in full knowledge of the facts.*

### **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 urges the Government to restore the system for the collection of union dues of CGTT members in the public sector, in order to avoid any discrimination and to prevent any impact on the freedom of workers to form or join trade unions.*
- (b) The Committee urges the Government to provide further information on its statements regarding the leaders of the CGTT who were penalized following the TUNIS AIR strike in May 2012, so that the complainant organization may respond. More generally, the Committee requests the Government to review, together with the CGTT, the situation of the leaders of that body who were allegedly suspended in violation of the principles recalled and, where appropriate, to ensure that they are provided with appropriate compensation. The Committee requests the Government to keep it informed in this regard.*
- (c) The Committee requests the Government and the complainant organization to provide further information on the transfer of Mr Belgacem Aouina, secretary-general of the CGTT, and to indicate whether he has appealed the decision to transfer him and the outcome, if any.*
- (d) The Committee once again reiterates to the Government its long-standing recommendation to take all necessary measures to set clear and pre-established criteria for trade union representation in consultation with the social partners, and to keep it informed of any progress in this regard. The Committee expects all the organizations concerned to be consulted in this regard and once again reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*
- (e) The Committee expects the Government to take all necessary measures to respond urgently and thoroughly to its recommendations and, in the event that, in the present case, the allegations refer to problems in a particular enterprise, the Committee urges the Government to make efforts to obtain the comments of the enterprise, via the employers' organization concerned, so that the Committee may examine the case in full knowledge of the facts.*

CASE NO. 3016

INTERIM REPORT

**Complaint against the Government of the Bolivarian Republic of Venezuela presented by**

- **the Union of Workers of the Ministry of Science and Technology (SITRAMCT)**
- **the National Alliance of Cement Workers (ANTRACEM) and**
- **the National Union of Workers of Venezuela (UNETE)**

*Allegations: Non-compliance with clauses of various collective agreements and anti-union practices in nationalized public cement enterprises, as well as dismissals and persecution of trade union activists and officials in these enterprises*

**1009.** The Committee examined this case at its March 2014 meeting, when it presented an interim report to the Governing Body [see 371st Report, paras 937–972, approved by the Governing Body at its 320th meeting (March 2014)].

**1010.** Previously, the National Union of Workers of Venezuela (UNETE) sent communications dated 9 June and 11 July 2014, related to the questions raised by this case.

**1011.** The Government sent new observations in communications dated 15 May and 17 October 2014.

**1012.** 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**

**1013.** In its previous examination of the case in March 2014, the Committee made the following recommendations on the pending issues [see 371st Report, para. 972]:

- (a) The Committee requests the Government to take measures in consultation with the most representative trade unions and employers' organizations to promote collective bargaining in the cement sector (according to the allegations, 32 collective agreements have expired and have not been renegotiated) and, in view of the excessive delays that it has found, to expedite disciplinary administrative proceedings in the event of repeated non-compliance with collective agreements, and it requests the Government to keep it informed of developments.
- (b) The Committee requests the Government to send a detailed reply without delay on the allegations referred to in the conclusions.

**1014.** As regards recommendation (b), the Committee referred to the following allegations [see 371st Report, para. 970]:

- the allegation presented by SITRAMCT regarding its Secretary-General, Mr Jesús Eliecer Martínez Suárez, reporting that the Ministry of Science and Technology had not paid his evaluation-based wage increase and bonus, in violation of the collective

agreement in force; non-compliance with clauses in collective agreements in the following cases: (1) as regards a number of clauses in the collective agreement between the enterprise CA Vencemos in Catia La Mar and SINTUECAV; and (2) the collective labour agreement of the ready-mix sector enterprise Cemex Venezuela, SACA, in the capital district, and SINTUECAV, for the period 2 May 2007 to 2 May 2010 (currently in force as no other collective agreement has been discussed) as regards union dues and allowances;

