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TWELFTH ITEM ON THE AGENDA

## Report of the Committee on Freedom of Association

### 377th Report of the Committee on Freedom of Association

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## Introduction

1. The Committee on Freedom of Association set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 10, 11, 12 and 18 March 2016, 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 Vice-Chairperson, Mr Echavarría and members, Mr Frimpong, Ms Hornung-Draus (substituting for Mr de Regil) and Mr Matsui; Workers' group Vice-Chairperson, Mr Veyrier (substituting for Mr Cortebeek), and members, Mr Asamoah, Ms Mary Liew Kiah Eng, Mr Martínez, Mr Ohrt and Mr Ross. The member of Argentinian nationality was not present during the examination of the case relating to Argentina (Case No. 2987).

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3. Currently, there are 175 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 17 cases on the merits, reaching definitive conclusions in 12 cases and interim conclusions in 5 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2882 (Bahrain) and 2923 (El Salvador) because of the extreme seriousness and urgency of the matters dealt with therein.

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

5. The Committee recalls that, in its last report (376th Report, paragraph 5), it had invited the Government of Somalia, by virtue of its authority as set out in paragraph 69 of its procedures, to come before it in March 2016 in light of the seriousness of the matters raised in Case No. 3113 and the apparent lack of understanding as to their fundamental importance. In a communication dated 3 March 2016, the Government of Somalia informed the Committee that it would not be able to attend its March meeting and requested a postponement of the hearing for three months, at which time it would have the results of an investigation carried out by the Office of the Prosecutor-General. The Committee is deeply concerned that it was not able to meet with the Government in March. The Committee recalls that it invokes paragraph 69 of its procedures in rare circumstances and that its intention is to improve the cooperation of Governments with its procedures and highlight serious concerns it may have with respect to individual cases. Recalling its previous recommendations urging the Government to refrain from interference in the National Union of Somali Journalists (NUSOJ) and the Federation of Somali Trade Unions (FESTU) and to ensure the protection and guarantee the security of its leaders and members, the Committee is alarmed by the recent allegations from the complainants concerning continued interference and harassment and an assassination attempt on the life of the Secretary-General of the NUSOJ. The Committee urges the Government in the strongest of terms to take immediate steps to give full effect to its recommendations of November 2015 (376th Report, paragraph 991) and

expects that the Government will come before it at its meeting in May–June 2016 with detailed information in this regard.

### **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 case without a response from the government: 3104 (Algeria).

### **Urgent appeals**

7. As regards Cases Nos 2723 (Fiji), 3018 (Pakistan) and 3119 (Philippines), 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: 3171 (Myanmar), 3172 (Bolivarian Republic of Venezuela), 3173 (Peru), 3174 (Peru), 3175 (Uruguay), 3176 (Indonesia), 3178 (Bolivarian Republic of Venezuela), 3179 (Guatemala), 3180 (Thailand), 3181 (Cameroon), 3182 (Romania), 3183 (Burundi), 3184 (China), 3185 (Philippines) and 3186 (South Africa), 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: 2318 (Cambodia), 3016 (Bolivarian Republic of Venezuela), 3019 (Paraguay), 3027 (Colombia), 3067 (Democratic Republic of the Congo), 3076 (Maldives), 3081 (Liberia), 3109 (Switzerland), 3117 (El Salvador), 3121 (Cambodia), 3124 (Indonesia), 3125 (India), 3126 (Malaysia), 3127 (Paraguay), 3130 (Croatia), 3133 (Colombia), 3137 (Colombia), 3138 (Republic of Korea), 3141 (Argentina), 3143 (Canada), 3146 (Paraguay), 3148 (Ecuador), 3149 (Colombia), 3150 (Colombia), 3154 (El Salvador), 3156 (Mexico), 3157 (Colombia), 3158 (Paraguay), 3159 (Philippines), 3160 (Peru), 3161 (El Salvador), 3162 (Costa Rica), 3163 (Mexico), 3164 (Thailand), 3165 (Argentina), 3167 (El Salvador), 3168 (Peru) and 3170 (Peru).

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

10. In Cases Nos 2203 (Guatemala), 2265 (Switzerland), 2445 (Guatemala), 2508 (Islamic Republic of Iran), 2609 (Guatemala), 2811 (Guatemala), 2817 (Argentina), 2830 (Colombia), 2869 (Guatemala), 2902 (Pakistan), 2927 (Guatemala), 2948 (Guatemala), 2967 (Guatemala), 2978 (Guatemala), 2989 (Guatemala), 2997 (Argentina), 3003 (Canada), 3023 (Switzerland), 3032 (Honduras), 3042 (Guatemala),

3047 (Republic of Korea), 3062 (Guatemala), 3078 (Argentina), 3089 (Guatemala), 3090 (Colombia), 3091 (Colombia), 3092 (Colombia), 3106 (Panama), 3115 (Argentina), 3120 (Argentina), 3134 (Cameroon), 3139 (Guatemala), 3151 (Canada), 3152 (Honduras) 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 2177 and 2183 (Japan), 2254 (Bolivarian Republic of Venezuela), 2673 (Guatemala), 2753 (Djibouti), 2761 (Colombia), 2824 (Colombia), 2897 (El Salvador), 2957 (El Salvador), 2958 (Colombia), 2982 (Peru), 2994 (Tunisia), 3007 (El Salvador), 3035 (Guatemala), 3059 (Bolivarian Republic of Venezuela), 3061 (Colombia), 3068 (Dominican Republic), 3069 (Peru), 3074 (Colombia), 3082 (Bolivarian Republic of Venezuela), 3093 (Spain), 3095 (Tunisia), 3097 (Colombia), 3098 (Turkey), 3103 (Colombia), 3108 (Chile), 3110 (Paraguay), 3111 (Poland), 3112 (Colombia), 3114 (Colombia), 3116 (Chile), 3122 (Costa Rica), 3123 (Paraguay), 3131 (Colombia), 3132 (Peru), 3135 (Honduras), 3142 (Cameroon), 3144 (Colombia), 3145 (Russian Federation), 3147 (Norway), 3155 (Bosnia and Herzegovina), 3166 (Panama), 3169 (Guinea), 3171 (Myanmar) and 3177 (Nicaragua), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

### **Withdrawal of complaints**

12. In Cases Nos 3048 (Panama – active) and 2868 (Panama – follow-up), the Committee notes with satisfaction that, in the context of an ILO technical assistance mission carried out at the request of the Government, by virtue of an Agreement dated 18 February 2016 within the framework of the Committee for the Rapid Handling of Complaints relating to Freedom of Association and Collective Bargaining, the parties concerned indicate that the questions raised in the corresponding complaints have been resolved. In these circumstances, the Committee decides to close these cases.

### **Determination of inadmissibility**

13. The Committee considered certain aspects of the complainant's additional allegations in Case 3095 (Tunisia) from November 2015 not to be admissible. It will examine the remaining aspects of the Case at its next meeting in May–June 2016.

### **Article 26 complaint**

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

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

15. 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: 2964 (Pakistan), 3053 (Chile), 3064 (Cambodia), 3118 (Australia), 3128 (Zimbabwe) and 3136 (El Salvador).

## **Working methods, visibility and impact**

16. The Committee on Freedom of Association has continued its review of its working methods, procedures, visibility and impact with a view to reporting to the Governing Body at its 326th Session in March 2016. The Committee has held separate dedicated sittings to this effect presided by the Committee's independent chair on 11 March, 30 May and 31 October 2015 and 12 March 2016.
17. At the outset, the Committee wishes to recall the fundamental importance of its work in ensuring universality, legal certainty and predictability in the area of freedom of association. These principles guide the Committee in its work so that it may continue to promote a fair and level playing field in the area of freedom of association as one of the primary safeguards of peace and social justice.
18. The Committee took a number of decisions over this period that are already clearly visible such as the naming of its members in the second paragraph of its report, the explicit identification in its introduction of cases that it had to examine in the absence of governments' replies and the important recourse that it has made to paragraph 69 of its procedures to convoke governments to its sessions to provide detailed information first-hand in cases of serious lack of cooperation. The Committee has also streamlined some of its working methods. The Committee considers that these are important new innovations that have contributed to the efficiency of its work and which it intends to pursue as appropriate.
19. Indeed, the Committee considers its periodic discussions on working methods to be a normal part of its task to improve its efficiency and impact. There were many different issues and proposals for its consideration; some of these necessitate further reflection and debate and the Committee is therefore committed to pursuing these matters with a view to more medium or longer term action. These matters concern the effective communication of the Committee's procedures and mandate to its constituents, the improvement of follow-up given to its recommendations, and the interface between the Committee and the other ILO supervisory bodies. The Committee intends to pursue its discussions on these and other points throughout its mandate and will be meeting again in this regard at its meeting in October 2016. In the meantime, the Committee wishes to raise below some concrete steps that it has agreed would improve its functioning and its interface with constituents and which it intends to implement immediately.

## ***Managing an increasing workload and effective use of the Committee's procedures***

20. The Committee has taken due note of the increasing workload over the years and the absence of cooperation or sufficient information from either the complainants or governments in some cases. The Committee has reflected on the manner in which it can most effectively handle its workload and ensure that, in this context, all efforts are made to ensure complete information for the preparation of cases on a priority basis without any undue delay.
21. In order to effectively carry out this task, the Committee considers it important to ensure effective governance in the handling of cases and has therefore decided to set up a

subcommittee, which will make proposals to the Committee for final decision. The CFA subcommittee, composed of the Chair, the two Vice-Chairs and the Government coordinator, will meet in Geneva on Tuesday and Wednesday just prior to the CFA's triannual meetings. The CFA subcommittee may also meet virtually in between CFA meetings as needed. It is proposed that the CFA subcommittee meet on a trial basis prior to the CFA meetings in May and October 2016, as well as in March 2017, at which time the CFA will review the functioning of the subcommittee and its impact and decide on any further action. A review of the functioning and impact of the subcommittee will be presented to the Governing Body at the end of the current CFA's mandate in 2017 and for consideration by the new CFA to be constituted in June 2017.

22. As it is proposed that the subcommittee meet prior to the CFA meeting, there will be a financial implication in order to cover the per diem of its non-governmental members, which is set out in GB.326/INS/12(Add.).
23. The Committee also considers that the handling of complaints and the internal working methods of the Office need to be further modernized with a view to streamlining administrative procedures and making them more transparent for the Committee, the Office and for the constituents. The Committee has asked the Office to engage reflections with other comparable institutions in this regard with a view to reporting back to the Committee and the Governing Body later this year.

### ***Facilitating access to its decisions and principles***

24. The Committee also reviewed the status of the *Digest of decisions and principles of the Freedom of Association Committee*, fifth (revised) edition, and considered that its updating was of prime importance. Recalling the principles of universality, legal certainty, predictability and a fair and level playing field in the area of freedom of association which it aims to ensure, the Committee considered that it would be most effective to its own work and to the needs of the outside world for clear and up-to-date information on the principles of freedom of association if the digest could also be made available in an easily accessible electronic format that would facilitate regular updating in real time of its decisions and principles taken in specific cases. Bearing in mind the varying needs and levels of technological advancement of its constituents, the *Digest* would be updated and published in hard copy, while further developments would be reflected in an e-Digest after each report. As this would also imply financial implications not accounted for in the programme and the budget, the cost estimates are also set out in document GB.326/INS/12(Add.).
25. The Committee has high expectations that these initial proposals will go a far way to responding to a variety of concerns related to the complaints procedure that have been raised over the years and hopes that it will be in a position to substantiate these expectations through the feedback to be provided by the end of the mandate of its current members in June 2017.
26. The Committee invites the Governing Body to review document GB.326/INS/12(Add.) which sets out the expenses estimated for the implementation of a number of these decisions and hopes that the Governing Body will support its efforts for reform.

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

### Case No. 2750 (France)

27. The Committee last examined this case at its March 2014 meeting [see 371st report, paras 59–63]. The Committee recalls that the complaint presented by the General Confederation of Labour–Workers’ Force (CGT–FO) concerned the conformity of the provisions of the Act of 20 August 2008 to renew social democracy and to reform working hours and its implementing texts, with the provisions of Conventions Nos 87, 98 and 135, which France has ratified. In its latest recommendations, the Committee invited the Government to report on the evaluation of the application of the Act of 20 August 2008 on the basis of the report to be submitted to Parliament on that subject, and on the consultations held in the High Council for Social Dialogue (HCDS) set up for this purpose. The Committee expressed the hope that the evaluation would duly take into account the concerns expressed by the CGT–FO, as well as the conclusions and recommendations made previously by the Committee on the points raised.
28. In a communication dated 10 September 2015, the complainant organization deplors the fact that the Government has not given effect to the Committee’s recommendations on two points that it had raised previously; the first relating to the freedom to appoint the trade union delegate responsible for representing the trade union within the enterprise, particularly in the context of collective bargaining, and the second relating to the appointment and duration of the mandate of a union branch representative, in view of the right of trade union organizations to organize their administration and activities in accordance with Article 3 of Convention No. 87. The CGT–FO states that the amendments to the Labour Code necessary to restore the full freedom to appoint trade union delegates and union branch representatives are very simple to implement, as it would be sufficient to amend article L2143-3 of the Labour Code on trade union delegates and article L2142-1-1 of the Labour Code on union branch representatives.
29. The CGT–FO states that it had reminded the Government on several occasions of the need to amend the Labour Code by implementing the Committee’s recommendations, including at the roundtable meetings and the parliamentary debate on the government bill on “the modernization of social dialogue”, which was recently debated and adopted (Act No. 2015-994 of 17 August 2015 on social dialogue and employment). The CGT–FO considers that restoring full freedom to appoint the trade union delegate and the union branch representative is all the more urgent because the Government has confirmed that it wants to reform the Labour Code in the near future to give even more weight to enterprise-level collective bargaining, including by derogating from legal provisions and sectoral agreements or national collective agreements. Lastly, the CGT–FO refers to two court decisions which, on the basis of the Act in force (article L2143-3 of the Labour Code), deny the CGT–FO the possibility of appointing the trade union delegate of its choice, even though it is representative in the enterprises concerned, having obtained more than 10 per cent of the vote at the election of the works committee. Yet, in both cases, the CGT–FO simply wanted to freely appoint one of its members, who was not elected to the works committee, as the trade union delegate after the members of the works committee had openly made it known that they did not wish to take on the duties of trade union delegate, in addition to those of elected representative to the works committee, which is a different role.
30. In its communication dated 17 July 2014 on the follow-up to the Committee’s recommendations regarding this case, the Government confirms that the reform of trade union representation, introduced by the Act of 20 August 2008 and subsequently extended, has led to a significant overhaul of the rules on the representation of employees in enterprises, at the industry, national and interoccupational levels. The implementation of

these new principles was the subject of a comprehensive review in the second half of 2013. In the process of reviewing the Act, substantive work was undertaken with the members of the HCDS, at the same time as the orders on sectoral representation were being published. Three thematic meetings of the High Council and its follow-up committee were organized between September and November. The first sessions were on the review of the reform at the national, interoccupational and industry levels, in particular the implementation of the system on the trade union's representative voting strength (the "MARS system"). Subsequent sessions focused on the review of the ballot organized for employees of very small enterprises. The last sessions focused on the review of enterprise representation reform. According to the Government, this work was coupled with a broader discussion involving all the actors who had contributed to the implementation of the Act, namely the high courts – such as the Court of Cassation and the State Council – and legal professionals, for the purpose of enriching legal doctrine on the subject. The Government adds that, as provided for by law, the report of the Ministry, which reviewed the implementation of the Act of 20 August 2008, was presented to the National Collective Bargaining Commission (CNNC) on 16 December 2013. According to the Government, the opinion of the CNNC shows that the social partners agreed that the report drawn up by the Ministry accurately set out the different concerns and positions on the application of the Act of 20 August 2008. Moreover, the members of the HCDS submitted an opinion on 20 December 2013 intended to build on the report presented and issue proposals for legislative, regulatory and operational developments concerning the reform of trade union representation.

- 31.** In its communication of 18 December 2015, the Government responded to the CGT–FO's observations. The Government recalls that the Committee on Freedom of Association had previously invited it to consider the possibility, in consultation with the social partners in the framework of the HCDS, of revising the legislation. This consultation was held on 20 December 2013 and gave rise to the following position of the HCDS on the condition introduced by article 5 of the Act of 20 August 2008 (article L2143-3 of the Labour Code reflecting article 10-3 of the joint position paper of 9 April 2008): "The view that this condition strengthens the legitimacy of trade union delegates by giving them an electoral base is not shared by everyone. However, all the members of the HCDS – with the exception of the CGT–FO and the French Confederation of Christian Workers (CFTC) – find, in practice, no particular difficulties relating to the application of this provision. They highlight that the provisions of the Act, complemented by the Court of Cassation's jurisprudence, allow pragmatic solutions to be found for situations in which trade unions, which may be representative but do not or no longer have a candidate who personally obtained 10 per cent of the votes, may find themselves. They therefore want the jurisprudence to be codified on this point but do not consider it necessary to develop the law in relation to the principle of freedom of association". The Government thus considers that it has acted on the recommendation of the Committee on Freedom of Association by reporting to the HCDS and by not developing the law since all members of the HCDS, with the exception of the CGT–FO and the CFTC, did not wish to call into question the principle concerning the appointment of trade union delegates as established by the Act of 20 August 2008.
- 32.** Moreover, the Government specifies that, with regard to the possibility of appointing a trade union delegate of its choice, the CGT–FO's complaint is unfounded since the Act of 20 August 2008 now stipulates that delegates must be chosen from candidates for occupational elections who have obtained at least 10 per cent of the votes; it does not require that they be chosen from elected members. Indeed, they do not necessarily have to be elected. The Government reiterates that the condition set out in the Act of 20 August 2008 as to the choice of trade union delegates is aimed at strengthening the relationship between workers and their representatives. The Government also refers to the decisions of 2010 of the Court of Cassation and the Constitutional Council, which held that the provision complied with national law. In addition, the Government states that the Act of 20 August 2008 ensures compensation for any situation in which it is impossible to appoint a trade union delegate

for a representative trade union which no longer has any candidates who obtained at least 10 per cent of the votes in the elections. In such cases, the Act allows the representative trade union to appoint a trade union delegate from among the other candidates or, failing that, from among its members within the enterprise or establishment. Furthermore, according to the Government, a situation where the trade union does not have anyone it can appoint as trade union delegate cannot be equated to a situation where persons who could be appointed refuse to be. Thus, the case cited by the CGT-FO, in which all candidates in the occupational elections stated that they did not want to be appointed as trade union delegate, cannot be equated to a situation where it is impossible for a trade union to appoint a trade union delegate from among the candidates, which would permit it to appoint one of its own members. The Government is of the opinion that, in the abovementioned case, the judge rightly observed and sanctioned attitudes that had the effect of circumventing the legal requirements.