- the suspension of part of the wages and benefits of the Secretary-General of SINTUECAV, Mr Ulice Rodríguez, which had been paid from 2005 to 2012, on a decision of the public management of Venezolana de Cementos SACA, which, in May 2012, arbitrarily cut his wages by nearly 80 per cent, in violation of the collective agreement (according to the allegations, the executive committees of SINTUECAV, ANTRACEM and UNETE have submitted complaints to the enterprise through the labour inspectorate, the labour courts and other institutions, without securing the restoration of the union official's rights on the pretext that SINTUECAV's executive committee was allegedly in a situation of electoral default);
- charges for misconduct were brought against the union official, Mr José Vale, the records and correspondence secretary, on 14 February 2013 (on 29 January 2013 an extraordinary assembly had been held to discuss the enterprise's violation of the collective labour agreement and its failure to provide a reply after the four meetings held between October 2012 and January 2013; the assembly decided that it would remain in statutory assembly until the enterprise resolved the dispute);
- the wages of Mr Manuel Rodríguez were also cut on 26 November 2012, in violation of clause No. 36 of the collective labour agreement (basic wage or daily rate increases), and having declared itself incompetent to hear the claims the labour inspectorate invited the worker to file his claim before the courts;
- in Lara State, on 27 April 2011, the enterprise filed charges for misconduct before the labour inspectorate against the union official Mr Orlando Chirinos, organization secretary of SINTRACEL and leading member of ANTRACEM, in violation of the collective labour agreement. It also filed charges for misconduct against the workers Mr Waldemar Pastor Crawther Sánchez and Mr Eduardo Adrián Zerpa, both members of SINTRACEL and ANTRACEM, violating the collective labour agreement and dated 16 May 2011 and 14 February 2011, respectively;
- in Trujillo State, Mr Alexander Enrique Santos Mendoza was subjected to degradation of his employment conditions, persecution and harassment, and the ruling in his favour by the labour inspectorate of Valera in Trujillo State, was held in contempt by the management of Cemento Andino and Corporación Socialista de Cemento.

**1015.** In its previous report, the Committee observed that the picture that emerges from the allegations and from the Government's reply – which only addresses some of those allegations – is that administrative proceedings are very slow; they are at times blocked in institutions such as the Office of the Attorney-General of the Republic; and many of them affect union officials. It observes, moreover, that no evidence is provided of sanctions for failure to comply with collective agreements [see 371st Report, para. 971].

## B. New allegations

**1016.** In communications dated 9 June and 11 July 2014, the UNETE alleges that the enterprise Venezolana de Cementos SACA: (1) has continued its dismissal procedure against the union official Ulice Rodríguez, threatening him with imprisonment; (2) has dismissed union official Orlando Chirinos; and (3) refuses to register a list of claims for non-compliance with the collective agreement. The UNETE associates these actions with the complaints filed by the aforementioned officials and notified to the high-level tripartite mission in January 2014. Furthermore, the UNETE reports new instances of non-compliance with collective agreements.

### C. The Government's reply

- 1017.** In its communication of 5 May 2014, the Government indicates that, with regard to collective bargaining in the cement sector (according to the complainants' allegations, 32 collective agreements in that sector have expired and have not been renegotiated), a review found that only nine draft collective agreements have been submitted by the various trade union organizations before the corresponding administrative body. Of these, three were duly dismissed on the grounds that they did not meet the legal requirements; the others are pending the completion of the nationalization process for the enterprise CEMEX de Venezuela CA, which will be integrated into the consortium Cementos Mexicanos SBD. However, in order to avoid delays in collective bargaining due to the legal status of the enterprise, in November 2012 a round table was organized with trade union representatives in order to review the benefits of the collective agreement, which remains in force in all the cement production plants of this enterprise. Accordingly, until the legal and administrative conditions of the purchase are established with regard to the transition of an enterprise in the private sector to the public sector, which is governed by different procedures, the State cannot begin discussions of the aforementioned draft collective labour agreements. However, the Government has organized several round tables and the parties have proposed some agreements. The Government indicates that ANTRACEM is not a legitimate trade union organization, but a political organization, according to the principle of freedom of association established by the Constitution of the Bolivarian Republic of Venezuela, and that some of its members are also members of the executive committees of trade union organizations. As officials of those trade union organizations, ANTRACEM members participate in collective bargaining, but as an organization, ANTRACEM cannot put forward draft collective agreements or act in representation of cement factory workers.
- 1018.** Regarding the allegation concerning the Secretary-General of SITRAMCT, Mr Jesús Eliecer Martínez Suárez, reporting that the Ministry of Science and Technology had not paid his evaluation-based wage increase and bonus, in violation of the collective agreement in force, the Government indicates that the Labour Act establishes the mechanism and procedures of the administrative labour bodies, allowing workers to submit claims when they consider that their rights have been violated. A review indicated that the complainants filed the corresponding proceedings (collective claim) with the labour inspectorate, and that this was duly registered. The last recorded action was taken on 20 November 2013, when the parties failed to attend a scheduled conciliation meeting, despite due notification, and an appropriate report was filed. The complainants, on whom it was incumbent, have to date not sent a new invitation to the defendant, and so this failure to attend has been taken as an indication of lack of interest in the reactivation of the respective proceedings.
- 1019.** As regards the Single Union of United Workers of the Company CA Vencemos (SINTUECAV), the Government reports that, on 3 October 2011, a request for collective conciliation proceedings was filed with the labour inspectorate of Miranda-Este by SINTUECAV, which represented a group of 27 workers, for five alleged violations of the law. The inspectorate registered the claims on 4 October 2011 and meetings began on 29 November, with more than 15 conciliation meetings being held between the employer representatives and the workers. On 1 October 2012, a meeting was held between the parties to the conciliation proceedings at which the employer representative indicated that the points set out in the workers' claims had been addressed and that the collective labour agreement was in turn being applied. However, at that same meeting, the workers indicated that they were not in agreement and that they therefore wished to file a list of claims and exercise the right to strike. Consequently, the trade union confirmed in writing its request to change their claims under the collective conciliation procedure to a list of grievances. Given that full conciliation had not been achieved and in view of the trade union's request to present a list of grievances, once it had examined the case, the labour inspectorate closed