33. *The Committee takes note of the detailed information provided by the complainant organization and by the Government. It recalls that, in its previous examinations of the case, the Committee had declared that the right of workers' organizations to elect their own representatives freely was an indispensable condition for them to be able to 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 of the elections themselves [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 391]. The public authorities should therefore refrain from any interference which might restrict the exercise of this right, whether as regards the holding of trade union elections, eligibility conditions or the re-election or removal of representatives. While noting that, except for the CGT-FO and the CFTC, the HCDS as a whole did not want to call into question the principle of the appointment of the trade union delegate as set out in the Act of 20 August 2008, the Committee must recall that it considers the right of workers' organizations to organize their administration and activities in accordance with Article 3 of Convention No. 87 includes the freedom for organizations recognized as representative to choose their trade union delegates for the purposes of collective bargaining, as well as the possibility of being assisted by advisers of their choice. The Committee expects the Government to ensure that the system established under the Act of 20 August 2008 does not exclude such possibilities. Taking into account the above, the Committee invites the Government to continue an open dialogue with the social partners to revise the legislation in light of this principle without delay.*
34. With regard to the freedom of a trade union that has failed to obtain 10 per cent of the votes cast in the most recent elections to appoint a union branch representative and determine the duration of their mandate (article L2143-3 of the Labour Code), the Government recalls that the Act of 20 August 2008 grants non-representative organizations prerogatives previously enjoyed only by representative trade unions (constitution of a trade union branch; appointment of a trade union representative; authorization to nominate candidates to the first round of occupational elections; negotiation and conclusion of a pre-election agreement on the organization of elections). The Government states that, under the Act, the mandate of a union branch representative expires following the first occupational elections held after their appointment, and that a representative who fails to reach the 10 per cent threshold required for their union cannot be reappointed immediately. The trade union nevertheless remains free to appoint another employee as union branch representative, and the employee appointed originally may, in any event, be reappointed as union branch representative as from six months prior to the subsequent occupational elections in the enterprise. The Government is of the opinion that this provision, which allows the trade union to appoint another employee, ensures the trade union's freedom to appoint a representative, and the trade union is free, between elections, to determine the duration of the mandate of the union

branch representative it has appointed. The Government adds that this issue is addressed in the report being prepared for transmission to Parliament, on the basis of which the HCDS will submit the conclusions to be drawn from the application of the Act of 20 August 2008 to the Labour Minister so that she can determine, where appropriate, whether adjustments are necessary. *During the previous examination of the case, the Committee recalled that, pursuant to Article 3 of Convention No. 87, the appointment and duration of the mandate of a union branch representative should be freely determined by the union concerned in accordance with its constitution. The Committee had thus concluded that it was for the union to decide on the person who was best equipped to represent it within the enterprise and to defend its members in their individual claims, even when that person had failed to obtain 10 per cent of the votes cast in occupational elections. Noting that this matter could be discussed in relation to the necessary adjustments, the Committee hopes that the analysis of the HCDS on the matter will be presented to the Parliament and that discussions will be held, with the participation of the social partners, on the revision of the legislation in light of the abovementioned principle without delay.*

### **Case No. 2700 (Guatemala)**

35. The Committee examined this case concerning the non-implementation of the collective agreement concluded with the Union of Statistics Workers of the National Institute of Statistics (STINE) at its March 2011 meeting. On that occasion [see 359th Report, paras 63–66], the Committee deeply regretted the time which had passed since the signing of the collective agreement without that agreement being implemented and recalled once again that collective agreements must be binding for both parties. Noting that the case was still awaiting a second judicial hearing, the Committee urged the Government to take measures to ensure that the ongoing procedures were concluded in the very near future and to keep it informed of any developments in that regard.
36. The Committee takes note of the Government's communication of 10 August 2015 in which it forwards the observations of the National Institute of Statistics (INE). This administration indicates that: (i) the appeal for annulment of the collective agreement filed by the INE was dismissed in 2013; and (ii) at the invitation of the STINE, in conformity with article 11 of the aforementioned agreement, the new INE administration agreed to establish an agreement implementation committee that meets several times per month, as a result of which most of the provisions of the collective agreement are being implemented and the consequences of the budget restrictions imposed by the Government are being addressed. *The Committee notes with interest these developments. In the event that the information forwarded by the Government is not contested by the complainant organization, the Committee will not pursue its examination of this case.*

### **Case No. 3024 (Morocco)**

37. The Committee last examined this case at its March 2015 meeting [see 374th Report, paras 544–561]. The Committee recalls that this case concerns allegations of exclusion of the Democratic Union of the Judiciary (SDJ) from all collective bargaining by the Ministry of Justice and Freedoms despite it being the most representative organization in the justice sector, acts of discrimination against its leaders, and the violent dispersal by the security forces of peaceful demonstrations organized by the SDJ. In its previous examination of the case, the Committee made the following recommendations [see 374th Report, para. 561]:
- (a) The Committee requests the Government to indicate any administrative or judicial actions filed by the SDJ deputy general secretary following the disciplinary measures imposed on him, to provide a copy of rulings handed down and to report on any follow-up action taken.

- (b) The Committee encourages the continuation of the peaceful discussions between the Ministry of Justice and Freedoms and the Democratic Union of the Judiciary, given the important representative nature of this union, and invites the Government to continue to report on measures taken in this regard.
  - (c) The Committee requests the Government to keep it informed of any new developments regarding the draft Law on Trade Unions, and to send a copy of the law once it has been adopted.
38. In its communication dated 28 May 2015, the Government provides certain information in relation to the recommendations previously made by the Committee. With regard to recommendation (a), the Government indicates that the Ministry of Justice and Freedoms has not received any information relating to the existence of judicial actions filed against persons or institutions by the SDJ affiliated with the trade union federation Democratic Federation of Labour (FDT) following the acts of violence against its deputy general secretary.
39. With respect to the Committee's recommendation encouraging the continuation of the peaceful discussions between the Ministry of Justice and Freedoms and the SDJ (recommendation (b)), the Government indicates that: (i) the Ministry of Justice and Freedoms encourages dialogue and constructive collective bargaining and strictly monitors the continuation of discussions with all the social partners, including the SDJ; (ii) the Ministry has taken the initiative to invite the members of the SDJ to participate in five discussion meetings with the Minister of Justice and Freedoms, the general secretary of the Ministry and national directors; and (iii) the SDJ has participated, along with other trade union representatives, in discussions on issues relating to justice reform and has also been on committees responsible for reviewing transfer applications submitted by officials.
40. As to the draft Law on Trade Unions (recommendation (c)), the Government reiterates that the draft law has been submitted to all the social partners for comments and observations and will subsequently be submitted for approval. The Government indicates that the law will be sent to the Committee once it has been published in the *Official Gazette*.
41. *The Committee notes the information provided by the Government regarding recommendations (a) and (b). With respect to the draft Law on Trade Unions (recommendation (c)), the Committee requests the Government to keep it informed of any new developments in this regard, and to send a copy of the law once it has been adopted.*

### **Case No. 2919 (Mexico)**

42. The Committee last examined this case concerning anti-trade union practices and interference by Atento Servicios SA de CV and two ballots to determine the most representative union, at its October 2014 meeting [see 373rd Report, paras 49–51]. On that occasion, the Committee: (i) indicated that it wished to receive information on whether the complainant trade union (the Union of Telephone Operators of the Mexican Republic (STRM)) filed a claim following the 2011 ballot alleging that the Progressive Union of Communication and Transport Workers of the Mexican Republic (SPTCTRM) (rival of the complainant organization) had not registered any company worker, and (ii) noting that the complainant organization indicated that it was prepared to request, once again, the bargaining rights for the collective agreement of the workers of Atento Servicios SA de CV, requested the complainant organization to keep it informed in that regard and once again emphasized the importance that it attaches, if there is a new ballot, to the authorities providing the safeguards necessary to avoid any allegation of irregularities, thus guaranteeing that the affected workers have a full and fair opportunity to participate, in an atmosphere of calm and security.

43. In its communication dated 27 January 2016, the Government states that, in relation to the November 2011 ballot, a number of appeals for *juiscos de amparo* (protection of a constitutional right) have been lodged, the most recent of which, lodged by the complainant organization against the ruling of 6 December 2011, was settled definitively by the Fifteenth Collegiate Labour Court of the First Circuit, which upheld the contested ruling. The Government states that, consequently, a decision was issued ordering that the files should be closed and that, in the absence of any challenge, both the ruling and the decision ordering that the files should be closed were, and still are, considered *res judicata*, the November 2011 ballot process having thus fully concluded.
44. As to the holding of a new ballot, the Government states that, on 7 November 2014, as a follow-up to the Committee's recommendation, the Local Conciliation and Arbitration Board of the Federal District (JLCADF) issued a resolution on the request for the bargaining rights for the collective agreement of *Atento Servicios*, ordering the holding of a new ballot on 21 November 2014. The JLCADF convened the workers of the abovementioned enterprise, setting out the basic guidelines for the procedure and providing for the presence of national and international observers. The Government indicates that, on the scheduled date, a ballot was held in line with the national Constitution, the Federal Labour Act, the case law of the Supreme Court of Justice of the Nation and the Committee's recommendations and observing the principles of publicity, impartiality, neutrality, legality, security, secrecy and certainty in terms of voting, and of publicity and transparency with regard to the counting of votes, without any of the parties raising an objection. The Government adds that 54 national and international observers took part in the process. The Government states that, as a result of the ballot, the trade union with the most votes was the Trade Union of Service, Communication and Transport Workers of the Mexican Republic, with a total of 2,305 votes, followed by the Union of Telephone Operators of the Mexican Republic (complainant organization), with 577 votes. Consequently, the defendant trade union retains the bargaining rights for the collective agreement of *Atento Servicios*, an outcome reflected in a ruling issued by the JLCADF on 17 March 2015.
45. *Noting the information provided by the Government and not having received any further information from the complainant organization, the Committee will not continue with the examination of the case.*

### **Case No. 2981 (Mexico)**

46. The Committee last examined this case concerning, *inter alia*, the arrest and criminal prosecution of a representative of the World Federation of Trade Unions (WFTU) at its June 2013 meeting [see 368th Report, paras 672–886]. On that occasion, the Committee requested the Government to send it a copy of the sentence handed down to the WFTU's coordinator, Mr Efraín Arteaga Domínguez, charged with a criminal attack on channels of communication.
47. In its communication dated 23 September 2013, the Government reports that on 26 September 2012 a conciliation judgment was adopted in the Supervisory and Oral Proceeding Court of the Judicial District of Zacatecas, in which compensation agreements were drawn up, bringing the proceedings to an early close and dismissing the criminal action against Mr Efraín Arteaga Domínguez.
48. *Noting the dismissal of the criminal action against the WFTU's coordinator, the Committee observes that there are no other outstanding issues and it will not continue examining this case.*

**Case No. 2964 (Pakistan)**

49. The Committee examined this case at its May–June 2013 meeting [see 368th Report, paras 770–787] and on that occasion it formulated the following recommendations:

- (a) The Committee requests the Government to take the necessary measures to amend section 3(a) of the IRA 2012, so as to ensure that workers can belong to trade unions at both sectoral/provincial and national levels. It requests the Government to keep it informed of all measures taken in this regard.
- (b) The Committee expects that pending the hearing before the High Court, the rights of the Pakistan Wapda Hydro Electric Central Labour Union are restored. The Committee also expects that the obligation of Pakistan to respect in national legislation and practice freedom of association principles and the Conventions which it had freely ratified will be taken into account by the High Court and that the complainant organization will be ensured the right to represent its members both at provincial and at national level as appropriate. The Committee requests the Government to keep it informed of the outcome of the decision handed down by the Islamabad High Court.

50. In its communication dated 7 August 2015, the Government indicates that the petition of the complainant before the Islamabad High Court was dismissed by the Court on 18 December 2012. Pakistan Water and Power Development Authority (WAPDA) Hydro Electric Central Labour Union filed a civil petition for leave to appeal before the Supreme Court of Pakistan, which disposed it in the following terms: “... the petitioners are at liberty to avail the remedy as provided under section 12 of the Industrial Relations Act (IRA), 2012, before the proper forum”. The Government informs that the petitioner Osama Tariq has filed an appeal under section 12 of the IRA 2012 before the labour bench of the National Industrial Relations Commission (NIRC). The hearing of his appeal was scheduled for 3 September 2015.

51. The Government points out that the workers of the defunct Pakistan WAPDA Hydro Electric Central Labour Union have registered another union under the name of Pakistan WAPDA Hydro Electric Workers Union, which has now acquired the status of collective bargaining agent. All the principle office bearers of the old union, including Mr Khurshid Ahmend and Mr Abdul Latif Nizamani, are now the office bearers of the new union, except for Mr Osama Tariq who has filed the abovementioned appeal.

52. *The Committee takes note of the Government’s reply. It understands that a solution appears to have been found to remedy the situation created by the deregistration of the complainant trade union, the Pakistan WAPDA Hydro Electric Central Labour Union.*

53. *The Committee regrets that no information has been provided by the Government on the measures taken to amend section 3(a) of the IRA 2012. It requests the Government to provide to the Committee of Experts on the Application of Conventions and Recommendations, to which it refers this aspect of the case, information on the measures taken to amend this provision, in consultation with the social partners, so as to ensure that workers can belong to trade unions at both sectoral/provincial and national levels.*

**Case No. 2533 (Peru)**

54. The Committee last examined this case at its June 2013 meeting and on that occasion it made the following recommendations [see 368th Report, paras 94 and 95]:

The Committee requests the Government to continue conducting its investigations with regard to the enterprise Textiles San Sebastián SAC and to ensure that all the dismissed trade union officials and workers receive the legal indemnity and compensation constituting a sufficiently dissuasive sanction against anti-union dismissals.

[At its November 2012 session, the Committee yet again urged the Government to ensure that the enterprise Textiles San Sebastián SAC still exists, and if it does, to take the necessary measures without delay to ensure that the enterprise reinstates the dismissed officials and workers with the payment of wage arrears, recognizes the union, rectifies the anti-union measures taken against it, refrains from adopting any such measures in the future and encourages collective bargaining between the parties. If reinstatement is not possible for objective and compelling reasons, the Committee urged the Government to ensure that the workers concerned received adequate compensation so as to constitute a sufficiently dissuasive sanction against anti-union dismissals (see 365th Report, para. 129)].

The Committee notes that the Government reports on the progress of the judicial proceedings concerning the dismissal of the trade unionists of CFG Investment, which are still pending resolution (Mr Abel Antonio Rojas, Mr Rodolfo Toyco Cotrina, Mr Primitivo Ramos, Mr Marco Antonio Matta and Mr Juan Germán Cáceres) and requests to be kept informed in that regard, and five cases which are under appeal (Mr Ángel Maglorio, Mr Alfredo Flores, Mr Segundino Flores, Mr Alex Javier Rojas and Mr Roberto Juan Gargate).

- 55.** In its communications of 2013 and 2014, the Government provides detailed information on the progress of the judicial proceedings initiated by the dismissed workers against CFG Investment. Specifically, it states the following: (1) in judgment No. 696-2011, the Supreme Court of Justice ordered the reinstatement of Mr Abel Antonio Rojas and the payment of the wages due and the interest accrued; (2) the case relating to Mr Rodolfo Toyco Cotrina is currently under way, the ruling handed down in the first instance upholding the petition having been annulled. Moreover, in Resolution No. 13, of 3 March 2014, the Lima Higher Court of Justice ordered the presentation of evidence as provided for by law; (3) the case relating to Mr Primitivo Ramos is currently pending awaiting the provision of evidence by the enterprise that will allow the 17th Specialized Labour Court to hand down a judgment; (4) the ruling upholding the petition submitted by Mr Marco Antonio Matta has been confirmed and the parties were notified of its implementation on 12 May 2014; and (5) as to the case relating to Mr Juan Germán Cáceres, the claimant has lodged a cassation appeal, with the case scheduled to be heard on 18 June 2014.
- 56.** As to the five cases which are under appeal, the Government states the following: (1) with regard to Mr Ángel Maglorio, the claimant lodged a cassation appeal, with the case scheduled to be heard on 12 June 2014; (2) the case relating to Mr Alfredo Flores is currently at the enforcement stage, the claimant was reinstated on 4 September 2013 and the wages due and appropriate statutory interest were calculated; (3) the case relating to Mr Segundino Flores is currently pending awaiting the issuing of a report on the basis of which a judgment will be handed down; (4) the case relating to Mr Alex Javier Rojas is currently at the enforcement stage; the claimant was reinstated in line with a reinstatement order dated 16 September 2013 and, on 3 January 2014, a court-recognized expert was commissioned to oversee the payment of the wages due and the statutory interest; and (5) the case relating to Mr Roberto Juan Gargate is currently at the enforcement stage; the worker was reinstated in the light of cassation ruling No. 2737-2012, and expert report No. 10-14 MGA on the payment of the wages due has been prepared.
- 57.** *The Committee notes with satisfaction the Supreme Court of Justice judgments ordering the reinstatement of the trade unionists Mr Abel Antonio Rojas, Mr Marco Antonio Matta, Mr Alfredo Flores, Mr Alex Javier Rojas and Mr Roberto Juan Garate. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings relating to the dismissal of a number of other trade unionists of CFG Investment which are still pending (Mr Rodolfo Toyco Cotrina, Mr Primitivo Ramos, Mr Juan Germán Cáceres, Mr Ángel Maglorio and Mr Segundino Flores). Finally, the Committee regrets that it has not received information on the enterprise Textiles San Sebastián SAC and requests the Government to continue conducting its investigations and to ensure that all the dismissed trade union officials and workers receive the legal indemnity and compensation constituting a sufficiently dissuasive sanction against anti-union dismissals.*

**Case No. 2976 (Turkey)**

58. The Committee last examined this case at its June 2013 meeting [see 368th Report, paras 827–847], when it expressed the expectation that all applications for the determination of competence to bargain collectively be examined without delay. With regard to the dismissal of 35 workers from the Togo Footwear Industry and Trade Inc., the Committee expressed its expectation that any information relating to the alleged anti-union nature of the dismissals be considered by the courts bearing in mind the relevant principles of freedom of association; that the decision be handed down in the very near future and that if the anti-union nature of the dismissals is established, the workers concerned be reinstated without loss of pay, or if reinstatement is not possible for objective and compelling reasons, adequate compensation be paid to them; and requested the Government to provide the relevant court judgment as soon as it is handed down. It also requested the Government to provide a copy of the inquiry report on the dismissal of 20 workers from the Ceha Office Furniture Limited Company.
59. The Government sent follow-up information in communications dated 6 September 2013 and 5 May 2014. In its 6 September communication, the Government recalls domestic constitutional and legislative provisions governing the right to establish and join trade unions and to conclude collective labour agreements. In its 5 May communication, the Government indicates in general that after the entry into force of Law No. 6356 (published on 7 November 2012) statistics began to be published regularly and the problems related to the process of determination of competence for concluding collective labour agreements were eliminated and notably, that the applications for certificates of competence presented by Petrol-İş were examined urgently for the following workplaces, with the outcomes specified:
- for Gripin Pharmaceutical Co. the certificate of competence was issued on 21 December 2012 and a collective labour agreement was concluded with its validity extending from 1 September 2012 to 31 August 2014;
  - for Elba Plaster Industry and Trade Inc. the certificate of competence was issued on 24 December 2012 and a collective labour agreement was concluded with its validity extending from 1 July 2012 to 30 June 2014;
  - for Arili Plastic Industry Inc. the certificate of competence was issued on 21 December 2012 and a collective labour agreement was concluded with its validity extending from 1 September 2012 to 31 August 2014;
  - for Saba Industrial Products Manufacturing and Trade Inc. the certificate of competence was issued on 27 December 2012 and a collective labour agreement was concluded with its validity extending from 1 January 2013 to 31 August 2014;
  - for Reckitt Benckiser Cleaning Supplies Industry and Trade Inc. the certificate of competence was issued on 13 December 2012 and a collective labour agreement was concluded with its validity extending from 1 September 2012 to 31 December 2014;
  - for Ürosan Chemical Industry and Trade Inc. the certificate of competence was issued on 24 December 2012 and a collective labour agreement was concluded with its validity extending from 1 September 2012 to 31 August 2014;
  - for Akin Plastic Industry and Trade Inc. the certificate of competence was issued on 31 December 2012 and a collective labour agreement was concluded with its validity extending from 1 September 2012 to 31 August 2014;

- for Sandoz Pharmaceutical Industry and Trade Inc. the certificate of competence was issued on 27 December 2012 and a collective labour agreement was concluded with its validity extending from 1 January 2013 to 31 December 2014;
- for Plastimak Profiled Injection Industry and Trade Limited Company the certificate of competence was issued on 24 December 2012 and a collective labour agreement was concluded with its validity extending from 1 July 2012 to 30 June 2014;
- for Plaskar Plastic Injection, Automotive, Accessories, Transport, Packaging, Molding Industry, Import, Export, Trade and Industry Inc. the certificate of competence was issued on 17 July 2013;
- for Mehmetçik Foundation Tourism, Oil, Instruction, Health, Food and Trade Limited Company the certificate of competence was issued on 28 December 2012 and a collective labour agreement was concluded with its validity extending from 1 October 2012 to 30 September 2014;
- for Plastiform Plastic Industry and Trade Inc. the certificate of competence was issued on 14 May 2013 and a collective labour agreement was concluded with its validity extending from 1 January 2013 to 31 December 2015.

With regard to Erze Packaging and Plastic Industry and Trade Inc., the Government indicates that Petrol-İş has failed to renew its application with a ruling of specific annotation as previously required by the Ministry of Labour and Social Security [see 368th Report, para. 839].

- 60.** With regard to the right to benefit from check-off facilities and the right to appoint trade union representatives, the Government indicates that with the enactment of Law No. 6356 and delivery of competence certificates the problem has been resolved.
- 61.** With regard to the consequences of suspension of the right of collective bargaining on the workers' freedom of association rights in Togo Footwear Industry and Trade Inc. (hereinafter the enterprise), the Government reiterates that a Ministry report indicated that as of 3 April 2012, 33 workers out of 59 were Deri-İş affiliates. However, a certificate of competence could not be issued due to the suspension of publication of statistics. The Government further indicates that following the enactment of Law No. 6356 the Ministry notified the employer that Deri-İş had the majority required to conclude a collective labour agreement. However, the employer indicated that because of the high labour cost of its products in Turkey, it shall reduce the number of its staff in accordance with Article 29 of the Labour Law entitled "Collective Dismissal". The Government indicates that in response to this statement of the employer, the Labour Inspection Board conducted an inspection with a view to analyse the situation and supervise the collective dismissal process and an inspection report was prepared, according to which: no collective labour agreement and union activity existed at the workplace; the workers were not forced to be or not to be a union member; the employer had no information about their status of union affiliation; and the workers were not informed about the dismissals. The Government further indicates that the proceedings before Ankara Third Labour Court are still ongoing and that on 4 June 2012 the Court requested the enterprise to submit the lists showing the dates of recruitment and termination of employment as well as the dates of resignation from the union of the workers working in the litigious workplace as of 16 November 2011; and on 6 June the court requested the submission, if available, of the file of application for conclusion of a collective labour agreement. The Government further indicates that on 19 July 2012, the union addressed a communication to the Ministry alleging that the employer had dismissed all the workers who were its affiliates.

62. With regard to Ceha Office Furniture Limited Company, the Government refers to additional allegations of the trade union claiming that the employer had recourse to practices aiming at preventing the union to get a competence certificate, namely that after the union addressed an application for certificate of competence to the Ministry, 20 affiliated workers were dismissed, while the total number of workers was raised through new recruitment. In response to these allegations the Ministry conducted an investigation as a result of which it was determined that on 12 March 2012, the number of workers employed in the enterprise amounted to 841, among which 351 were affiliates of United Metal Workers' Union. The Ministry consequently determined that the union affiliates did not constitute the majority of workers as required in Article 41 of Law No. 6356 that defines the notion of competence. The union appealed to the Labour Court against this decision, requesting its reversal on the grounds that the numbers of workers and union affiliates relied upon were wrong. An expert report was presented to the Court according to which between 14 and 19 March 2012 the employer proceeded to recruit intensively, while a date prior to 12 March was notified as the date of recruitment and the whole process was a sham. On 7 November 2013 the Court requested the Ministry to submit membership registration forms and the employed workers' petitions for resignation referred to in the expert report. The Ministry duly submitted those documents and the judicial process is still ongoing.
63. *The Committee takes note of the information provided by the Government and welcomes the resumption of publication of statistics and issuance of certificates of competence by the Ministry of Labour that mark the end of the period of de facto suspension of collective bargaining rights in the country, and allow trade unions to once again benefit from check-off facilities and appoint their representatives. In particular, the Committee notes with satisfaction that certificates of competence were delivered to Petrol-İş for 12 workplaces and collective agreements concluded in 11 of those. The Committee takes note of the Government's indication with regard to Erze Packaging and Plastic Industry and Trade Inc., that the certificate of competence could not be delivered as Petrol-İş failed to renew its application with a ruling of specific annotation as required by the Ministry of Labour and invites the complainant to provide follow-up information on this particular process.*
64. *With regard to the dismissal of 35 workers from the Togo enterprise, the Committee notes with concern that more than three years after the alleged anti-union dismissal of the said workers, the judicial proceedings on the determination of the nature of dismissals have not yet come to their conclusion. Recalling that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 105], and that cases concerning anti-union discrimination should be examined rapidly in order to ensure that the remedies provided are truly effective, the Committee urges the judicial authorities to pronounce on the dismissals without further delay so as to avoid a denial of justice and requests the Government to provide it with a copy of the ruling as soon as it is handed down.*
65. *The Committee further notes the Government's indication that the enterprise has expressed its intention of having recourse to collective dismissals for economic reasons. The Committee understands that this statement relates to the period after the enactment of Act No. 6356 (7 November 2012), and hence is posterior to the abovementioned dismissal of 35 workers that occurred in May 2012. Observing that the court proceedings in this case are ongoing, the Committee requests the Government to keep it informed of the outcome.*
66. *With regard to the dismissal of 20 workers from the Ceha Office Furniture Limited Company, the Committee notes with regret that the Government has not provided the copy of the inquiry report as requested at its last examination of the case and reiterates its request to this effect. The Committee further notes the new information provided by the Government with regard to the exercise of the right to collective bargaining at the workplace, notably that the United Metal Workers' Union initiated judicial proceedings in order to obtain*

*reversal of the Ministry's rejection of its application for a certificate of competence, on the grounds that the employer had recourse to intensive recruitment after the union applied for a certificate of competence, in order to defeat the majority status of the union at the enterprise. The Committee trusts that the Court will thoroughly review the allegations of anti-union actions in this case and requests the Government to provide it with a copy of the judgment as soon as it is delivered.*

\* \* \*

67. Finally, the Committee requests the governments and/or complainants concerned to keep it informed of any developments relating to the following cases.

Case	Last examination on the merits	Last follow-up examination
1787 (Colombia)	March 2010	June 2014
2096 (Pakistan)	March 2004	March 2011
2362 (Colombia)	March 2010	November 2012
2400 (Peru)	November 2007	November 2015
2434 (Colombia)	March 2009	–
2512 (India)	November 2007	November 2015
2528 (Philippines)	June 2012	November 2015
2566 (Islamic Republic of Iran)	November 2008	–
2595 (Colombia)	June 2009	October 2013
2603 (Argentina)	November 2008	November 2012
2637 (Malaysia)	March 2009	November 2015
2652 (Philippines)	November 2003	November 2015
2654 (Canada)	March 2010	March 2014
2679 (Mexico)	June 2010	March 2015
2684 (Ecuador)	June 2014	–
2715 (Democratic Republic of the Congo)	June 2014	–
2743 (Argentina)	November 2015	–
2755 (Ecuador)	June 2010	March 2011
2756 (Mali)	March 2011	November 2015
2758 (Russian Federation)	November 2012	June 2015
2780 (Ireland)	March 2012	–
2786 (Dominican Republic)	November 2015	–
2797 (Democratic Republic of the Congo)	March 2014	–
2815 (Philippines)	November 2012	November 2015
2837 (Argentina)	March 2012	November 2015
2844 (Japan)	June 2012	November 2015
2850 (Malaysia)	March 2012	June 2015
2870 (Argentina)	November 2012	June 2015
2872 (Guatemala)	November 2011	–
2892 (Turkey)	March 2014	November 2015
2896 (El Salvador)	June 2015	–
2925 (Democratic Republic of the Congo)	March 2014	–

Case	Last examination on the merits	Last follow-up examination
2934 (Peru)	November 2012	–
2947 (Spain)	March 2015	–
2966 (Peru)	November 2013	November 2015
2977 (Jordan)	March 2013	November 2015
2988 (Qatar)	March 2014	November 2015
2991 (India)	June 2013	November 2015
2998 (Peru)	March 2015	–
3011 (Turkey)	June 2014	November 2015
3022 (Thailand)	June 2014	–
3041 (Cameroon)	November 2014	–
3046 (Argentina)	November 2015	–
3051 (Japan)	November 2015	–
3055 (Panama)	November 2015	–
3060 (Mexico)	November 2015	–
3072 (Portugal)	November 2015	–
3075 (Argentina)	November 2015	–
3083 (Argentina)	November 2015	–
3087 (Colombia)	November 2015	–
3096 (Peru)	November 2015	–
3102 (Chile)	November 2015	–
3105 (Togo)	June 2015	–

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

**69.** In addition, the Committee has received information concerning the follow-up of Cases Nos 1865 (Republic of Korea), 1962 (Colombia), 2086 (Paraguay), 2153 (Algeria), 2341 (Guatemala), 2430 (Canada), 2488 (Philippines), 2540 (Guatemala), 2583 (Colombia), 2656 (Brazil), 2667 (Peru), 2678 (Georgia), 2699 (Uruguay), 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), 2871 (El Salvador), 2883 (Peru), 2895 (Colombia), 2900 (Peru), 2915 (Peru), 2916 (Nicaragua), 2917 (Bolivarian Republic of Venezuela), 2924 (Colombia), 2929 (Costa Rica), 2937 (Paraguay), 2944 (Algeria), 2946 (Colombia), 2947 (Spain), 2952 (Lebanon), 2953 (Italy), 2954 (Colombia), 2960 (Colombia), 2962 (India), 2973 (Mexico), 2979 (Argentina), 2980 (El Salvador), 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), 3026 (Peru), 3030 (Mali), 3033 (Peru), 3036 (Bolivarian Republic of Venezuela), 3039 (Denmark), 3040 (Guatemala), 3043 (Peru), 3054 (El Salvador), 3057 (Canada), 3058 (Djibouti), 3063 (Colombia), 3070 (Benin), 3077 (Honduras), 3084 (Turkey), 3085 (Algeria) and 3101 (Paraguay), which it will examine at its next meeting.

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CASE NO. 3104

INTERIM REPORT

**Complaint against the Government of Algeria  
presented by  
the Autonomous National Union of Postal Workers (SNAP)**

***Allegations: The complainant organization denounces the anti-trade union dismissal of two of its officials, including its president, by Algérie Poste***

70. The complaint is contained in communications from the Autonomous National Union of Postal Workers (SNAP) dated 27 August and 18 September 2014, 7 March 2015 and 2 January 2016.
71. Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case several times. At its November 2015 meeting [see 376th Report, para. 7], 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.
72. Algeria 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 complainant's allegations**

73. In communications dated 27 August and 18 September 2014, 7 March 2015 and 2 January 2016, SNAP affirms that it has legal trade union status, having filed its constitution with the Ministry of Labour, Employment and Social Security on 2 July 2012. In this connection, SNAP recalls that it previously presented a complaint against the Government to the Committee on Freedom of Association for the authorities' refusal to register it (Case No. 2944). SNAP nevertheless indicates that it has a strong local presence, a fact which is reflected by the hundreds of articles on it which have appeared in the national press.
74. SNAP denounces the dismissal of two of its officials by Algérie Poste (Algerian postal service), a public enterprise of an industrial and commercial nature, and the dismissal of an employee who demonstrated solidarity with them. With regard to the dismissal of its two officials, Mr Tarek Ammar Khodja, the union's communications officer, and Mr Mourad Nekache, its president, SNAP states the following.
75. Mr Ammar Khodja had worked at the post office in Dar El-Beida (Algiers) as a customer support officer since 1998. He was also a communications officer for SNAP and, in that capacity, was responsible for media relations (press and television). According to the complainant organization, following the refusal of the director of the Wilaya (provincial) postal unit (UPW) of East Algiers to receive their delegation, a group of 28 postal workers at the Dar El-Beida post office decided to stop work for two hours (from 8 a.m. to 10 a.m.) on 7 July 2014, and asked for a meeting with the director in order to protest against the suspension of a colleague which was in violation of the internal regulations. The director of

auditing on the Algérie Poste management board, plus the director of the East Algiers UPW, its head of personnel and an inspector from the East Algiers UPW travelled to the post office in question.

- 76.** According to the complainant organization, Mr Ammar Khodja was then called into his supervisor's office. In the presence of the director of the East Algiers UPW, its head of personnel and the manager of the branch post office, the auditing director aggressively confronted and threatened Mr Ammar Khodja, claiming that he had made statements to the press. The following day, Mr Ammar Khodja was summoned to the East Algiers UPW head office. The UPW director accused him of having instigated the two-hour work stoppage the previous day, which he denied. The director also accused him of having made certain statements to the press, which he likewise denied, adding that he had never made any statements while on duty or at his place of work.
- 77.** SNAP states that on 9 July 2014 Mr Ammar Khodja was summoned to the UPW head office, where he was subjected to intimidation and called upon to answer a series of 20 questions relating essentially to his union membership and the statements allegedly made to the press. That same day, a copy of a decision to suspend him from work – on nine separate grounds – was sent to his post office by fax. Mr Ammar Khodja learned of the suspension that same evening, since it was Ramadan and the post office was open in the evening.
- 78.** On 13 July 2014, Mr Ammar Khodja received a letter summoning him to appear before the disciplinary committee of the East Algiers UPW. According to SNAP, the letter contained no mention of the reason for the summons to the meeting scheduled for 17 July 2014, in violation of article 113 of the Algérie Poste internal regulations. Following his appearance on 17 July, Mr Ammar Khodja received notification of his dismissal on 23 July 2014 (copy attached).
- 79.** Mr Ammar Khodja noted the following irregularities in the course of the disciplinary procedure: (i) the summons to appear before the disciplinary committee was dated 13 July 2014, only five days before the scheduled appearance – instead of eight working days, the time period required by the company's internal regulations; furthermore, the letter contained no grounds for the summons; (ii) throughout the disciplinary procedure, Mr Ammar Khodja was unable to consult his personnel file in the format he wished, in view of his visual disability, and he was denied the opportunity to present evidence in his defence; (iii) there is no material evidence to substantiate the grounds on which Mr Ammar Khodja was penalized; moreover, the disciplinary committee refused to examine the nine reasons given for the decision to suspend him, arguing that it was for him to disprove the allegations; and (iv) the workers who stopped work for two hours on 7 July 2014 were merely issued with a warning.
- 80.** On 12 August 2014, Mr Ammar Khodja filed an appeal with the management board of Algérie Poste, aimed at having the dismissal decision overturned. The company took no action in response to the appeal, in violation of article 119 of its internal regulations, which stipulates that the appeals committee must respond in writing within three months. On 16 November 2014, a complaint for unfair dismissal was filed with the competent labour inspectorate in Bab Ezzouar (Algiers). The labour inspectorate merely organized a conciliation meeting for the two parties for 22 December 2014. As a result of the company's failure to send a representative to the meeting, a second meeting was arranged for 29 December 2014. At the second conciliation meeting the company refused to reinstate Mr Ammar Khodja, and even indicated that it had filed a complaint against him with the court of El Harrach (Algiers) for his union activity. On 15 April 2015, Mr Ammar Khodja received a summons to appear before the appeals committee, more than eight months after filing his appeal of 12 August 2014. On 29 April 2015, he received a final decision upholding his dismissal.

- 81.** On 25 May 2015, Mr Ammar Khodja brought the matter before the court of El Harrach. After more than three months of proceedings, a definitive judgment was handed down in his favour. The court clearly ordered his reinstatement in his post, with all acquired benefits (copy of the ruling attached to the complaint). On 7 October 2015, the judgment was communicated to the Algérie Poste management board by a court officer. Since the company had not taken any action to implement the ruling by the statutory 15-day deadline, on 19 November 2015 the court officer issued an official report of non-compliance with the ruling ordering Mr Ammar Khodja's reinstatement.
- 82.** Mr Ammar Khodja, a family breadwinner and father of three children, has been deprived of any remuneration since 9 July 2014, despite a legal decision of August 2015 ordering his reinstatement and the payment of all acquired benefits.
- 83.** As regards the situation of SNAP president Mr Nekache, the complainant organization indicates that he had been employed at the post office in Boudouaou Benterquia (Boumerdès) as a customer support officer since his recruitment in August 2000. In his trade union capacity, he was responsible for media relations (press and television).
- 84.** On 22 July 2014, SNAP organized a press conference at the trade union centre in Algiers. The press conference was led by the SNAP president, Mr Nekache, and the communications officer, Mr Ammar Khodja. According to the complainant organization, on 23 July 2014, a team of three inspectors from the Boumerdès UPW arrived at the Boudouaou Benterquia post office. The inspectors firstly wanted to know the reason for his absence the day before. Mr Nekache indicated that he had previously provided an explanation to his supervisor, who had recorded the matter in writing. The inspectors then questioned Mr Nekache about the content of his remarks to the press, making it clear that they were acting on the orders of the auditing director on the company's management board. Mr Nekache said that he had made statements to the press in his capacity as president of a trade union and on the basis of the freedom of expression guaranteed him by the national Constitution. On 27 July, Mr Nekache was again questioned by a team of inspectors concerning his statements to the press. He again replied that, in making statements to the press in his capacity as trade union president, he was merely exercising the freedom of expression which is a fundamental right recognized in the Constitution. He added that the questioning represented gross interference by the company in the trade union's operation. That same day, Mr Nekache sent a fax to the director of the Boumerdès UPW denouncing the harassment to which he had been subjected.
- 85.** The complainant organization indicates that, on 31 July, Mr Nekache received a letter at work notifying him of his suspension from work, effective as of 2 August 2014. On 11 August 2014, Mr Nekache received a summons to appear before the disciplinary committee on 21 August 2014. The letter, in violation of article 113 of the company's internal regulations, did not specify the reason for the summons. The following day, Mr Nekache went to the administrative department of the Boumerdès UPW to consult his personnel file, but was informed that he was required to submit a written request prior to such a visit. Furthermore, the complainant denounces the fact that, on 21 August 2014, Mr Nekache was denied the right to defend himself before the disciplinary committee and, as a result of his protestations, he was even excluded from the meeting by the committee chairperson. On 27 August 2014, Mr Nekache received a notification by mail of the decision to dismiss him.
- 86.** Mr Nekache lodged an appeal with the disciplinary committee of the national head office of Algérie Poste on 17 September 2014, seeking to have the decision to dismiss him overturned. Since there was no follow-up to the appeal from the company management, Mr Nekache lodged a complaint for unfair dismissal with the competent labour inspectorate on 18 December 2014. According to the complainant organization, the labour inspectorate merely arranged for an initial conciliation meeting between the two parties, to be held in

January 2015, which it then postponed at the company's request. At the rescheduled conciliation meeting, the company made clear its refusal to reinstate Mr Nekache. The labour inspectorate therefore issued an official report indicating the failure to reach an agreement.

- 87.** Mr Nekache was then summoned by the police in March 2015 because his company had lodged a complaint against him for engaging in trade union activities. Six months after he had filed his appeal, the company summoned him to appear before the appeals committee, despite the fact that its internal regulations stipulate that the committee must respond to all appeals within three months. Finally, on 31 March 2015, Mr Nekache received a notification confirming his dismissal and indicating that it would be without notice, the penalty thus being made more severe. However, the decision of the appeals committee was not communicated to him.
- 88.** On 25 May 2015, Mr Nekache brought the matter before the court of El Harrach. After more than three months of proceedings, a definitive ruling was handed down in his favour. The court clearly ordered his reinstatement in his post with all acquired benefits (copy of the ruling attached to the complaint). However, despite the fact that the company was informed of the ruling by a court officer on 7 October 2015, it did not take any steps to implement it. In November 2015, after the 15-day implementation deadline following notification of a ruling had long expired, the court officer issued an official notice of failure to execute the judgment. According to the complainant organization, Mr Nekache, a family breadwinner and father of two children, has been deprived of any remuneration since 2 August 2014, in spite of the legal ruling in his favour.
- 89.** In conclusion, SNAP states that its two leaders were dismissed as a direct consequence of their trade union activities, and that the statements made to the press served as a pretext for their dismissals, which were in fact intended to weaken the trade union in question and restrict its freedom of action.
- 90.** The complainant organization provided additional information in a communication dated 18 September 2014 describing the unfair dismissal of a third Algérie Poste employee, which SNAP claims was directly linked to the anti-union dismissal of Mr Nekache. In this connection, the complainant states the following.
- 91.** Mr Bilal Benyacoub worked at the post office in Naciria (Boumerdès) as an assistant operator. After working for two years under the auspices of a vocational integration programme, he was finally recruited in April 2014 on a subsidized employment contract. In the afternoon of Thursday 21 August 2014, a group of seven workers came to support the president of SNAP, Mr Nekache, at the end of his disciplinary committee meeting at the Boumerdès UPW head office. Mr Benyacoub, who had finished work for the day, joined the group waiting for the SNAP president outside on the road. According to the complainant organization, on Sunday 24 August, Mr Benyacoub was summoned by the director of the Boumerdès UPW, who admonished him for his presence on the road opposite the UPW office on Thursday 21 August. After answering questions under duress, Mr Benyacoub was made to fingerprint the official record, an action which was unprecedented in the company's internal disciplinary procedures. Mr Benyacoub received notification of his suspension during the day whilst at work (the complainant specifies that Friday and Saturday are the weekly days of rest).
- 92.** On 27 August 2014, Mr Benyacoub received a summons to appear before the disciplinary committee of the Boumerdès UPW. The letter, like those sent to the two SNAP leaders, did not indicate the reason for the summons, in violation of article 113 of the company's internal regulations. Following his appearance on 2 September 2014, Mr Benyacoub received notice of his dismissal on 7 September 2014.