---

the proceedings on the grounds that conciliatory proceedings cannot be changed to a grievance procedure, notifying the union in this regard on 8 January 2014.

- 1020.** As regards the Secretary-General of SINTUECAV, Mr Ulice Rodríguez, on 24 August 2009 a complaint was filed with the labour inspectorate of the State of Vargas and it was registered on 25 August 2009. The administrative proceedings were closed and, on 10 November 2009, the workers (including Mr Ulice Rodríguez) decided to file their complaint before the labour courts, exhausting the administrative channels and receiving the relevant ruling. The records of the labour inspectorate contain no further information relating to this person.
- 1021.** As regards the charges for misconduct brought against the union official Mr José Vale, the Government indicates that Venezuelan legislation guarantees comprehensive protection for the employment stability and against the dismissal of union officials under trade union immunity.
- 1022.** Section 422 of the Labour Act lays down the procedure for the authorization of justified dismissals, transfers and modifications to the working conditions of workers entitled to trade union immunity: “Where an employer seeks to dismiss for good reason a worker enjoying trade union immunity, transfer him or her from their post or modify their conditions of work, it must request the corresponding authorization from the labour inspector, within 30 days following the date on which the worker committed the act of misconduct given as the grounds for dismissal, or the reason for transfer or the modification to the conditions of work under the procedure in question.” Accordingly, initiating proceedings does not alone constitute a violation of the collective agreement referred to by the complainant, since the proceedings indicate the steps which an employer seeking to dismiss a worker must take to apply to the administrative authorities. Furthermore, once due process and the equality of the parties have been guaranteed, a decision is to be taken on the basis of the allegations and evidence, in accordance with the labour legislation in force.
- 1023.** Regarding the complaint filed by Mr Manuel Rodríguez, it was examined and ruled upon by the corresponding administrative authority, which declared itself incompetent to hear claims relating to a point of law and indicated that the complaint should be brought before and ruled on by the courts. Accordingly, the Government urges the Committee on Freedom of Association to advise the complainant to file its complaint through the corresponding channel.
- 1024.** As regards the grounds for the dismissal of Mr Orlando Chirinos, Secretary of SINTRACEL, Mr Waldemar Pastor Crawther Sánchez, member of SINTRACEL, and Mr Eduardo Adrián Zerpa, member of SINTRACEL, the Government reiterates that Venezuelan legislation provides comprehensive protection for employment stability and against the dismissal of trade union officials under trade union jurisdiction.
- 1025.** Section 422 of the Labour Act establishes the procedure for authorization of the justified dismissal, transfer and modification to working conditions of workers entitled to trade union immunity. The Government refers in this regard to the information concerning the case of the union official Mr José Vale.
- 1026.** As regards the case of the worker Mr Alexander Santos, the Government reports that all administrative channels have been exhausted, as a result of a decision in favour of this worker. The complainant may file judicial proceedings, which is the channel available once all administrative remedies have been exhausted.

**1027.** Lastly, in its communication of 17 October 2014, the Government indicates its willingness to send additional information, if necessary, regarding the allegations made by the UNETE, considering that it already sent information in its previous communication.