93. According to the complainant organization, Mr Benyacoub received the summons to appear before the disciplinary committee only five days – rather than eight working days – before the meeting. Moreover, the letter did not give the reason for the summons, in violation of the company’s internal regulations. On top of this, Mr Benyacoub did not have access to his disciplinary file, in breach of the internal regulations. Lastly, Mr Benyacoub was penalized for incidents which occurred when he was off duty, on a public road outside the workplace, and without any unlawful assembly having taken place.
94. Mr Benyacoub lodged an appeal with the Algérie Poste management board on 17 September 2014, requesting that the decision to dismiss him be overturned. No follow-up action was taken by the company management, in violation of article 119 of the internal regulations, which provides that the appeals committee must respond in writing within three months. In the meantime, at the end of September 2014, Mr Benyacoub was called to perform his military service. However, when his military service ended in September 2015, he relaunched the appeal process, which resulted in a summons to appear before the appeals committee on 30 November 2015. According to the complainant organization, since his appearance before the committee, the company has still not taken any follow-up action on the matter.
95. The complainant organization believes that the dismissal of Mr Benyacoub was directly linked to the dismissal of the SNAP president and was intended to create a climate which is openly hostile to any trade union solidarity among post office employees. The speed with which Mr Benyacoub’s case was handled, in violation of the existing regulations, is an indication of the company management’s determination to put an end to SNAP’s activities.
96. In conclusion, the complainant organization denounces the unfair and anti-union dismissals, the sole purpose of which was to hinder the exercise of freedom of association and the functioning of a trade union. SNAP requests the Committee on Freedom of Association to call for the immediate reinstatement of the three workers whose cases are described above.

## **B. The Committee’s conclusions**

97. *The Committee regrets that, despite the time which has elapsed since the presentation of the complaint in August 2014, the Government has not replied, even though it has been requested to do so several times, including through an urgent appeal. The Committee urges the Government to be more cooperative in the future.*
98. *Hence, in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee is obliged to present 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.*
99. *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 ensure respect for trade union rights in law and in fact. The Committee is confident that, if this procedure protects governments against unreasonable accusations, they will recognize the importance of formulating, for objective examination, detailed replies to allegations brought against them [see First Report of the Committee, para. 31].*
100. *The Committee observes that the present case relates to the allegation of the anti-union dismissal of two leaders of SNAP by Algérie Poste, a public enterprise, and the dismissal of a third company employee for showing support for one of the leaders in question at the time of the disciplinary proceedings that he was facing.*

- 101.** *First of all, the Committee notes that SNAP has been active in the postal sector since it was founded in 2012. The Committee observes that the Government, in the follow-up information provided in January 2016 in relation to Case No. 2944 (which concerns a complaint presented by numerous Algerian trade unions, including SNAP), indicated that SNAP had been registered by the authorities in December 2015.*
- 102.** *On the basis of the information provided by the complainant organization, the Committee observes that the situation described can be summarized as follows: the president of SNAP, Mr Mourad Nekache, an employee at the Boudouaou Benterquia post office (Boumerdès), and the communications officer of SNAP, Mr Tarek Ammar Khodja, an employee at the post office in Dar El-Beida (Algiers), were both subjected to disciplinary proceedings by Algérie Poste in July 2014 because of statements they had made to the media and for Mr Ammar Khodja's organization of a two-hour work stoppage on 7 July 2014. Each of the union officials was individually questioned under duress about their trade union activity and the content of their remarks reported by the media.*
- 103.** *The Committee notes that, according to SNAP, the two union officials were then suspended and called before a disciplinary committee, without respect for the company's internal regulations (the two officials were refused the right to defend themselves and the minimum period of notice required for a disciplinary summons was not respected in Mr Ammar Khodja's case), after which they were notified of decisions to dismiss them.*
- 104.** *With regard to Mr Ammar Khodja, the Committee notes that, by decision No. 39/2014, the management of the Wilaya (provincial) postal unit (UPW) of East Algiers ordered his suspension on a number of grounds, including: "scheming and attempts to compromise, intimidate, provoke or slander individuals; impeding freedom of labour; damaging the moral and material interests of the establishment; and engaging in threatening and abusive conduct in statements and in the press". Mr Ammar Khodja was summoned to appear before the disciplinary committee by a letter dated 10 July 2014, but the letter did not mention the grounds for the summons as required by the company's internal regulations. Lastly, through letter No. 41/2014 of 20 July 2014, the management of the East Algiers UPW informed him of his dismissal, effective as of 9 July 2014, without indicating any grounds.*
- 105.** *With regard to Mr Nekache, the Committee notes that, by decision No. 592/2014 of 31 July 2014, the management of the Boumerdès UPW ordered his suspension on the grounds of "insubordination towards management; refusing, without a valid reason, to comply with instructions relating to professional obligations; and damaging the moral and material interests of the establishment". He was summoned to appear before the disciplinary committee by a letter dated 10 August 2014, but the letter did not mention the reason for the summons as required by the company's internal regulations. Lastly, through decision No. 600/2014 of 24 August 2014, the management of the Boumerdès UPW ordered his dismissal, effective as of 21 August 2014.*
- 106.** *The Committee notes that Mr Ammar Khodja and Mr Nekache both made appeals to the disciplinary committee of the national head office of Algérie Poste, in August and September 2014 respectively, requesting that the dismissal decisions be overturned, but that no follow-up was given to their appeals – according to SNAP, also in violation of the company's internal regulations, which stipulate that the committee must provide a written reply within three months. The two union officials then lodged, in November and December 2014 respectively, complaints for unfair dismissal with the competent labour inspectorate. According to the complainant organization, the labour inspectorate merely organized conciliation meetings for the two parties. In both instances, at the second conciliation meeting, the company made it clear that it would not reinstate the dismissed workers, which led the inspectorate to issue an official report indicating the failure to reach an agreement.*

107. *The Committee notes that, according to SNAP, the two leaders were subsequently informed of complaints made against them by the company for their trade union activities. The company also summoned them before the appeals committee at head office, after the expiry of the deadlines established by the internal regulations. Following their appearances in March 2015 (Mr Nekache) and April 2015 (Mr Ammar Khodja), they received confirmation of their dismissals by mail. In that connection, SNAP points out that Mr Nekache received a notification that his dismissal was effective without notice, the initial decision to dismiss him thus being made more severe.*
108. *The Committee notes that, on 25 May 2015, Mr Nekache and Mr Ammar Khodja referred the matter to the court of El Harrach (Algiers) and that after three months of proceedings, definitive rulings were handed down in their favour. According to the complainant organization, the court ordered their reinstatement with all acquired benefits and the payment of an indemnity compensation. However, the complainant denounces the fact that, despite a court officer having notified the company's management board of the court's decisions on 7 October 2015, the company took no action, which led the court officer, in November 2015, to issue an official notice indicating that the rulings had not been executed.*
109. *The Committee notes that the situation remains unchanged to date, and that Mr Nekache and Mr Ammar Khodja continue to be without employment or remuneration, notwithstanding the court decisions ordering their reinstatement which were duly communicated to the employer.*
110. *The Committee would like, firstly, to recall 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. Next, the Committee has pointed out that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 771 and 804]. Lastly, in relation to the allegations, the Committee recalls that the full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end, workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language [see **Digest**, op. cit., para. 154].*
111. *In this case, the Committee is bound to note the rapidity with which the disciplinary procedure led to the dismissals of Mr Nekache and Mr Ammar Khodja. It notes with concern the allegations of violations of the regulations in force, particularly the fact that the trade union officials were unable to present any proper defence throughout the procedure, and that the employer only responded to the appeal to the national head office after the prescribed three-month period had elapsed (this took six months in the case of Mr Nekache and eight months in the case of Mr Ammar Khodja). Lastly, the Committee is particularly concerned by the fact that, despite the rulings handed down by the court of El Harrach (Algiers) ordering the reinstatement of the two union officials, the company in question has refused to implement the court decisions with complete impunity since October 2015, when it was notified of them by a court officer. The Committee wonders how a public institution can refuse to implement the rulings of a judicial authority without being penalized. The Committee observes with deep concern that this violation of freedom of association has had an extremely harmful effect on two trade union officials by leaving them without any income since July and August 2014, respectively.*

112. *In view of the above, the Committee urges the Government to immediately take all necessary steps to ensure the implementation of the rulings of the court of El Harrach (Algiers) ordering the reinstatement of the two SNAP trade union officials, Mr Nekache and Mr Ammar Khodja, with the payment of all salary arrears and any compensation due, as per the rulings of the court, and to keep it informed in this regard. The Committee trusts that the registration of SNAP by the authorities in December 2015 will contribute to the swift resolution of these matters and to the establishment of harmonious professional relations between the company and SNAP.*
113. *With regard to the allegations concerning the dismissal of a company employee, Mr Bilal Benyacoub, for demonstrating solidarity with the SNAP president during the disciplinary procedure against him, the Committee notes that, according to the allegations, on 21 August 2014 Mr Benyacoub joined a group of six other workers on a public road opposite the head office of the UPW in Boumerdès to wait for the SNAP leader after his disciplinary committee meeting. Mr Benyacoub had finished work for the day. Yet, according to SNAP's allegations, the company suspended (on 24 August 2014) and then dismissed (on 7 September 2014) Mr Benyacoub for the sole reason that he had been present on the road opposite the UPW head office on Thursday, 21 August. In that connection, the Committee notes that on 24 August 2014, Mr Benyacoub received decision No. 599/2014 from the management of the Boumerdès UPW, informing him of his suspension for participation in an assembly not forming part of regular trade union activity inside or in the vicinity of his own workplace or in other workplaces, and for damaging the moral and material interests of the establishment. He was called before the disciplinary committee by a letter dated 25 August 2014 without any grounds for the summons being indicated. Finally, by letter No. 606/2014 of 3 September 2014, the management of the Boumerdès UPW informed him of his dismissal, effective from 2 September 2014.*
114. *The Committee notes that, according to the complainant organization, the disciplinary procedure against Mr Benyacoub was flawed by the following irregularities. He received the letter summoning him to appear before the disciplinary committee only five days – instead of eight working days – before the date of the meeting. Furthermore, the letter did not specify the reason for the meeting, in violation of the company's internal regulations. In addition, Mr Benyacoub did not have access to his disciplinary file, also in violation of the internal regulations. Lastly, the accusations against Mr Benyacoub related to events that occurred when he was off duty, on a public road outside the workplace, and there was no unlawful assembly.*
115. *The Committee notes that Mr Benyacoub lodged an appeal with the management board of the company on 17 September 2014, requesting that the decision to dismiss him be overturned, but the company management took no action. In the meantime, Mr Benyacoub was called to perform his military service at the end of September 2014. However, when his military service ended in September 2015, he relaunched the appeal procedure, which resulted in a summons to appear before the appeals committee on 30 November 2015. According to the complainant organization, since his appearance before the committee, the company has still not taken any action.*
116. *In this case, the Committee notes that there is no evidence in the information provided by the complainant organization or in the documents at its disposal that Mr Benyacoub is a trade unionist. However, the Committee observes that Mr Benyacoub finds himself in a situation instigated by his employer which is directly connected to a disciplinary procedure against a trade union leader employed by the company. The Committee therefore considers it appropriate to examine Mr Benyacoub's situation. In this connection, the Committee expresses its question and concern that a company would instigate disciplinary proceedings for "participation in an assembly not forming part of regular trade union activity inside or in the vicinity of his own workplace or in any other workplace" against an employee who,*

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*according to the allegations, was off duty and on a public road, without there being any unlawful assembly, violation of the law or threat to public order.*

- 117.** *Noting the allegation that the dismissal of Mr Benyacoub, like those of the SNAP leaders, was intended to intimidate postal workers who wished to engage in trade union activity and to restrict the exercise of freedom of association by hindering the operation of a trade union, the Committee urges the Government to take all necessary steps to ensure that the competent departments conduct an investigation into Mr Benyacoub's dismissal, and to indicate the outcome of the investigation and any follow-up action taken. Furthermore, the Committee expects the Government to send information without delay concerning Mr Benyacoub's employment situation.*

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

- 118.** *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 August 2014, the Government has not replied to any of the complainant's allegations, although it was requested to do so several times, including through an urgent appeal. The Committee urgently requests the Government to be more cooperative in the future.*
- (b) The Committee urges the Government to immediately take all necessary steps to implement the rulings of the court of El Harrach (Algiers) ordering the reinstatement of the two SNAP trade union officials, Mr Mourad Nekache and Mr Tarek Ammar Khodja, and the payment of all salary arrears and the compensation, as per the rulings of the court, and to keep it informed in this regard.*
- (c) The Committee urges the Government to take all necessary steps to ensure that the competent departments conduct an investigation into Mr Bilal Benyacoub's dismissal, and to indicate the outcome of the investigation and any follow-up action taken. Furthermore, the Committee expects the Government to send information without delay concerning Mr Benyacoub's employment situation.*

CASE NO. 2987

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

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

- the Trade Union Association of Subway and Light Rail Workers (AGTSyP) and
- the Confederation of Workers of Argentina (CTA)

*Allegations: The complainant organizations challenge the decision of the administrative labour authority of the Government of the City of Buenos Aires to summon to compulsory conciliation proceedings the parties to a dispute in the subway sector and the imposition of a fine on AGTSyP for failing to respond to the summons*

119. The Committee last examined this case at its March 2014 meeting when it presented an interim report to the Governing Body [see 371st Report, paras 154–170, approved by the Governing Body at its 320th Session (March 2014)].
120. The Government sent new observations in communications dated 3 November 2014, 28 May 2015 and 10 March 2016.
121. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

122. In its previous examination of the case in October 2014, the Committee made the following recommendations [see 371st Report, para. 170]:
- (a) The Committee requests the Government to keep it informed of the outcome of the action for reconsideration with a subsidiary appeal which, according to the complainants, was brought against Administrative Decision No. 1015/SSSTR/2012 ordering compulsory conciliation proceedings in a dispute in the Buenos Aires subway sector;
  - (b) The Committee requests the Government to indicate whether Administrative Decision No. 1016/SSSTR/2012 of 11 August 2012 imposing the fine on the AGTSyP has been withdrawn;
  - (c) The Committee requests the Government to send its observations without delay regarding the allegations that prosecutors (representatives of the Public Prosecutor's Office) have filed complaints in relation to this dispute, which are ongoing, and that the Government City of Buenos Aires has applied to the National Ministry of Labour, Employment and Social Security and the National Labour Court for the withdrawal of the legal personality of the AGTSyP.

## B. The Government's reply

123. In its communications dated 3 November 2014 and 28 May 2015, the Government reports that it consulted the Office of the Undersecretary of Labour, Industry and Trade of the Government of the City of Buenos Aires, which indicated that no new claims had been made by the interested parties and that the problem had been resolved through new agreements.

## C. The Committee's conclusions

124. *The Committee recalls that this case concerns a dispute in the context of the negotiation of certain working conditions and a salary adjustment for workers in the subway sector of the City of Buenos Aires. The Committee notes the indications by the Government that the problem has been resolved through new agreements. As regards Administrative Decisions Nos 1015/SSTR/2012 (ordering compulsory conciliation proceedings) and 1016/SSTR/2012 (imposing a fine on the AGTSyP and which, according to the Government, has not been served) the Committee requests the complainant organizations and the Government to indicate whether they are awaiting any administrative or court decisions in relation to these decisions and, if this is the case, to keep it informed of their outcomes. As regards the allegations that certain prosecutors had filed complaints in relation to this dispute and that the Government of the City of Buenos Aires is applying for the withdrawal of the legal personality of the AGTSyP, in view of the indications by the Government, unless the complainant organizations provide additional information in this regard, the Committee will not pursue the examination of these allegations.*

## The Committee's recommendation

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

*As regards Administrative Decisions Nos 1015/SSTR/2012 (ordering compulsory conciliation proceedings in the context of a dispute in the subway sector of Buenos Aires) and 1016/SSTR/2012 (imposing a fine on the AGTSyP and which, according to the Government, has not been served) the Committee requests the complainant organizations and the Government to indicate whether they are awaiting any administrative or court decisions in relation to these decisions and, if this is the case, to keep it informed of their outcomes.*

CASE NO. 3118

DEFINITIVE REPORT

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

- **the Community and Public Sector Union (CPSU)**
- **the Public Service Association of New South Wales (PSANSW) and**
- **the Australian Council of Trade Unions (ACTU)**

*Allegations: The complainants allege that the Government of the State of New South Wales has enacted legislation imposing restrictions on free collective bargaining on wages and other*

*matters for state public sector workers, thus violating the principles of freedom of association and collective bargaining*

- 126.** The complaint is set out in a communication dated 4 March 2015 from the Community and Public Sector Union (CPSU), the Public Service Association of New South Wales (PSANSW) and the Australian Council of Trade Unions (ACTU).
- 127.** The Government submitted its observations in a communication dated 2 September 2015, which contains the information transmitted by the New South Wales (NSW) Government.
- 128.** Australia 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 neither ratified the Labour Relations (Public Service) Convention, 1978 (No. 151), nor the Collective Bargaining Convention, 1981 (No. 154).

**A. The complainants' allegation**

- 129.** In their communication dated 4 March 2015, the CPSU, PSANSW and ACTU explain that:
- The CPSU is registered under the Federal Fair Work Act 2009 and is the largest union representing State and federal system public sector employees in Australia. It is composed of two groups: the State Public Services Federation (SPSF) Group which represents State public sector workers (approximately 90,000 employees of State governments in departments, agencies, statutory authorities, instrumentalities and State owned corporations, as well as general staff employees of universities) and the Public Sector Union (PSU) Group which represents Federal and Territory public sector workers.
  - The PSANSW is a registered union under the Industrial Relations Act 1996 (NSW) and the Fair Work Act 2009 (federal). It represents members employed in the NSW public sector, including government departments, schools, prisons, statutory authorities, state-owned corporations, Technical and Further Education (TAFE) NSW and universities. The union represents approximately 40,000 members spread over 4,000 worksites.
  - The ACTU is the peak body for Australian unions. Made up of 46 affiliated unions it represents almost 2 million working Australians and their families.
- 130.** By way of background, the complainants explain that: (1) the NSW public sector is the largest employer in Australia, employing approximately 11 per cent of the total NSW workforce (399,243 employees at the end of 2013); (2) in 2011–12, the NSW public sector made up 12.8 per cent of the NSW economy; (3) total NSW general government transaction expenses were AUD\$64.5 billion in 2013–14, of which employee related costs accounted for 48 per cent; (4) over 60 per cent of public sector workers are engaged in the health (31.75 per cent) and education sectors (30.49 per cent); and (5) other major services include transport, police and justice, and community and social services. The complainants argue that the finances of the NSW State are extremely sound (operating surpluses in seven out of ten years since 2003), and that currently, the State has the strongest growth figures in the country and lower than national level unemployment rate.
- 131.** The complainants allege that while the State has the legislative capacity to make and amend employment law pertaining to employers and employees within the State, including the framework for collective bargaining, the trend over the last decade has been for states to relinquish their powers in relation to employment law (by either compulsion or consent),

and for laws set by the Federal Government to prevail. In 2005 all employers (and their employees) trading as constitutional corporations were compulsorily transferred to the federal system of employment law under the Workplace Relations Act 1996 (federal). In 2010, the NSW Government transferred non-constitutional employers (and their employees) to the federal system to be covered by the Fair Work Act 2007 (which replaced the Workplace Relations Act 1996). According to the complainants, the outcome of this is that the State law applies only to employees of the State Government and federal law applies to private sector employers (including corporations owned by the state) and their employees. The two systems have different collective bargaining frameworks.

- 132.** The federal system is intended to facilitate collective bargaining at the enterprise level. The role of the federal arbitral body, the Fair Work Commission, is to provide a conciliation and arbitration function only when negotiations at the enterprise level have demonstrably failed, to regulate any conduct pertaining to industrial action, and to ratify contracts (known as agreements) once they have been completed and approved (by ballot of employees) at the enterprise level.
- 133.** The collective bargaining system in the NSW jurisdiction places greater emphasis on the role of the arbitral body, the NSW Industrial Relations Commission, in the striking of contracts (known as awards). Formally, the making of all awards in NSW is initiated by either an employer or union party making an application to the Commission to make or vary an award. In practice, extensive negotiations often occur between the parties prior to any application to the Commission being made. Where these negotiations result in a consensus position being reached, the function of the Commission is largely to ratify an agreed award. Where dissent between the parties exists, upon a formal award application to the Commission being made, the Commission takes an active role in conciliation and, where this fails, undertakes compulsory arbitration. Compared to federal laws, the NSW system presents a lower barrier to the use of compulsory arbitration to resolve collective bargaining disputes and subsequently, the State Commission more frequently performs a role as a third party to negotiations.
- 134.** According to the complainants, the industrial relations policy has been a principal tool in giving effect to the Government's fiscal policy. They allege that the policy explicitly seeks to impose restrictions on the ability of unions to bargain collectively and the outcomes which they can achieve, through a series of interrelated legislation and subordinate regulation and policy. Pertinent to this complaint are:
- Industrial Relations Act 1996;
  - Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011;
  - Industrial Relations Amendment (Public Sector Conditions of Employment) Regulation 2011;
  - Public Sector Employment and Management (PSEM) Amendment Bill 2012;
  - State Revenue and Other Legislation Amendment (Budget Measures) Act 2014;
  - The Government Sector Employment Act 2013;
  - NSW Public Sector Wages Policy 2011; and
  - Managing Excess Employees Policy.
- 135.** The complainants consider that the combined effect of these items is to legislatively prohibit unions from achieving pay increases above those set by the government policy, to prescribe

the manner in which all awards are to be determined, and to limit the matters upon which awards can bestow enforceable entitlements upon employees.

**136.** The complainants explain that the PSANSW challenged the constitutional validity of the legislative provisions contained in the Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011. The High Court found the legislation to be constitutionally valid. The central provision of the proceedings was section 146C of the Act:

**146C Commission to give effect to certain aspects of government policy on public sector employment**

- (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
  - (a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and
  - (b) that applies to the matter to which the award or order relates.
- (2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.
- (3) **An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section.** (emphasis added)
- (4) This section extends to appeals or references to the Full Bench of the Commission.
- (5) This section does not apply to the Commission in Court Session.
- (6) This section extends to proceedings that are pending in the Commission on the commencement of this section. A regulation made under this section extends to proceedings that are pending in the Commission on the commencement of the regulation, unless the regulation otherwise provides.
- (7) This section has effect despite section 10 or 146 or any other provision of this or any other Act.
- (8) In this section:

*award or order* includes:

- (a) an award (as defined in the Dictionary) or an exemption from an award, and
- (b) a decision to approve an enterprise agreement under Part 2 of Chapter 2, and
- (c) the adoption under section 50 of the principles or provisions of a National decision or the making of a State decision under section 51, and
- (d) anything done in arbitration proceedings or proceedings for a dispute order under Chapter 3.

*conditions of employment* – see Dictionary.

*public sector employee* means a person who is employed in any capacity in:

- (a) the Government Service, the Teaching Service, the NSW Police Force, the NSW Health Service, the service of Parliament or any other service of the Crown, or
- (b) the service of any body (other than a council or other local authority) that is constituted by an Act and that is prescribed by the regulations for the purposes of this section.

**137.** Thus, according to the complainants, section 146C(1) removes all discretion held by the NSW Industrial Commission to consider any subject matter which is dealt with in a government policy that has been declared by the regulations, as it mandates the Commission to give effect to any policy on conditions of employment of public sector employees. The broad scope of the power to set policy on any aspect of the conditions of employment means that there is no capacity for the PSANSW to enter into any type of binding agreement or

award with the Government in relation to matters determined by declared government policies. Thus, according to the complainants, the Government has conferred on itself the capacity to unilaterally determine which conditions can be dealt with through either bargaining or arbitration.

- 138.** According to the complainants, section 146C(2) provides the minister with wide-ranging authority to expand the scope of the current arrangements by two mechanisms: (1) allowing the constraints on the Commission to be set out in a regulation; and (2) enabling a limitation to a term and condition by reference to this regulation in a government policy. Section 146C(3) gives any regulation setting out a policy the power to override and render inoperative provisions of an award or order that is inconsistent with the terms of that regulation or policy. Section 146C(7) provides that “this section has effect despite section 10 or 146 or any other provision of this or any other Act”. Section 10 provides that “the Commission may make an award in accordance with this Act setting fair and reasonable conditions of employment for employees”. Section 146 sets out the general functions of the Commission:

#### **146 General functions of Commission**

- (1) The Commission has the following functions:
  - (a) setting remuneration and other conditions of employment,
  - (b) resolving industrial disputes,
  - (c) hearing and determining other industrial matters,
  - (d) inquiring into, and reporting on, any industrial or other matter referred to it by the Minister,
  - (e) functions conferred on it by this or any other Act or law.
- (2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:
  - (a) the objects of this Act, and
  - (b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.

This subsection does not apply to proceedings before the Commission in Court Session that are criminal proceedings or that it determines are not appropriate.

- 139.** Section 146(2) requires the Commission to take into account the “public interest” and the objects of the Act, which are set out in section 3:

#### **3 Objects**

The objects of this Act are as follows:

- (a) to provide a framework for the conduct of industrial relations that is fair and just,
- (b) to promote efficiency and productivity in the economy of the State,
- (c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,
- (d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,
- (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,
- (f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,

- (g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality,
- (h) to encourage and facilitate cooperative workplace reform and equitable, innovative and productive workplace relations.

**140.** The complainants point out that the objectives that require the Commission to take into account the need to provide “a framework for the conduct of industrial relations that is fair and just” or to promote “efficiency and productivity in the economy of the State” or to “encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations” are all subordinate to the requirement to give effect to the government policy. Thus, the complainants consider that the intention of the legislative amendments is for government policy to prevail even when it is not fair or just or even when it is contrary to the public interest.

**141.** The complainants indicate that the Government used the regulatory power conferred by the Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 to issue the Industrial Relation (Public Sector Conditions of Employment) Regulation 2011 (the 2011 Regulation) on the same day the legislation became law. The key elements of the regulation are as follows:

#### **4 Declarations under section 146C**

The matters set out in this Regulation are declared, for the purposes of section 146C of the Act, to be aspects of government policy that are to be given effect to by the Industrial Relations Commission when making or varying awards or orders.

#### **5 Paramount policies**

The following paramount policies are declared:

- (a) Public sector employees are entitled to the guaranteed minimum conditions of employment (being the conditions set out in clause 7).
- (b) Equal remuneration for men and women doing work of equal or comparable value.

**Note.** Clause 6(1)(c) provides that existing conditions of employment in excess of the guaranteed minimum conditions may only be reduced for the purposes of achieving employee-related cost savings with the agreement of the relevant parties.

Clause 9(1)(e) provides that conditions of employment cannot be reduced below the guaranteed minimum conditions of employment for the purposes of achieving employee-related cost savings.

#### **6 Other policies**

- (1) The following policies are also declared, but are subject to compliance with the declared paramount policies:
  - (a) Public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5 per cent per annum.
  - (b) Increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5 per cent per annum can be awarded, but only if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs. For this purpose:
    - (i) whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the Commission, and
    - (ii) increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and
    - (iii) the full savings are not required to be awarded as increases in remuneration or other conditions of employment.

- (c) For the purposes of achieving employee-related cost savings, existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be reduced with the agreement of the relevant parties in the proceedings.
  - (d) Awards and orders are to resolve all issues the subject of the proceedings (and not reserve leave for a matter to be dealt with at a later time or allow extra claims to be made during the term of the award or order). However, this does not prevent variations made with the agreement of the relevant parties.
  - (e) Changes to remuneration or other conditions of employment may only operate on or after the date the relevant parties finally agreed to the change (if the award or order is made or varied by consent) or the date of the Commission's decision (if the award or order is made or varied in arbitration proceedings).
  - (f) Policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments.
- (2) Subclause (1)(e) does not apply if the relevant parties otherwise agree or there are exceptional circumstances.
  - (3) The *relevant parties* in relation to a matter requiring agreement under this clause are the employer and any other party to the proceedings that is an industrial organization of employees with one or more members whose interests are directly affected by the matter.

## 7 The guaranteed minimum conditions of employment

- (1) For the purposes of this Regulation, the *guaranteed minimum conditions of employment* are as follows:
  - (a) Unpaid parental leave that is the same as that provided by the National Employment Standards.
  - (b) Paid parental leave that applies to the relevant group of public sector employees on the commencement of this clause.
  - (c) Employer payments to employee superannuation schemes or funds (being the minimum amount prescribed under the relevant law of the Commonwealth).
- (2) The *guaranteed minimum conditions of employment* also include the following:
  - (a) Long service or extended leave (being the minimum leave prescribed under Schedules 3 and 3A of the *Public Sector Employment and Management Act 2002* or the *Long Service Leave Act 1955*, whichever Act is applicable to the employment concerned).
  - (b) Annual leave (being the minimum leave prescribed under the *Annual Holidays Act 1944*).
  - (c) Sick leave entitlements under section 26 of the Act.
  - (d) Public holiday entitlements under the *Public Holidays Act 2010*.
  - (e) Part-time work entitlements under Part 5 of Chapter 2 of the Act.

## 8 Meaning of employee-related costs

For the purposes of this Regulation, *employee-related costs* are the costs to the employer of the employment of public sector employees, being costs related to the salary, wages, allowances and other remuneration payable to the employees and the superannuation and other personal employment benefits payable to or in respect of the employees.

## 9 Meaning of employee-related cost savings

- (1) For the purposes of this Regulation, *employee-related cost savings* are savings:
  - (a) that are identified in the award or order of the Commission that relies on those savings, and

- (b) that involve a significant contribution from public sector employees and generally involve direct changes to a relevant industrial instrument, work practices or other conditions of employment, and
  - (c) that are not existing savings (as defined in subclause (2)), and
  - (d) that are additional to whole of Government savings measures (such as efficiency dividends), and
  - (e) that are not achieved by a reduction in guaranteed minimum conditions of employment below the minimum level.
- (2) Savings are *existing savings* if they are identified in a relevant industrial instrument made before the commencement of this Regulation (or in an agreement contemplated by such an industrial instrument) and are relied on by that industrial instrument, whether or not the savings have been achieved and whether or not they were or are achieved during the term of that industrial instrument.

142. The complainants consider that the above provisions place a legislative constraint on wage outcomes of collective bargaining for the following reasons:

- The key feature of the regulation is the limiting of increases in remuneration or other conditions of employment to 2.5 per cent per annum.
- Under these laws, the NSW Government can dictate the remuneration and conditions of employment without its employees having any means to either fairly bargain or to seek the intervention of an independent arbitrator.
- The current rate of 2.5 per cent is struck on the basis that it reflects the midpoint of the Reserve Bank of Australia's (RBA) inflation target. Implicitly, the Government assumes that the RBA will use its monetary policy lever to retain prices within the target band, such that in the long-run, public sector pay levels will retain their real value.
- There is nothing to prevent the regulation from being amended to a rate below 2.5 per cent. Similarly, there is no compensation envisaged in the event the price level exceeds 2.5 per cent. There is the evident risk the cap will operate to reduce the real wages of public sector employees over time.
- The legislation allows increases above the 2.5 per cent cap but in very limited circumstances. Any such increase is contingent on the identification of employee-related cost savings that fully offset the increase in employee costs. This effectively means wage rises above the cap can only be achieved by the cashing out of existing conditions.
- Clause 6(1)(b) constrains the timing of the awarding and payment of increases in excess of the 2.5 per cent cap. It also enables employees to be short-changed where the full value of savings achieved need not be passed on to employees as a remuneration increase.
- Clause 6(1)(d) requires all matters the subject of proceedings to be resolved and prevents further claims to be made during the term of the award.
- Clause 6(1)(e) constrains the capacity of the NSW Commission to order backdating of payment.
- The strictures imposed by the Act and Regulations led to the Public Service Association (PSA) accepting salary increases of 2.5 per cent on behalf of public sector workers in 2011 and 2012.

143. The complainants further indicate that in March 2012, the federal Government passed legislation to increase the mandatory employer contribution rate to an employees' superannuation fund (pension account). The Act sets out a series of incremental increases from the then rate of 9 per cent through to 12 per cent commencing 1 July 2013, completing 1 July 2019. This Act applies to all employers in Australia including State governments. On 1 May 2013, the NSW Government announced its intention to absorb the first incremental increase of 0.25 per cent and all increases thereafter, into the 2.5 per cent wages cap. The PSA opposed the enforceability of this position within the terms of the regulation as it was then constructed. On 17 June 2013 in *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors (No. 1)* [2013] NSWIRComm 53, the Full Bench of the Commission ruled in favour of the PSA, deciding that increases of up to 2.5 per cent were available to employees as the remuneration cap pertained only to costs awarded by the Commission itself, and not to employee related costs compelled by Commonwealth government legislation. An interim increase of 2.27 per cent was awarded while the Government sought further legal mechanisms to circumvent the decision. The Government twice amended the regulations to specify the inclusion of increases to the superannuation guarantee within the wages cap. On both occasions these amendments were disallowed by a vote in the upper house of NSW Parliament, with such votes occurring on 21 August 2013 and 5 March 2014. On 6 May 2014 in *Secretary of The Treasury v. Public Service Association & Professional Officers' Association Amalgamated Union of NSW* (2014) NSWCA 138, the Court of Appeal in the Supreme Court of NSW upheld the Government's appeal of the Commission's June decision and ordered the subsequent direction issued by the Commission on 17 December 2013, that the full 2.5 per cent be paid, to be quashed. On 17 June 2014, the State Revenue and Other Legislation Amendment (Budget Measures) Act 2014 was passed by both houses of Parliament under the pretext of a budget supply bill. Schedule 5, Part 5.2, clause 6 of this Act contains the regulatory amendments previously disallowed by the upper house pertaining to superannuation:

## 6 Other policies

- (1) The following policies are also declared, but are subject to compliance with the declared paramount policies:
  - (a) Public sector employees may be awarded increases in remuneration or other conditions of employment, but only if employee-related costs in respect of those employees are not increased by more than 2.5 per cent per annum as a result of the increases awarded together with any new or increased superannuation employment benefits provided (or to be provided) to or in respect of the employees since their remuneration or other conditions of employment were last determined.
  - (b) Increases in remuneration or other conditions of employment can be awarded even if employee-related costs are increased by more than 2.5 per cent per annum, but only if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs beyond 2.5 per cent per annum. For this purpose:
    - (i) whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the Commission, and
    - (ii) increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and
    - (iii) the full savings are not required to be awarded as increases in remuneration or other conditions of employment.

- (c) For the purposes of achieving employee-related cost savings, existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be reduced with the agreement of the relevant parties in the proceedings.
  - (d) Awards and orders are to resolve all issues the subject of the proceedings (and not reserve leave for a matter to be dealt with at a later time or allow extra claims to be made during the term of the award or order). However, this does not prevent variations made with the agreement of the relevant parties.
  - (e) Changes to remuneration or other conditions of employment may only operate on or after the date the relevant parties finally agreed to the change (if the award or order is made or varied by consent) or the date of the Commission's decision (if the award or order is made or varied in arbitration proceedings).
  - (f) Policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments.
- (2) Subclause (1)(e) does not apply if the relevant parties otherwise agree or there are exceptional circumstances.
  - (3) The relevant parties in relation to a matter requiring agreement under this clause are the employer and any other party to the proceedings that is an industrial organisation of employees with one or more members whose interests are directly affected by the matter.
  - (4) In subclause (1)(a), new or increased superannuation employment benefits means any new or increased payments by an employer to a superannuation scheme or fund of an employee as a consequence of amendments to the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth or the State Authorities Non-contributory Superannuation Act 1987.

**144.** According to the complainants, on 22 June 2011, the Coalition Government announced a new policy in relation to management of excess employees, which contains a number of features that constitute a significant departure from the earlier policies regarding the management of displaced employees:

- (1) The policy removes reference to redeployment being the principal means of managing excess employees.
- (2) An employee is to be declared excess by their agency immediately they no longer have a substantive position and must, upon being declared excess, be given two weeks to choose between accepting an offer of voluntary redundancy or pursuing redeployment (clause 4.1).
- (3) An excess employee must be made one (and one only) offer of voluntary redundancy with the voluntary redundancy package comprising four weeks (or five weeks) notice, severance payment of three weeks per year of service up to a maximum of 39 weeks and an additional payment of up to eight weeks' pay (clause 5). No provision is made for job assist payments or job search leave.
- (4) Excess employees who decline the voluntary redundancy offer are entitled to a three months' retention period during which they may be placed in any suitable position without advertising and are to be provided with priority access to redeployment opportunities. Redeployment means permanent placement in a funded position (clause 6).
- (5) An excess employee who accepts a temporary secondment or assignment during the retention period will continue to be employed for the remaining period of the secondment or assignment (clause 6.2.1). Access to priority assessment or direct placement without advertising will only apply during the retention period.

- (6) If an excess employee is placed in a position at a lower grade, they are to be entitled to salary maintenance at their former grade for a period of three calendar months (clause 6.4).
- (7) If an excess employee is not redeployed at the end of the three months' retention period, they will be forcibly retrenched. The severance payment upon forcible retrenchment is the statutory minimum payment under the Employment Protection Regulation 2001, plus 4 weeks' (or 5 weeks') salary in lieu of notice (clause 7).

**145.** The PSA challenged this policy in the Industrial Court seeking declaratory relief in relation to contracts of employment of public sector employees who had been declared excess, to determine:

- Whether government policies relating to the management of excess employees formed part of the contracts of public sector employees who had been declared excess; and
- Whether the services of any of the employees may only be lawfully dispensed with in accordance with section 56 of the PSEM Act.

The PSA sought orders declaring that the contract of employment, employment and collateral arrangements and/or related conditions between employers and employees in the public sector who had been declared excess, are harsh, unfair, unconscionable and contrary to the public interest. The Industrial Court found in favour of the Association's application, finding the arrangement to be "unfair" under section 105 of the Industrial Relations Act 1996.

**146.** The complainants allege that the Government responded to this judgment by introducing the PSEM Amendment Bill 2012, which effectively nullified the outcome of the judgment as it may have applied to similar cases in the future. Significantly, it amended section 56 to remove the requirement that excess officers could not be retrenched while there was "useful work" available in a department. This removed the common obligation on employers in a redundancy situation to take steps to mitigate the impact of the abolition of a position by genuinely exploring alternative employment. The complainants refer to the following amendment:

#### **56 Excess officers of Departments**

- (1) If the appropriate Department Head is satisfied that the number of officers employed in the Department or in any part of the Department exceeds the number that appears to be necessary for the effective, efficient and economical management of the functions and activities of the Department or part of the Department.
  - (a) the Department Head is to take all practicable steps to secure the transfer of the excess officers to on-going public sector positions, and
  - (b) the Department Head may, with the approval of the Commissioner, dispense with the services of any such excess officer who is not transferred to an on-going public sector position.
- (2) An officer does not cease to be an excess officer merely because the officer is engaged (on a temporary basis) to carry out other work in a public sector agency.
- (3) In this section: on-going public sector position means a position in a Department, or in any other public sector service, that is not temporary.

**147.** According to the complainants, to compound the injustice the Government also inserted in the PSEM Act a new section 103A which states:

Division 2 of Part 9 of Chapter 2 of the *Industrial Relations Act 1996* (Unfair contracts) does not apply to contracts of employment of members of staff of any public sector agency that are alleged to be unfair for any reason relating to excess employees, including the following:

- (a) when and how members of staff become excess employees,
- (b) the entitlements of excess employees (including with respect to redeployment, employment retention, salary maintenance and voluntary or other redundancy payments),
- (c) the termination of the employment of excess employees.

**148.** Further, according to the complainants, the effects of these changes were worsened upon the commencement of the Government Sector Employment Act 2013 which replaced the PSEM Act as the underpinning legal structure for public sector employment in the state on 24 February 2014. The jurisdictional exclusion of excess employees from the unfair contract provisions of the Industrial Relations Act was maintained under section 74 of the 2013 Act:

#### **74 Excess employees-jurisdiction of Industrial Relations Commission**

(1) In this section:

“**excess employee**” means an *employee* of a *government sector agency* who is determined by the head of the agency to be excess to the requirements of the relevant part of the agency in which the employee is employed, and includes an *employee* of a *government sector agency* who has been notified by the *head* of the agency:

- (a) that his or her role, position or work in the agency has been abolished or terminated, and
- (b) that he or she is an excess or displaced employee.

Any such person does not cease to be an excess employee merely because the person is engaged (on a temporary basis) to carry out other work in the same or any other *government sector agency*.

“**termination**” of the employment of a person includes dispensing with the services of the person.

(2) Division 2 of Part 9 of Chapter 2 of the *Industrial Relations Act 1996* does not apply to contracts of employment of *employees* of any *government sector agency* that are alleged to be unfair for any reason relating to excess employees, including the following:

- (a) when and how employees become excess employees.
- (b) the entitlements of excess employees (including with respect to redeployment, employment retention, salary maintenance and voluntary or other redundancy payments),
- (c) the termination of the employment of excess employees.