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

**1028.** *The Committee observes that the allegations still pending refer to difficulties in collective bargaining on various collective agreements in the cement sector or in their application, as well as the initiation of proceedings for the dismissal of trade union officials.*

**1029.** *As regards the allegations according to which more than 30 collective agreements in the cement sector had expired and had not been renegotiated, the Committee takes note of the observations made by the Government, according to which only nine new draft collective agreements have been submitted by trade union organizations. Of these, three were duly dismissed on the grounds that they did not meet the legal requirements (the Government does not, however, indicate which ones). As regards the six remaining draft collective agreements, the Committee notes that the Government reports that the negotiation of these collective agreements cannot be carried out because it is pending the transfer of a private enterprise into the public domain. These two sectors have different processing procedures and the legal and administrative conditions of nationalization also need to be established. The Government adds that, notwithstanding the above, in 2012 a round table was organized with the trade unions in order to review the benefits of the collective agreement in force, and that round tables have achieved some agreements between the parties.*

**1030.** *The Committee highlights the vagueness of the expression “some agreements” used by the Government and considers that the situation described by the Government impinges upon the exercise of collective bargaining in the enterprise CEMEX de Venezuela CA. It cannot but express concern at the Government’s line of argument, which makes the negotiation of six draft collective agreements in this sector conditional on the establishment of the legal and administrative conditions for the acquisition of the enterprise Cementos Mexicanos SBD by CEMEX de Venezuela CA, a process that has been delayed for a number of years. The Committee urges the Government to promote collective bargaining without delay in the latter enterprise.*

**1031.** *On the other hand, the Committee observes that the Government has not replied to the allegation that the public management of the enterprise Venezolana de Cementos SACA arbitrarily decreased the wages of workers by 80 per cent in violation of the collective agreement. The Committee considers that the unilateral decrease of the wages of workers by 80 per cent in violation of the collective agreement constitutes a serious infringement of the principles of freedom of association and collective bargaining. In these conditions, the Committee urges the Government to take measures to ensure the implementation of the wage clauses of the collective agreement in the enterprise.*

**1032.** *As regards the alleged non-compliance with the collective agreement by the enterprise CA Vencemos, the Committee notes that the Government declares that the trade union representing 27 workers reported the violation of the collective agreement; that 15 conciliation meetings were held in Catia La Mar and in the capital district before the labour authorities; and that, on 1 October 2015, the trade union decided to resort to strike action, whereby the administrative proceedings were concluded. The Committee invites the complainants to indicate whether, after the strike, agreements were signed in respect of the violations of the collective agreement in this enterprise.*

**1033.** *In general, taking into account the conclusions in the paragraphs above, the Committee draws to the attention of the Government the principle whereby mutual respect of the commitment undertaken is an important element of the right to bargain collectively and*

should be upheld in order to establish labour relations on stable and firm ground [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth (revised) edition, 2006, para. 940] and that agreements should be binding on the parties [see *Digest*, op. cit., para. 939]. The Committee requests the Government to ensure full compliance with the collective agreements in the public enterprises in the cement sector.

- 1034.** As regards the union member Mr Manuel Rodríguez, whose wages were, according to the allegations, cut in violation of the collective agreement, the Committee observes that in its previous reply, the Government reported that the labour authorities disqualified themselves and that its last reply suggested that this occurred because the case concerned a point of law, whereby the trade union member was invited to initiate judicial proceedings. As regards the union member Mr Alexander Santos, who according to the allegations was subjected to a wage cut and harassment and had obtained a ruling in his favour from the labour inspectorate, the Committee notes that the Government indicates that, having exhausted the administrative channels, the complainant may file judicial proceedings. As regards the allegations concerning the union official Mr Ulice Rodríguez (suspension of wages and benefits, on a decision of the public management of Venezolana de Cementos SACA, and the arbitrary reduction of his wages by 80 per cent in violation of the collective agreement), the Committee notes that the Government reports that, after various cases of arbitrary proceedings were brought before the labour inspectorate in the State of Vargas, on 10 November 2009, the complainant decided to file the complaint before the courts. The Committee regrets that the Government has not informed it of whether the three union members in question did actually file judicial proceedings or of the possible outcome of any such proceedings. The Committee invites the Government and the complainant organizations to keep it informed in this regard.
- 1035.** As regards the alleged charges for misconduct brought against the union officials Mr José Vale and Mr Orlando Chirinos, and the union members Mr Adrián Zerpa and Mr Waldemar Pastor Crawther Sánchez, the Committee notes that the Government indicates that the legislation provides comprehensive protection of employment stability and trade union immunity, requiring a justified reason for dismissal. Accordingly, authorization for dismissal requires an authorization by the labour inspector, whereby initiating the procedure to request an authorization to dismiss does not, alone, constitute a violation of the collective agreement. The Committee notes that the union organization UNETE submitted allegations and documents in June and July 2014, according to which Mr Orlando Chirinos was dismissed (following further proceedings on charges of misconduct) and the dismissal proceedings against Mr Ulice Rodríguez have been maintained in retaliation for the complaints filed with the ILO high-level tripartite mission in January 2014. The Committee recalls that no one should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and the persons responsible for such acts should be punished [see *Digest*, op. cit., para. 772]. The Committee requests the Government to provide, as a matter of urgency, observations on these allegations and on the grounds for dismissal given in the proceedings under examination concerning the aforementioned union members, and to keep it informed of the progress of the proceedings.
- 1036.** In general, the Committee reiterates and highlights that the picture that emerges is that administrative proceedings for non-compliance with collective agreements, including in the case of clauses protecting union members and workers against dismissal, are slow and ineffective and that the Government has provided no information regarding any administrative sanctions for non-compliance with the clauses of collective agreements, and simply points to the right of the interested parties to file judicial proceedings. This is, in the Committee's opinion, highly unsatisfactory given that the original complaint was filed in 2013.