**149.** The complainants explain that the requirement upon the head of a Public Service agency to take any measures prior to declaring an employee excess was entirely excluded from the 2013 Act. The authority to make such a decision is now described in Section 13 of the rules to the 2013 Act (which can be amendment by an appointed public service commissioner):

#### **13 Excess non-executive employees**

- (1) The head of a Public Service agency may determine a person who is employed in ongoing employment in the agency other than as a Public Service senior executive to be excess to the requirements of the relevant part of the agency in which the person is employed.
- (2) In making any such determination and in dealing with any such excess employee, the agency head is to have regard to any relevant government policies that were in force immediately before 24 February 2014 and are notified by the Commissioner

for the purposes of this rule. Any such policies are to be made publicly available on a website provided and maintained by the Commissioner.

- 150.** The complainants consider that the cumulative effect of these legislative and policy changes has been facilitating the undertaking of mass job cuts across the NSW public sector. Since the introduction of the policy in 2011, 6,789 employees have been made redundant under it.
- 151.** Furthermore, according to the complainants, clause 6(1)(f) of the Regulations prevents policies “regarding the management of excess public sector employees” from being “incorporated into industrial instruments”. The 2013 Act defines an industrial instrument to mean: an award, an enterprise agreement, a public sector industrial agreement, a former industrial agreement, a contract determination or a contract agreement. The complainants allege that the significance of this provision is that it prevents public sector employees from obtaining any legally enforceable rights in relation to redundancy. The legal standing of this clause was firstly upheld by the Commission in the SASS Redundancy Case, rejected and declared invalid upon appeal by the PSA in the Court of Appeal in the Supreme Court of NSW, only to be reinstated as a valid law by specific reference in the explanatory notes to Schedule 5 of the State Revenue and Other Legislation Amendment (Budget Measures) Act 2014:

**Explanatory note**

Schedule 5.1 amends the Industrial Relations Act 1996 to give effect to the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 as a regulation validly made under that Act.

Schedule 5.2 sets out the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014. The Regulation remakes, with some changes for clarification, the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011. The remaking of the Regulation confirms the validity of the Government policies that are required to be given effect to by the Industrial Relations Commission. In particular, it confirms the Government’s policies regarding the management of excess public sector employees and the 2.5 per cent cap on increases in remuneration or other conditions of employment (including superannuation).

Schedule 5.3 repeals the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011.

- 152.** The complainants argue that the clear intention of the Conventions pertinent to this complaint is to embed collective bargaining as the preferred and default mechanism for determining the wages and conditions of public sector workers. Actions that cause a departure from this norm should occur only as “exceptional measures”. It is the view of the complainants that the overall economy of NSW is stable and the fiscal circumstances confronted by the NSW Government are benign. Departure from a system of free collective bargaining in these circumstances represents a fundamental repudiation of the intention of the relevant conventions.
- 153.** While the complainants submit that the Committee should not find an economic stabilization policy justified, they argue that if the Committee is to opine that the fiscal circumstances faced by the NSW Government satisfied the need for an economic stabilization policy, the Committee should also take into account the manner in which these measures have been implemented. Specifically, that the measures were not preceded by any consultation with public sector workers or their representatives; are not temporary or time-limited in any way; and are not accompanied by safeguards to effectively protect the standard of living of the workers they affect.
- 154.** The complainants conclude that collectively, the measures outlined in this complaint remove altogether any significant role for collective bargaining in determining wages and conditions of public sector workers in NSW.

**B. The Government's reply**

- 155.** By its communication dated 2 September 2015, the Government of Australia transmits a reply of the NSW Government on the allegation in this case.
- 156.** The NSW Government explains that the primary NSW statute regulating industrial relations is the Industrial Relations Act 1996. While its application has narrowed since its making, it still applies to local government workers and State public sector workers, and in particular, to the workers who are the subject of the complaint. The Act provides for the making of industrial instruments which document employee pay and conditions, relief from unfair dismissal, resolution of industrial disputes, regulation of employee and employer organizations and other matters. It establishes an independent tribunal, the NSW Industrial Relations Commission (IRC), whose key functions are the making of industrial instruments and the resolution of disputes. The Act also establishes an Industrial Court. Judges of the Court are also members of the Commission, but only judicial members of the Commission are members of the Court. The Act provides for the setting of pay and conditions primarily by means of awards. Awards are legally enforceable documents made by the IRC which detail pay and conditions for the employers and employees to whom they apply, who may be all of the employees and employers in an industry or occupation, or employers and employees at a particular enterprise. Awards are usually made following negotiation and agreement between the relevant employer and union parties. In the event that negotiations do not yield an agreed outcome, the IRC may conciliate between the parties, and in some cases, arbitrate. In making industrial instruments including awards, the Commission must have regard to matters such as public interest, and Government policy regarding the conditions of public sector employees. While other instruments – such as enterprise agreements – are available, awards are the primary instruments which set the pay and conditions of public sector employees.
- 157.** The NSW Government indicates that the established mechanisms for varying the pay of public sector employees are to either vary the pay rates in the relevant awards, or to make a new award. This will usually follow negotiation and agreement between the Government and the unions representing the relevant employees. For example, negotiations for a 2.5 per cent pay increase for 2015–16 were recently concluded between the NSW Government and relevant unions (including the PSANSW), and the increase was codified by the IRC making a new award, the Crown Employees (Public Sector – Salaries 2015) Award.
- 158.** The NSW Government indicates that some public sector conditions, such as conditions of engagement, transfers and secondments, and misconduct (but not pay) may be set by the Government Sector Employment Act 2013. The operation of this and Industrial Relations Act is intended to be complementary.
- 159.** Furthermore, one way in which consultation between NSW social partners regarding industrial matters is supported is under the Industrial Relations Advisory Council Act 2010. This Act provides for an Industrial Relations Advisory Council (IRAC), chaired by the Minister for Industrial Relations, and composed of representatives of unions, employers, local government, State government employer and policy agencies and legal practitioners. The IRAC was established in 2010 and is required to meet twice a year. Discussions at the IRAC may canvass any matter brought to the meeting by its members. The IRAC has met on eight occasions since its inception. There have been several meetings between the Minister for Industrial Relations and IRAC members since December 2010 where unions had the opportunity to raise concerns about the NSW Wages Policy. Unions NSW has attended each meeting of the IRAC, and the PSA attended the fourth meeting of IRAC on 23 March 2012, the fifth meeting on 5 October 2012 and the sixth meeting on 18 April 2013. Public sector wages were discussed at the fifth and sixth meetings but the Wages Policy was

not raised as a particular item for discussion by any member attending. The then Minister has discussed the state of the economy at several IRAC meetings.

- 160.** Regarding the NSW Government Public Sector Wages Policy, the NSW Government indicates that it applies to the “government sector” as defined in the Government Sector Employment Act, which includes public service agencies, departments, executive agencies, state owned corporations including their subsidiaries, and independent statutory bodies. As at 30 June 2014 there were 328,311 public service employees in the whole government sector. Over the years, various NSW governments have developed policies regarding the appropriate level of public sector wages. NSW Government Public Sector Wages Policies have sought to deliver fair wage outcomes to employees, subject to ensuring that any increases are not to the detriment of the Government’s fiscal position. For example, the 2007 policy put in place by the then Labor Government began by stating that:

The NSW Public Sector Wages Policy 2007 (“the Policy”) is to maintain wages in real terms and encourage workplace reform in return for additional increases. To maintain real wages, the NSW Government will fund a 2.5 per cent annual increase in employee related expenses. Agencies must fund any increases above 2.5 per cent per annum to wages, or other employee related expenses such as allowances, superannuation etc, through employee related cost saving measures.

- 161.** An increase of 2.5 per cent is the midpoint of the RBA’s inflation target band of 2–3 per cent per annum. Choosing this figure as the target for wages growth is consistent with long term movements in the Consumer Price Index and is a valid forward-looking measure that is established by an independent body. An increase to wages of 2.5 per cent is still seen as appropriate in Australia’s current economic climate. In its Annual Wage Review 2014–15 decision, the Fair Work Commission’s Expert Panel referred to the RBA’s medium-term target band of 2–3 per cent in awarding a wage increase of 2.5 per cent to minimum weekly wages and modern award weekly wages. In practice however, public sector wage outcomes under the 2007 policy failed to meet this target, with real average wage increases in the NSW public sector between 1997 and 2011 totalling 21.9 per cent. NSW Treasury estimates that this approach over the four years from 2007 to 2011 cost the State \$900 million in unfunded public sector wages.
- 162.** Following its election in March 2011, the current Liberal National Party Government sought to put in place a stronger and more effective public sector wages policy. By achieving fiscal discipline, the Government would be in a better position to achieve its commitments to improving the economy and public services of the state. While similar to its predecessor, the 2011 policy was reinforced by giving legislative force to its provisions to ensure compliance. This was done by amending the Industrial Relations Act to mandate the matters to which the Commission must have regard when making awards or orders. Specifically, a new Section 146C was inserted into the Act. This amendment passed NSW Parliament on 16 June 2011.
- 163.** As can be seen from the text of Section 146C(1), the Commission is required “to give effect to any policy on conditions of employment of public sector employees ... that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission”. Consequently, in order to give meaning and content to this requirement, a policy needed to be declared in the form of a regulation. This was done by making the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011. In broad terms, the key Public Sector Wages Policy provisions given effect by the Regulation are contained in its clause 6.
- 164.** In short, public sector pay increases are restricted to a maximum of 2.5 per cent, unless employee-related cost savings (as defined at clause 9 of the Regulation) can be demonstrated and have been achieved. If these conditions have been satisfied, the actual quantum paid beyond 2.5 per cent is a matter for negotiation between the parties, contingent upon the

magnitude of the employee related cost savings. These provisions apply to the NSW Public Service, the NSW Teaching Service, the NSW Police Force, the NSW Health Service, the service of Parliament or any other service of the Crown.

- 165.** While the Wages Policy is required to be observed by state owned corporations such as electricity and water utilities, railways and the like, the statutory and regulatory provisions do not apply because these employers operate in the national workplace relations system under the Fair Work Act 2009. NSW laws and regulations cannot affect the operation of the national system. In practice however, these organizations do apply the policy reflected in these statutory provisions to wage negotiations with their employees.
- 166.** The 2011 Regulation was superseded in 2014 by the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 (the 2014 Regulation). The sole difference between the 2011 and 2014 Regulations is that the latter Regulation clarifies that the 2.5 per cent limit includes any increased superannuation charges. The basic policy approach remains unchanged.
- 167.** On the issue of consultations, the NSW Government explains that the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011 was introduced in the Legislative Council on 24 May 2011. It was subject to extensive and lengthy debate in the Legislative Council. All parties had full opportunity to put their views and propose amendments for the consideration of the Parliament before its adoption on 16 June 2011. The Bill was introduced as a means to strike a balance between maintaining the real value of wages for public servants and the ability of the State budget to fund wage increases. The then Minister for Industrial Relations explained the need for the legislation in his second reading speech to Parliament on 24 May 2011. After noting the Government's commitment to "rebuild the economy, return quality services, renovate infrastructure, restore accountability, and protect the local environment and communities", the then Minister said:

Employee-related costs are the largest component of government expenditure, accounting for almost half of government expenses. In 2010–2011 approximately half of government expenses will be employee-related and are projected to be \$28 billion. Managing this expenditure is a major challenge, given that front-line services such as education, health care and policing are labour intensive. Each 1 per cent increase in wages permanently increases government expenses by around \$277 million per annum.

Underpinning the need for fiscal restraint is the Government's Wages Policy. The policy was first introduced by the previous Labor Government in 2007, but that Government failed to implement it. The New South Wales Coalition Government will continue the key provisions of the Wages Policy introduced by the former Labor Government. However, the Coalition Government has proposed changes to the way the Wages Policy operates to ensure that the key requirements of the Wages Policy are actually followed. Our policy and legislative response will ensure that wage increases of 2.5 per cent are available each year to our hardworking public sector employees. Increases in excess of 2.5 per cent are available but will be required to be funded through employee-related savings.

Key elements of the policy require that any increases to employee-related expenses exceeding 2.5 per cent per annum, including wages, allowances, superannuation and conditions of employment, must be funded through employee-related cost savings that have been achieved.

- 168.** The NSW Government further indicates that while regulations do not have to be introduced into Parliament and debated in the same way that legislation is, regulations made by the executive are subject to disallowance by the Parliament. This mechanism ensures that the Legislative Council also had the opportunity for a full debate on the details of the Wages Policy declared in the regulation. On 22 June 2011, the Labor Party moved to disallow the 2011 Regulation. The debate on the disallowance motion took place on 3 August 2011. A vote was taken and the disallowance motion did not succeed, therefore the Regulation remained in place. Furthermore, a Regulatory Impact Statement was prepared for the 2011

Regulation. The purpose of this Impact Statement was to provide interested parties and stakeholders with a detailed analysis of the options considered during the making of the 2011 Regulation and invite relevant submissions about its content. Subsequently, an invitation for public comment on the making of the Regulation was published on the NSW Industrial Relations website, with submissions due by 18 November 2011. Only one submission was received, from the Crown prosecutors.

- 169.** The NSW Government explains that Section 146C of the Industrial Relations Act and the Regulations made thereunder have been the subject of a number of legal challenges in courts and tribunals. The constitutional validity of the provisions was upheld by the High Court of Australia on 12 December 2012. This action was brought to the High Court by the PSA, which appealed against the finding of the Industrial Court of NSW on 31 October 2011 that the legislation and the regulation were valid. The PSA argued that Section 146C was invalid because it “impairs the institutional integrity of the Industrial Court in a manner inconsistent with Chapter III of the Constitution”. The PSA submitted that the institutional integrity of the Industrial Court is impermissibly affected because judicial members of the Commission, who sit as the Industrial Court, must comply with government policy when exercising the arbitral functions conferred on the Commission. The High Court delivered three separate but concurring judgments upholding the validity of Section 146C and the Regulation. These provisions were held to be no different from any other laws which the IRC must apply in exercising its functions. The Court ruled that it cannot undermine the integrity of the Industrial Court for its judicial members to apply the law as it stands from time to time (including as it stands at present, that is, in light of the requirement to give effect to the Wages Policy) when sitting as, and exercising the functions of, the Commission.
- 170.** On 6 May 2014, the NSW Court of Appeal upheld the Government’s position that increases to the superannuation guarantee charge (SGC) were to be considered by the IRC when awarding increases in remuneration up to 2.5 per cent. That is, the 0.25 per cent increase in the SGC meant that in order to comply with the Wages Policy cap on remuneration increases, rates of pay could increase by no more than 2.27 per cent. This position is reflected in the 2014 Regulation. On 3 June, the PSA and other unions filed an application in the High Court seeking special leave to appeal that decision. However, the unions withdrew this application on 25 July 2014. The Court of Appeal decision was the culmination of lengthy proceedings in the IRC in relation to the 2013 round of wage negotiations. The original application by the unions was for increases to commence on 1 July 2013; however, proceedings were protracted by controversy as to whether the increase to the SGC should be incorporated in the Wages Policy cap or in addition to the Wages Policy cap. The Government was concerned to ensure that employees were not disadvantaged by the time being taken to settle the legal question of whether or not the SGC formed part of the 2.5 remuneration increase, and made an offer to pay the 2.27 per cent increase from 1 July 2013. Unions accepted this offer and relevant variations were made to awards, ensuring that employees were paid an annual increase. The Court of Appeal’s unchallenged decision meant that no further variations of the wage increase were necessary.
- 171.** The NSW Government indicates that it attempted on a number of occasions to address the ongoing uncertainty about how the increase to the SGC should be dealt with in the context of the Wages Policy. The Industrial Relations (Public Sector Conditions of Employment) Amendment Regulation 2013 was published on the NSW Legislation website on 28 June 2013. The regulation included words to clarify that the 2.5 per cent cap includes any new or increased superannuation benefits. A disallowance motion was moved in the Legislative Council on 21 August 2013 and the debate took place on that day, giving members of the Legislative Council the opportunity to express their views. The Legislative Council voted to disallow the Regulation. This had the effect of restoring or reviving the 2011 Regulation, as it was immediately before it was amended or repealed, as if the amending Regulation had not been made.

**172.** Under the Subordinate Legislation Act 1989, if a regulation is disallowed, a statutory rule the same in substance as one disallowed cannot be published on the NSW Legislation website within four months after the date of disallowance. The Industrial Relations (Public Sector Conditions of Employment) Amendment Regulation 2013 was published on the NSW Legislation website on 23 December 2013. It was in the same terms as the July regulation. A further disallowance motion was moved, debated and passed by the Legislative Council on 5 March 2014. Once again, the previous (2011) Regulation was revived.

**173.** The Government decided to put this issue beyond doubt by making the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014. This Regulation was made by virtue of Schedule 5 of the State Revenue and Other Legislation Amendment (Budget Measures) Act 2014. The Bill was passed on 19 June 2014 and Schedule 5 commenced on assent on 24 June 2014. There was no parliamentary debate on that legislation. This legislative action created the 2014 Regulation.

**174.** Increases of at least 2.5 per cent have been made available to all groups of employees since the inception of the Wages Policy. Since 1 July 2014 increases of 2.27 per cent (plus superannuation increases of 0.25 per cent) have been applied to 72 industrial instruments covering approximately 179,000 employees. In December 2013 the Department of Education and Communities and the NSW Teachers Federation reached agreement to the making of a new Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award for three years from 2014 to 2016. In addition to providing increases averaging 2.5 per cent per year over the duration of the award (inclusive of superannuation guarantee contribution increases) the parties also agreed to a number of reform initiatives over the term of the award, including the implementation of:

- standards-based remuneration for classroom teachers;
- new performance and development processes for principals, executives and teachers;
- a new principal classification structure; and
- amendments to the teacher efficiency process.

This consent agreement applies to approximately 63,000 full time employees.

**175.** On 8 April 2015, the NSW Industrial Relations Commission granted increases of 2.5 per cent to salaries and salary related-allowances from the first full pay period to commence on or after 1 July 2015 and made a new Crown Employees (Public Sector – Salaries 2015) Award effective from 1 July 2015 for a period of one year. This application was made with the consent of the PSA, which represents the industrial interests of the employees covered by the award and applies to approximately 64,000 public service employees (FTE). Achieving a consent agreement was a significant step as it had been difficult to conclude matters in previous years. The parties were unable to reach agreement in 2013 on the quantum of the increase, and in 2014 on the requirement for a No Extra Claims clause, resulting in the requirement for a number of legal proceedings. The NSW Government further indicates that since 22 June 2011, 21 entities have successfully negotiated with unions to provide increases above 2.5 per cent to their employees and provides some examples in this regard.

**176.** In addition to the information provided by the NSW Government, the Federal Government emphasizes that Australia has not ratified Conventions Nos 151 and 154 and that these Conventions are not under consideration for ratification. While the NSW Wages Policy sets certain parameters on employee-related cost increases, it does not purport to restrict or impede trade unions' ability to organize their administration and activities and to formulate

their programmes. The Government further states that in relation to Convention No. 98, its Article 6 and the subsequent findings of ILO supervisory bodies have resulted in the Convention being applied somewhat differently to public sector employees in comparison with private sector employees, with there being some latitude for governments to set limits on public sector wage negotiations. As such, the Australian Government does not consider that the NSW Wage Policy raises issues with regard to the intent of the Conventions which Australia has ratified. The Government points out that in recent years many governments have adopted various measures in relation to public sector employment to address fiscal pressures and ensure an effective and sustainable public sector. While Australia has weathered the global financial crisis relatively well, the global economy remains volatile. The NSW Government has recognized the importance of fiscal restraint and debt reduction while continuing to offer fair remuneration for its employees. The Australian Government also points out that the complaint was lodged during a NSW State election campaign despite the NSW Wages Policy having been in place largely unchanged since 2011. The NSW Liberal–National Coalition Government was returned in the 2015 election, suggesting that the voters of NSW are broadly comfortable with the quality and resourcing of public services in that state.

### C. The Committee's conclusions

177. *The Committee notes that this case deals with the collective bargaining rights of public sector workers in New South Wales and recalls at the outset 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 of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 886]. 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 (ratified by Australia) [see **Digest**, *op. cit.*, para. 887]. As the scope of the law appears to go well beyond the restricted notion of public servants engaged in the administration of the State and covers those engaged in health, transport, education, etc., the Committee will examine this case in respect of this broader category of public servants.*
178. *The Committee notes that the complainants in this case, the CPSU, the PSANSW and the ACTU, refer, in particular, to the Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 and the accompanying Regulation, which require the NSW Industrial Relations Commission to give effect to the Government's public sector policies when making or varying awards or orders relating to the remuneration or other conditions of employment of public sector employees. The complainants are particularly aggrieved by the following features of the 2011 Regulation (clause 6), which set out the NSW Government's policy: (i) increases in remuneration or other conditions of employment are limited to 2.5 per cent per annum (increases above this cap are only permitted where "sufficient employee-related cost savings have been achieved to fully offset the increased employee-related cost"); and (ii) policies "regarding the management of excess public sector employees" are not permitted to be "incorporated into industrial agreements".*
179. *The Committee notes that the validity of the above legislation and the accompanying regulation was tested in the High Court. The Court found both the legislation and regulation to be valid, and in particular, that their application by the NSW Industrial Relations*

*Commission and the NSW Industrial Court did not undermine the institutional integrity of these bodies.*

- 180.** *The Committee further notes that the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014, made by virtue of Schedule 5 of the State Revenue and Other Legislation Amendment (Budget Measures) Act 2014, replaced the 2011 Regulation. The new Regulation confirms the Government's policies regarding the management of excess public sector employees and increases in remuneration previously expressed in the 2011 Regulation. Clause 6 of the Regulation remained unchanged.*
- 181.** *The Committee notes that the NSW Government points out that the legislation and regulation merely provide for a framework within which outcomes must be negotiated. Regarding the public sector pay increases, as reflected in the Regulation, those are restricted to a maximum of 2.5 per cent unless employee-related cost savings have been achieved. The amount of increase above the set percentage is a matter for negotiation between the parties, contingent upon the magnitude of the employee-related cost savings. The Committee notes that the wording of the Regulation (subclause (1)(a)–(c) of clause 6) appears to allow the parties to negotiate increases in remuneration above the set cap if “sufficient employee-related cost savings have been achieved”. The Committee notes several examples provided by the Government of parties achieving, through negotiations, increases above 2.5 per cent.*
- 182.** *The Committee regrets that the NSW Government provides no information on the complainants' allegation regarding the subclause (1)(f) of clause 6 of the Regulation, according to which, “policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments”. The Committee considers that public servants not engaged in the administration of the State should enjoy the right to bargain collectively on all matters related to terms and conditions of their employment, including on the rights of employees on termination. It recalls that rationalization and staff reduction processes should involve consultations or attempts to reach agreement with the trade union organizations, instead of giving preference to proceeding by decree and ministerial decision [see **Digest**, *op. cit.*, para. 1080]. Furthermore, where a staff reduction programme is undertaken, negotiations should take place between the relevant trade union and the employer. The Committee therefore requests the Government to provide to the Committee of Experts on the Application of Conventions and Recommendations, to which it refers this aspect of the case, information on the measures taken to review the restriction imposed by subclause 1(f) of clause 6 of the Regulation, in consultation with the social partners, so as to promote collective bargaining on all matters related to terms and conditions of employment for public servants not engaged in the administration of the State.*
- 183.** *The Committee further notes the complainants' allegation that the above measures were not preceded by consultations with public sector workers and their representatives and that the state of the economy did not justify these measures. In this respect, the Committee notes that the Australian Government emphasizes the importance of fiscal restraint and debt reduction in the context of a volatile global economy, while continuing to offer fair remuneration for its employees. The NSW Government further points out that the Industrial Relations Advisory Council composed, among others, of unions and employers' representative was established in 2010. The Council meets twice a year to discuss any matter brought before it by its members, including wages policies. The Government indicates that while public sector wages were discussed twice, no member has so far raised issues for discussion on the wage policy. Furthermore, with regard to the consultations prior to the adoption of the legislation, the NSW Government indicates that the Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 was subject to extensive and lengthy debate in the Legislative Council, where it was introduced on 24 May 2011, and that all parties had full opportunity to put their views forward and propose amendments for the consideration of the Parliament where it was adopted on 16 June 2011. The NSW Government also indicates that*

*the Legislative Council had also the opportunity for a full debate on the details of the Wages Policy declared in the Regulation and that prior to its adoption, the public was invited to provide comments thereon through submissions. The Committee further notes the Government's indication that there was no parliamentary debate on State Revenue and Other Legislation Amendment (Budget Measures) Act 2014 pursuant to Schedule 5 of which, the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 was made.*

- 184.** *The Committee considers that a fair and reasonable compromise should be sought between the need for financial sustainability, on the one hand, and the need to preserve as far as possible the autonomy of the bargaining parties, on the other. The Committee considers that as much as possible, governments should seek general consensus regarding labour, social and economic policies adopted in the context of economic restraint given that social partners should be able to share in the responsibility of securing the well-being and prosperity of the community as a whole. In the same vein, the Committee recalls that it is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by full and detailed consultations with the appropriate organizations of workers and employers. It further recalls that tripartite consultation should take place before the Government submits a draft to the Legislative Assembly or establishes a labour, social or economic policy [see **Digest**, op. cit., paras 1070 and 1075]. The Committee is of the opinion that the process of consultation on legislation affecting conditions of employment helps to give laws and policies adopted and applied by governments a firmer justification and helps to ensure that they are well respected and successfully applied. The Committee requests the Government to ensure that in the future, any questions or proposed legislation affecting workers' rights are brought, at an early stage of the process, to the attention of the Industrial Relations Advisory Council or any other appropriate forum so as to permit the attainment of mutually acceptable solutions.*

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

- 185.** *In the light of its forgoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to provide to the Committee of Experts on the Application of Conventions and Recommendations, to which it refers this aspect of the case, information on the measures taken to review the restriction imposed by subclause 1(f) of clause 6 of the Regulation, in consultation with the social partners, so as to promote collective bargaining on all matters related to terms and conditions of employment for public servants not engaged in the administration of the State.*
  - (b) The Committee requests the Government to ensure that in the future, any questions or proposed legislation affecting workers' rights are brought, at an early stage of the process, to the attention of the Industrial Relations Advisory Council or any other appropriate forum so as to permit the attainment of mutually acceptable solutions.*

CASE NO. 2882

INTERIM REPORT

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

- **the International Trade Union Confederation (ITUC)**
  - **the General Federation of Bahrain Trade Unions (GFBTU)**
- supported by**
- **Education International (EI)**

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

- 186.** The Committee last examined this case at its March 2015 meeting, when it presented an interim report to the Governing Body [see 374th Report, paras 70–89, approved by the Governing Body at its 323rd Session].
- 187.** The Government sent its observations in a communication dated 5 October 2015.
- 188.** In a communication dated 8 October 2015, Education International (EI) associates itself with the complaint presented by the International Trade Union Confederation (ITUC) and the General Federation of Bahrain Trade Unions (GFBTU) and provides additional information.
- 189.** Bahrain has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 190.** At its March 2015 meeting, the Committee made the following recommendations [see 374th Report, para. 89]:
- (a) Deploring that nearly four years after the allegations of torture and ill treatment of Jalila Al-Salman and Abu Dheeb while in detention have been made, the investigations have not yet been concluded, the Committee urges the Government to expedite these investigations and to inform it of the results without delay. The Committee regrets that no information has been provided by the Government on the outcome of the appeals brought by these trade unionists before the Court of Cassation. It therefore, once again, requests the Government to provide copies of the court judgments, including on appeal. It further requests the Government to ensure that Abu Dheeb is immediately released should it be found that he has been detained for the exercise of legitimate trade union activity and to keep it informed of developments in this regard.
  - (b) Bearing in mind the Government's commitment in the tripartite agreement to work on the possibility of ratifying Conventions Nos 87 and 98, thus facilitating the Government's ratification of these fundamental Conventions, the Committee reiterates its request made

in the framework of Case No. 2552 and expects that the amendments to the Trade Union Act and the Prime Minister's Decision No. 62 of 2006 will be made in the very near future and that they will bring Bahraini law and practice into conformity with freedom of association principles. The Committee reminds the Government that ILO technical assistance is available in this regard. The Committee also expects that the Government will take steps without delay for specific legislative provisions to ensure effective implementation of the freedom of association rights of domestic workers. It requests the Government to keep it informed of the progress made in the above legislative matters.

- (c) The Committee requests the Government to conduct inquiries without delay into the allegations of anti-union discrimination and interference by the employer in trade union affairs in the following companies: ALBA, BAS, ASRY, GARMCO, BATELCO, BAPCO, BAFCO, Gulf Air, Yokogawa Middle East, KANOO cars and Sphynx cleaning. It further requests the Government to provide information on the outcome of these inquiries. The Committee invites the Government to solicit information from the employers' organization concerned on these allegations so that its views, as well as those of the enterprises concerned, may be made available to the Committee.

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

191. In its communication dated 8 October 2015, EI associates itself with the present case and submits additional information concerning the fate of the leaders of the BTA. In particular, the complainant indicates that the health of Abu Dheeb, who is still serving a five-year sentence in Jaw prison, is deteriorating and that prison officers prevent him from receiving medication for hypertension and diabetes and supportive shoes for back pain from a slipped disk that the complainant maintains was due to the torture Abu Dheeb suffered during solitary confinement. The complainant further indicates that Jalila al-Salman continues to suffer from a job ban and restrictions to her right to free speech. The complainant also states that since the BTA was dissolved in 2011, it has not been allowed to be re-established.

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

192. In its communication dated 5 October 2015, the Government indicates that a special investigation unit of the Public Prosecutor's Office had begun an investigation into the allegations of torture in detention of Abu Dheeb and Jalila al-Salman, the president and vice-president of the Bahraini Teachers Association (BTA), including the examination of the relevant medical records with the competent authorities. The Government further specifies that the veracity of the allegations made by Abu Dheeb and Jalila al-Salman was not established by the special investigation unit and therefore both complaints were filed without further action. The Government further adds that the complainants have the right to appeal the special investigation unit's decisions, submit additional evidence or documentation and request the judicial authorities to examine their allegations.
193. As regards the Committee's request for steps to be taken to amend the Trade Union Act and the Prime Minister's Decision No. 62 of 2006, the Government indicates that in relation to the Prime Minister's Decision, which prohibits strike action in certain vital sectors, it will hold the necessary consultations with the relevant parties when the sectors concerned are reviewed and will update the Committee in respect of all developments in this regard.
194. With regard to a series of allegations of anti-union discrimination and interference by the employer in trade union affairs of several private sector companies (ALBA, BAS, ASRY, GARMCO, BATELCO, BAPCO, BAFCO, Gulf Air, Yokogawa Middle East, KANOO cars and Sphynx cleaning), the Government states that the Ministry of Labour and Social Affairs had launched investigations into the situation of trade unions in the aforementioned companies, in the course of which the competent authorities conducted field visits, communicated with a number of trade unions and examined all of the available

documentation. Through the investigations, the authorities concluded that the trade unions examined continued to conduct their activities normally and enjoyed all of the rights established under the Trade Union Act. The Government further indicates that groups of workers were forming new trade unions in a number of companies, in accordance with the Trade Union Act which allows trade union pluralism at the enterprise level. The Government also affirms that the Ministry of Labour and Social Affairs is prepared to analyse any complaint received from the aforementioned unions and to take the necessary measures in accordance with the laws and regulations of Bahrain.

#### D. The Committee's conclusions

195. *The Committee recalls that this case concerns grave allegations of widespread arrest, torture, dismissals, intimidation and harassment of trade union members and leaders following a general strike action in March 2011 in defence of workers' socio-economic interests.*
196. *As regards recommendation (a), the Committee notes the Government's indication that the allegations of torture and ill-treatment of Jalila Al-Salman and Abu Dheeb, who has been in detention since 2011, had been investigated by a special investigation unit of the Public Prosecutor's Office, which also examined the relevant medical records, and that these investigations did not establish the veracity of the allegations made by Jalila Al-Salman and Abu Dheeb. The Committee also observes the Government's indication that while both complaints were filed without further action, the complainants have the right to: appeal the special investigation unit's decisions, submit additional evidence or documentation and request the judicial authorities to examine their allegations. The Committee notes with deep concern that this investigation was concluded after four years out of a five-year prison term for Abu Dheeb and recalls that the freedom of expression which should be enjoyed by trade unions and their leaders should also be guaranteed when they wish to criticize the government's economic and social policy [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 157]. The Committee further notes, with deep concern the allegations of Abu Dheeb's deteriorating health and the prison officers' prevention of his receipt of necessary medication and requests the Government to reply to these allegations without delay and to take the necessary measures to ensure that Abu Dheeb immediately receives all necessary medical attention. The Committee further notes with regret that, once again, the Government has not provided any information on the outcome of the appeals brought by Jalila Al-Salman and Abu Dheeb before the Court of Cassation, nor has it provided copies of the court judgments handed down in their cases. The Committee, therefore, once again urges the Government to provide, without delay, copies of the judgments condemning Abu Dheeb and Jalila Al-Salman and to provide any information relating to their appeals and requests the Government to ensure that Abu Dheeb is immediately released should it be found that he has been detained since 2011 for the exercise of legitimate trade union activity, as this would then mean that he would have been wrongfully detained for four years. The Committee urgently requests to be kept informed of any developments in this respect. Finally, the Committee notes with concern the additional information received from the complainant regarding the refusal to allow the BTA to be re-established and the continued job ban and restrictions on freedom of expression of Jalila Al-Salman. The Committee recalls that the right to express opinions through the press or otherwise is an essential aspect of trade union rights and that all practices involving the blacklisting of trade union officials or members constitute a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measures to combat such practices [see **Digest op. cit.**, paras 155 and 803]. The Committee further recalls that workers should have the right to form organizations of their own choosing regardless of their political opinions. The Committee, therefore, urges the Government to remove any obstacles to the re-establishment of the BTA and to ensure that*

*Jalila Al-Salman can exercise her legitimate right to freedom of expression and that she is not blacklisted due to her trade union activity.*

**197.** *As regards recommendation (b), concerning the Committee's request for measures to be taken to amend the Trade Union Act and the Prime Minister's Decision No. 62 of 2006 in order to bring Bahraini law and practice into conformity with freedom of association principles, the Committee notes the Government's indication that it will hold the necessary consultations with the relevant parties when the sectors concerned by the Prime Minister's Decision are reviewed and will update the Committee in respect of all developments in this regard. Bearing in mind the Government's commitment in the 2012 tripartite agreement to work on the possibility of ratifying Conventions Nos 87 and 98 and its indication that it hoped that the Labour Code would be a catalyst for the development of the relationship between the production parties, thereby contributing to the elaboration of the decision to ratify Conventions Nos 87 and 98 [see 374th Report, para. 86], the Committee expects consultations to be held by the Government without delay on this and on the Trade Union Act, taking into account the Committee's previous comments and the need to ensure effective implementation of the freedom of association rights of domestic workers [see 364th Report, paras 300–305]. The Committee once again reminds the Government that it can avail itself of ILO technical assistance and requests the Government to keep it informed of any developments in this regard.*

**198.** *With regard to recommendation (c), concerning allegations of anti-union discrimination and interference by the employer in trade union affairs in a number of private sector companies (ALBA, BAS, ASRY, GARMCO, BATELCO, BAPCO, BAFCO, Gulf Air, Yokogawa Middle East, KANOO cars and Sphynx cleaning), the Committee notes the Government's indication that: (i) the Ministry of Labour and Social Affairs has launched investigations into the situation of trade unions in the aforementioned companies; (ii) the competent authorities conducted field visits, communicated with a number of trade unions and examined all of the available documentation; (iii) through the investigations, the authorities concluded that the trade unions examined conducted their activities normally and enjoyed all of the rights established under the Trade Union Act; (iv) groups of workers were forming new trade unions in a number of companies, in accordance with the Trade Union Act which allows trade union pluralism at the enterprise level; and (v) the Ministry of Labour and Social Affairs is prepared to analyse any complaint received from the concerned unions and to take the necessary measures in accordance with the laws and regulations of Bahrain. Recalling that it had previously requested the Government to conduct inquiries without delay into the specific allegations raised by the GFBTU in its communication dated 14 February 2013 [see 371st Report, para. 176], the Committee requests the Government to provide detailed information on the outcome of its investigation and to solicit information from the employers' organization concerned in relation to the following allegations:*

- *Aluminium Bahrain (ALBA): punitive measures taken by the management with respect to workers who were establishing an alternative union to the BLUFF, resulting in the dismissal of Hussain Ali Al-Radi, Vice-President of the founding committee, Abdel Menhem Ahmad Ali, Secretary, and Nader Mansour Yaakoub, founding committee member. The Ministry of Labour has refused to respond to the grievances they have made. Following the first founding Congress, the union's Secretary-General, Yousif al Jamri, was demoted and punitive measures were taken against executive board members Abdallah Chaaban and Mohamad Achour. Membership dues continue to be transferred to the management-backed union, despite the withdrawal of 500 workers, and the management refuses to recognize and meet the trade union leaders of the newly formed union.*

- *Bahrain Airport Services (BAS): the company refuses to restore the check-off system for union dues, forcibly shutting the union office, unilaterally taking over the*

*management of the savings fund, refusing to respond to GFBTU calls for dialogue and negotiation, while meeting regularly with the BLUFF-affiliated union. Yousuf Alkhaja, President of the BAS trade union, has still not been reinstated. Moreover, Governing Body member Abdullah Hussein's airport access permit has not been renewed due to his trade union work.*

- *Arab Shipbuilding and Repair Yard (ASRY): the trade union's representation on joint committees has been cancelled, while management supports the establishment of a rival union affiliated to the BLUFF. Migrant workers have been pressured to withdraw from the GFBTU-affiliated union and affiliate with the BLUFF union.*
- *Aluminium Rolling Mill: the unilateral cancellation of facilities provided to the Aluminium Rolling Mill Workers' trade union for a full-time president; management has provided support for the creation of a rival union; intimidation and pressure placed on migrant workers to withdraw from the GFBTU-affiliated union and affiliate to the rival management-supported union; favouritism towards the rival union by according free time to its president; the unilateral ending of the collective bargaining process; and the unilateral reduction of privileges obtained through collective agreements.*
- *Bahrain Telecommunications Company (BATELCO): the absence of dialogue on the part of the management with respect to mass dismissals; the freezing of the joint union-management committee under the pretext of confusion due to the recent trade union plurality; the unilateral withdrawal of trade union privileges; and the placing of all three unions at the workplace on an equal footing, despite the representativeness of the GFBTU.*
- *Bahrain Petroleum Company (BAPCO): the management has unilaterally put in place an alternative negotiation mechanism replacing a decade-old agreed mechanism; three trade union board members remain suspended; the trade union office at Jabal Camp has been demolished; all trade union offices have been locked up by management; documents have been confiscated from the Awali office; management issued a circular calling on workers to withdraw their membership from the GFBTU-affiliated union; and all facilities previously granted to the union have been cancelled by management.*
- *Gulf Air: the management dismissed Hussein Mehdi, the GFBTU-affiliated union board member, under the pretext that he was divulging work secrets. Management sent an email asking workers if they wanted to remain members of the GFBTU-affiliated union.*
- *Yokogawa Middle East: management refuses to hold negotiation meetings with the trade union and refuses to delegate its representatives to attend a meeting with the Ministry of Labour to resolve these issues. The President of the union has been transferred and harassed in reprisal for his trade union work and he has not been granted full-time trade union status to enable him to carry out his representative functions.*
- *Bahrain Aviation Fuelling Company (BAFCO): the re-dismissal of the trade union president, Abdul Khaleq Abdul Hussain, in January 2013, after having transferred him to a job without any specific tasks. All his attempts to rectify the situation were ignored.*

*The continued refusal to reinstate: former board member of the Banks trade union, Ayman Al Ghaban; the President of the trade union at KANOO cars, Hassan Abdul Karim; and board members of Sphynx trade union for cleaning.*

*The Committee further invites the complainant to provide any additional information at its disposal in relation to its complaints of anti-union discrimination in these companies.*

## The Committee's recommendations

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

- (a) Noting with deep concern the allegations of Abu Dheeb's deteriorating health and the prison officers' prevention of his receipt of necessary medication, the Committee requests the Government to reply to these allegations without delay and to take the necessary measures to ensure that Abu Dheeb immediately receives all necessary medical attention. The Committee further once again urges the Government to provide copies of the judgments condemning Abu Dheeb and Jalila Al-Salman and to provide any information relating to their appeals and requests the Government to ensure that Abu Dheeb is immediately released should it be found that he has been detained since 2011 for the exercise of legitimate trade union activity, as this would then mean that he would have been wrongfully detained for four years. The Committee urgently requests to be kept informed of any developments in this respect. The Committee further urges the Government to remove any obstacles to the re-establishment of the BTA and to ensure that Jalila Al-Salman can exercise her legitimate right to freedom of expression and that she is not blacklisted due to her trade union activity. The Committee draws the Governing Body's attention to the serious and urgent nature of this aspect of the case.*
- (b) Bearing in mind the Government's commitment in the 2012 tripartite agreement to work on the possibility of ratifying Conventions Nos 87 and 98, the Committee expects consultations to be held by the Government without delay on this and on the Trade Union Act, taking into account the Committee's previous comments. The Committee once again reminds the Government that it can avail itself of ILO technical assistance and requests the Government to keep it informed of any developments in this regard.*
- (c) The Committee requests the Government to provide detailed information on the outcome of its investigations into, and to solicit information from the employers' organization concerned, on the precise allegations of anti-union discrimination and interference by the employer in trade union affairs in the following companies: ALBA, BAS, ASRY, GARMCO, BATELCO, BAPCO, BAFCO, Gulf Air, Yokogawa Middle East, KANOO cars and Sphynx cleaning. The Committee further invites the complainant to provide any additional information at its disposal in relation to its complaints of anti-union discrimination in these companies.*