**1037.** *The Committee requests the Government to submit these problems to tripartite dialogue with trade union organizations and employers in the cement sector with a view to expediting the identification of effective solutions to the various problems raised in the complaint, and to keep it informed in this regard.*

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

**1038.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee urges the Government to promote collective bargaining without delay in the enterprise CEMEX de Venezuela CA.*
- (b) The Committee urges the Government to take measures to ensure the implementation of the wage clauses of the collective agreement in the enterprise Venezolana de Cementos SACA.*
- (c) The Committee invites the complainants to indicate whether, after the strike referred to in the allegations, agreements were signed regarding the violations of the collective agreement in the enterprise CA Vencemos.*
- (d) The Committee requests the Government to ensure full compliance with the collective agreements in the public enterprises in the cement sector.*
- (e) As regards the union member Mr Manuel Rodriguez (whose wages were allegedly cut in violation of the collective agreement), the union member Mr Alexander Santos (who, according to the allegations, was subjected to a wage cut and harassment), and the union official Mr Ulice Rodríguez (suspension of wages and benefits, on a decision of the enterprise Venezolana de Cementos SACA and the arbitrary reduction of his wages by 80 per cent in violation of the collective agreement), the Committee regrets that the Government has not informed it of whether the three union members in question did actually file judicial proceedings or of the possible outcomes of any such proceedings. The Committee invites the Government and the complainant organizations to keep it informed in this regard.*
- (f) Observing that the union organization the UNETE submitted allegations and documents in June and July 2014, according to which Mr Orlando Chirinos was dismissed (following further dismissal proceedings) and the dismissal proceedings against Mr Ulice Rodríguez have been maintained in retaliation for the complaints filed with the ILO high-level tripartite mission in January 2014, the Committee requests the Government to provide, as a matter of urgency, additional information on these allegations and on the grounds for dismissal given in the proceedings under examination concerning the union members Mr Ulice Rodríguez, Mr José Vale, Mr Adrián Zerpa and Mr Waldemar Pastor Crawther Sánchez, and to keep it informed of the progress of the different proceedings.*

- (g) *The Committee requests the Government to submit these problems to tripartite dialogue with trade union organizations and employers in the cement sector with a view to expediting the identification of effective solutions to the various problems raised in the complaint, and to keep it informed in this regard.*

Geneva, 6 November 2015

(Signed) Professor Paul van der Heijden  
Chairperson

<i>Points for decision:</i> Paragraph 167	Paragraph 568
Paragraph 175	Paragraph 585
Paragraph 189	Paragraph 704
Paragraph 203	Paragraph 728
Paragraph 224	Paragraph 750
Paragraph 244	Paragraph 786
Paragraph 275	Paragraph 804
Paragraph 300	Paragraph 824
Paragraph 320	Paragraph 847
Paragraph 337	Paragraph 860
Paragraph 351	Paragraph 896
Paragraph 364	Paragraph 927
Paragraph 424	Paragraph 956
Paragraph 435	Paragraph 991
Paragraph 448	Paragraph 1008
Paragraph 471	Paragraph 1038
Paragraph 487	