CASE NO. 3064

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

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

*Allegations: The complainant organization alleges that the Government makes no effort to ensure the adoption of the new draft trade union law, thus excluding civil servants, judges, air and maritime transport workers, police and domestic workers from the right to freedom of association and denounces the increase in the use of fixed duration contracts in the garment industry, creating employment insecurity and undermining freedom of association and collective bargaining*

200. The complaint is contained in a communication from the International Trade Union Confederation (ITUC) dated 30 May 2013.
201. The Government sent its observations in a communication dated 22 May 2015.
202. Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

203. In its communication dated 30 May 2013, the complainant points to the deficiencies of the current trade union law and indicates that the most troubling issue is the continued exclusion of civil servants (including teachers), police, air and maritime transportation workers, judges and domestic workers from the right to freedom of association. As an example, the complainant asserts that the Government refused to register the Cambodian Confederation of Unions (CCU) as a union confederation because most of their members were teachers and that this non-registration was a failure of the Government to abide by Convention No. 87. To support its point, the ITUC indicates that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) had also previously noted that the existing law regulating trade unions remained far out of compliance with Conventions Nos 87 and 98 and that at the 100th International Labour Conference, the Conference Committee on the Application of Standards urged the Government to approve a new Trade Union Law in full consultation with social partners, which would be consistent with its obligations under Conventions Nos 87 and 98. According to the complainant, the new draft trade union law would permit the mentioned groups of workers and others to finally be able to exercise their trade union rights but the complainant claims that although the law had been completed since November 2011, the Government made no effort to ensure its adoption.
204. The complainant also alleges a dramatic increase in the use of fixed-duration contracts (FDCs), particularly in the garment industry. According to the complainant, the decision by

the industry to shift from undetermined-duration contracts (UDCs) to FDCs has created substantial employment insecurity for many workers, has damaged industrial relations and has had the unintended effect to avoid the formation of new trade unions or to undermine the power of existing trade unions in the garment industry. Citing a report from Yale University, the complainant indicates that this trend reflects a decision by the garment industry as a whole to reclassify the workers who are hired on repeatedly-renewed short-term FDCs. According to the ITUC, although this practice violates article 67 of the Labour Law of 1997, it is widely permitted in practice and has numerous legal implications, including fewer rights and benefits for workers under FDCs, easier dismissal and shorter notice periods, difficulties in proving anti-union retaliation and lesser compensation upon termination of contract than would be due a worker with a UDC. Furthermore, the complainant affirms that the move to FDCs is undermining freedom of association and collective bargaining, as it creates great instability for workers, who reasonably fear that their contracts will not be renewed if they fail to obey the employer, including by joining a trade union. The complainant also observes that due to their short-term character, FDCs negatively affect the organization of a trade union, election of trade union leaders and their efficacy. The ITUC indicates that in 2012 a new Memorandum of Understanding was reached between the Garment Manufacturers Association in Cambodia (GMAC) and several trade unions, which included a commitment to reach a separate agreement on the issue of fixed-duration contracts but that no movement to initiate such negotiations was taken.

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

- 205.** In its communication from 22 May 2015, the Government recalls the development of the draft Trade Union Law, which began at the end of 2010 with a long series of tripartite consultations, facilitated by the ILO, between representatives of trade unions, representatives of employers and the Ministry of Labour and Vocational Training. The ILO was also asked to provide comments on the draft and workers as well as employers were consulted at various stages of the drafting process thus showing its thoroughness and inclusiveness. The Government submits that the draft law is currently under a soon-to-be completed discussion of the inter-ministerial meeting and its adoption is important to create the elements of the tripartite partnership, respect, understanding and trust, which are the foundation of a meaningful social dialogue and sustainable industrial relations. Furthermore, according to the Government, the draft trade union law aims at defending the rights and interests of workers and employers, guaranteeing the right to collective bargaining between workers and employers, improving industrial relations and ensuring employment and national development. While expressing its continuous commitment to promoting freedom of association, the Government also states that the new draft law was not developed for employers or workers but to serve the common interest of the country and to ensure industrial peace and stability.
- 206.** In relation to FDCs, the Government acknowledges the concerns raised by the complainant but clarifies that under article 65 of the Labour Law of 1997, employers can enter into any type of employment contract, FDC or UDC, depending on their agreement. The Government further states that legally speaking, the Labour Law provides the same benefits to workers regardless of the type of their employment contract and that a workers' job security is protected more by their behaviour and work performance than by UDCs, as it is unlikely that an employer would terminate the contract of a high-performing worker while a worker who has committed serious misconduct or has low-level performance would be subject to termination even though he or she is employed under a UDC. The Government further adds that it may even be easier to terminate the contract of a worker if he or she is employed under a UDC as it only requires prior notice and a valid reason relating to the workers' behaviour or professional capacity, whereas FDCs cannot be terminated before the end date of the contract unless the contract is fully paid out according to the law and unless there is consent from the worker, serious misconduct or an Act of God. In addition, the Government asserts

that the Ministry of Labour and Vocational Training does not allow employers to use FDCs for ill purposes and that article 12 of the Labour Law prohibits employers to use union membership as a reason to hire, define or assign work, grant social benefits, take disciplinary action or terminate an employment contract of any worker. Other provisions of the Labour Law also provide protection to trade unions and workers.

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

- 207.** *The Committee notes that this case concerns allegations of lack of progress by the Government in ensuring the adoption of the draft trade union law, thus perpetuating the exclusion of civil servants (including teachers), police, air and maritime transportation workers, judges and domestic workers from the right to freedom of association, as well as claims of an increase in the use of FDCs in the garment industry creating employment insecurity and undermining freedom of association and collective bargaining.*
- 208.** *With regard to the adoption of the draft Trade Union Law, the Committee notes that according to the complainant, the Government made no effort to ensure the adoption of the law even though it had already been completed in November 2011. The Committee further observes that, as indicated by the complainant, the Conference Committee on the Application of Standards, at the 100th International Labour Conference, urged the Government to approve a new trade union law, which would be consistent with its obligations under Conventions Nos 87 and 98.*
- 209.** *The Committee welcomes the Government's greater engagement in the Committee's procedures following the hearing in June 2015 by virtue of paragraph 69 of its procedures and notes the Government's detailed observations on the development of the draft legislation, especially the various tripartite consultations and the multiple invitations to employers and workers to submit comments on the draft as well as the consultations with the ILO. It also observes that, according to the Government, the drafting process was thorough and inclusive and the new draft reflects many ILO recommendations and is aimed at defending the rights and interests of workers and employers, guaranteeing the right to collective bargaining, improving industrial relations and ensuring employment and national development. The Committee also notes the Government's commitment to continuously promote freedom of association and to ensure industrial peace and stability.*
- 210.** *Although welcoming the Government's recourse to tripartism and the inclusiveness of the social partners in the drafting process of the new draft Trade Union Law, the Committee regrets the prolonged delay in its adoption. The Committee also recalls that according to Articles 2 and 9 of Convention No. 87, 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. Therefore, civil servants, teachers, judges, air and maritime transport workers and domestic workers, like all other workers, should benefit from the right to freedom of association, whether through the draft Trade Union Law or other relevant legislative measures. The Committee firmly expects that the Government will take all necessary steps to expedite the adoption of the draft Trade Union Law and requests the Government to provide a copy of the latest draft of the law to the CEACR for examination of its application of ratified Conventions Nos 87 and 98.*
- 211.** *In relation to the alleged widespread use of FDCs, especially in the garment industry, the Committee notes the complainants' allegations about the negative impact of such contracts on employment security, industrial relations, and formation and functioning of trade unions. In particular, the Committee observes the complainant's assertion that although this practice violates article 67 of the Labour Law of 1997, it is widely permitted in practice and has numerous legal implications, including fewer rights and benefits for workers under FDCs, easier dismissal and shorter notice periods, difficulties in proving anti-union*

*retaliation and lesser compensation upon termination of contract than would be due a worker with a UDC. The Committee especially notes that the complainant considers that the move to FDCs is undermining freedom of association and collective bargaining, by creating great instability for workers, who fear that their contracts will not be renewed if they fail to obey the employer, including by joining a trade union. Due to the short-term nature of the contracts, further concerns are raised by the complainant relating to the organization and functioning of a trade union, including election of trade union leaders and their efficacy. The Committee notes that a commitment was made by the GMAC in 2012 to reach a separate agreement on the issue of FDCs but that no movement to initiate such negotiations was taken.*

- 212.** *The Committee observes that the Government acknowledges the complainants' concerns with regard to FDCs but emphasizes that: the Labour Law of 1997, provides the same benefits to workers regardless of their contract; under article 65 of the Labour Law employers and workers can enter into any type of contract; and in any case, the Ministry of Labour and Vocational Training does not allow employers to use FDCs for ill-purposes. The Committee further notes the Government's indication that the Labour Law provides protection to all workers, article 12 of which prohibits employers to use union membership as a reason to hire, define or assign work, grant social benefits, take disciplinary action or terminate an employment contract of any worker.*
- 213.** *The Committee recalls that fixed-term contracts should not be used deliberately for anti-union purposes and that, in certain circumstances, the employment of workers through repeated renewals of fixed-term contracts for several years can be an obstacle to the exercise of trade union rights [see for instance 375th Report, Cases Nos 3065 and 3066 (Peru), para. 481 and 374th Report, Case No. 2998 (Peru), para. 723]. Observing the complainants' concerns that fixed-term contracts have had an important negative impact on trade union rights and that this issue was recognized by the GMAC and several trade unions which agreed to reach a separate agreement on the matter, the Committee encourages the Government to take all appropriate measures to promote these negotiations between the parties with a view to arriving at an agreement on the use of FDCs and to follow-up the situation so as to ensure that workers in the garment industry are able to exercise their trade union rights freely. The Committee requests the Government to keep it informed of any developments in this regard.*

## **The Committee's recommendations**

- 214.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *The Committee firmly expects that the Government will take all necessary steps to expedite the adoption of the draft Trade Union Law and requests the Government to provide a copy of the latest draft of the law to the CEACR for examination of its application of ratified Conventions Nos 87 and 98.*
- (b)** *The Committee recalls that fixed-term contracts should not be used deliberately for anti-union purposes and that, in certain circumstances, the employment of workers through repeated renewals of fixed-term contracts for several years can be an obstacle to the exercise of trade union rights. Observing the complainants' concerns that fixed-term contracts have had an important negative impact on trade union rights and that this issue was recognized by the GMAC and several trade unions which agreed to reach a separate agreement on the matter, the Committee encourages the Government to take all appropriate measures to promote these negotiations between the*

*parties with a view to arriving at an agreement on the use of FDCs and to follow-up the situation so as to ensure that workers in the garment industry are able to exercise their trade union rights freely. The Committee requests the Government to keep it informed of any developments in this regard.*

CASE NO. 3107

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

**Complaint against the Government of Canada  
presented by  
the Amalgamated Transit Union (ATU), Local 113**

***Allegations: The complainant organization alleges that its members employed by the Toronto Transit Commission (TTC) have been deprived of their fundamental right to strike and their right to freely negotiate the terms and conditions of their employment by virtue of a legislation (Toronto Transit Commission Labour Dispute Resolution, 2011) declaring the TTC to be an essential service***

- 215.** The complaint is contained in a communication dated 5 December 2014 from the Amalgamated Transit Union (ATU), Local 113.
- 216.** The Government of Canada transmitted observations of the Government of Ontario in a communication dated 28 October 2015.
- 217.** Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 218.** In its communication dated 5 December 2014, the ATU, Local 113 explains that it is a trade union pursuant to the Ontario Labour Relations Act, 1995. It represents transportation and maintenance workers in the public transit sector in Ontario, Canada, including employees of the Toronto Transit Commission (TTC). The TTC is a public transportation agency that operates bus, streetcar, para-transit, and rapid transit services in Toronto, Ontario. At present, there are approximately 10,066 employees of the TTC represented by Local 113 (6,719 in transportation departments and 3,347 in maintenance departments).
- 219.** The complainant further explains that Local 113 and the TTC have a mature and long-standing collective bargaining relationship and have negotiated approximately 55 collective agreements since the 1920s. Prior to the enacting of legislation in 2011 designating all Local 113 members employed by the TTC as “essential”, Local 113 had engaged in decades of hard bargaining to improve protection and working conditions for its members. Unionized workers of the TTC have engaged in strike action eight times in the last 62 years:

- 1952 – On strike for 19 days;
- 1970 – On strike for 12 days;
- 1974 – On strike for 23 days; back-to-work legislation imposed;
- 1978 – On strike for eight days; back-to-work legislation imposed;
- 1991 – On strike for eight days;
- 1999 – On strike for two day; back-to-work legislation imposed;
- 2006 – On strike for one day; back-to-work legislation imposed;
- 2008 – On strike for two days; back-to-work legislation imposed.

**220.** In this respect, the complainant alleges that: in five of the eight times that Local 113 has taken strike action against the TTC, the Province of Ontario has introduced and rapidly implemented back to work legislation, ending the labour disruption; as the time went on, even short strikes were terminated with politically expedient back-to-work legislation; and that, in spite of a complete lack of evidence that strikes by members of Local 113 endangered or could endanger the life, personal safety or health of the whole or part of the population, it became politically desirous for governments to limit or eliminate strike action at the TTC.

**221.** The complainant further alleges that on 16 December 2010, the City of Toronto requested that the Province of Ontario declare public transit in Toronto to be an essential service and thereby ban strike action by members of Local 113. The City of Toronto Staff Report prepared in advance of this request noted a number of key points with respect to strikes at the TTC:

- (a) According to the city’s Economic Development, Culture & Tourism (EDCT) Division, the main impact of a TTC strike would be a reduction in the total output of goods and services produced in the city, resulting from increased travel times and commuters making alternate work arrangements;
- (b) The Toronto Fire Services, Toronto Emergency Medical Services and the Toronto Police Services have each provided their assessment regarding the impact of a strike at the TTC on their ability to effectively respond to emergencies. Each service has reported that there has been no noticeable effect upon their response times or ability to respond due to a strike by TTC employees and the interruption of TTC services;
- (c) According to Toronto Public Health [...] there is no available data quantifying any health impacts during a transit strike in Toronto.

**222.** According to the complainant, a motion brought before the Council of the City of Toronto to request that the Province of Ontario declare the TTC an essential service clearly reveals the motivation for the request: “recent polls have consistently shown that over 75 per cent of Torontonians support declaring the TTC an essential service (sometimes as high as 90 per cent)”. According to the complainant, when introducing the legislation to the Ontario Legislature, the then Minister of Labour spoke of the “economic impact work stoppages have” and noted that “work disruptions on the TTC severely affect the city’s economy”.

**223.** On 22 February 2010, the then Ontario Minister of Labour introduced the Toronto Transit Commission Labour Disputes Resolution Act, 2011, which subsequently received Royal Assent on 30 March 2011. Pursuant to sections 1 and 15 of the Act, the prohibition on otherwise legal strike action applies to all employees of the TTC. The Act provides:

1. (1) In this Act, ...

“employee” means an employee of the employer; (“employé”)

“employer” means the Toronto Transit Commission; (“employeur”)

15. (1) Despite anything in the Labour Relations Act, 1995, employees to whom this Act applies shall not strike and the employer shall not lock them out.

**224.** The Act further provides for binding arbitration to resolve any outstanding disputes, including a number of restrictive criteria which, according to the complainant, limit the arbitrator’s discretion and flexibility:

4. Where the Minister has informed the parties that the conciliation officer has been unable to effect a collective agreement, the matters remaining in dispute between the parties shall be decided by arbitration in accordance with this Act.

10. [...]

(2) In making an award, the arbitrator shall take into consideration all factors it considers relevant, including the following criteria:

1. The employer’s ability to pay in light of its fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario and the City of Toronto.
4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
5. The employer’s ability to attract and retain qualified employees.
6. The purposes of the Public Sector Dispute Resolution Act, 1997.

**225.** The complainant refers to Case No. 1768, concerning Iceland, in which the Committee held that an Icelandic statute that required an arbitrator to “take account of the valid wages and terms of agreements on merchant ships and the general wage trend in the country” when setting wage rates was inconsistent with fundamental associational freedoms, because “it does not allow [the arbitrator] any flexibility of interpretation” and considered that compulsory arbitration must be “truly independent and the outcomes of arbitration should not be predetermined by legislative criteria”.

**226.** The complainant argues that with Royal Assent granted, members of Local 113 employed by the TTC lost their long-standing right to strike and gained an interest arbitration model in which the arbitrator faced significant restrictive criteria. The immediate impact of the Toronto Transit Commission Labour Disputes Resolution Act, 2011, was to freeze substantive bargaining and place a chilling effect on all future bargaining.

**227.** The Act further requires a review within one year following the fifth anniversary of the coming into force of the Act:

22. Within one year following the fifth anniversary of the coming into force of this Act, the Minister shall initiate a review of the operation of this Act and shall require a report on the results of the review to be provided to the Minister.

**228.** The complainant indicates that such a review should occur in late 2015 or early 2016. The findings and recommendations of this Committee would be highly relevant to such a review.

**229.** According to the complainant, although bargaining in 2011 continued for some time, no substantive progress was made. In comparison to previous rounds of bargaining where the parties have not bargained complete collective agreements and have resorted to strikes, there were far fewer items agreed in the 2011 round of bargaining than previously. As the parties

were unable to reach a collective agreement in 2011, pursuant to the Act, the dispute was referred to a labour arbitrator for interest arbitration. Although the parties were able to reach a mediated collective agreement in 2014, the inability of Local 113 to threaten strike action had a chilling impact on bargaining and fundamentally altered Local 113's bargaining power.

- 230.** With reference to the cases examined by the Committee, the complainant recalls that the Committee has repeatedly and consistently held that the right to strike is a fundamental and legitimate means for workers to defend their social and economic interests and that it is “an intrinsic corollary to the right to organize protected by Convention No. 87” (Case No. 1954, para. 405). The complainant further recalls that the Committee has given “essential services” a narrow definition when it concluded that a service is essential only if its interruption would “endanger the life, personal safety or health of the whole or part of the population” (see, for example, Case No. 1989, para. 324) and that the fact that the interruption of a service would cause significant economic damage is “not relevant” for the purpose of determining whether a service is essential (Case No. 1963, para. 230):

[B]y linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service “essential”, and thus the right to strike should be maintained.

- 231.** The complainant further refers to the cases in which the Committee had held that passenger transport services are not “essential services” for the purposes of restricting the right to strike (Case No. 2078: municipal public transit in Vilnius, Lithuania; Case No. 2057: municipal public transit in Bucharest, Romania; Case No. 2324: island ferry services in British Columbia, Canada; Case No. 1768: island ferry services in Iceland; Case No. 2212: island ferry services in Greece; Case No. 2044: island ferry services in Cape Verde; and Case No. 2741: transport workers in New York, United States). The complainant points out that having consistently held that the “transportation sector, including metropolitan transit, does not constitute an essential service in the strict sense of the term”, the Committee has on occasion recognized that in certain circumstances it would be appropriate to maintain minimum service in metropolitan transit (Case No. 2741, paras 767–68).

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

- 232.** In its communication dated 28 October 2015, the Government of Canada transmits the following observations of the Government of Ontario.
- 233.** The Government of Ontario indicates that the Toronto Transit Commission Labour Disputes Resolution Act, 2011, came into force on 30 March 2011. It provides a fair and neutral system of independent third-party binding arbitration as the means to resolve disputes that the parties are unable to resolve through the normal collective bargaining process. According to the Government of Ontario, the parties play a key role and have the following important rights under the Act: they are entitled to choose the arbitrator; may select the method of arbitration; they are provided with a full opportunity to present their evidence and make submissions; and they may, at any time before an award is issued, agree that the arbitration should be recommenced before a different arbitrator.
- 234.** The Government of Ontario argues that the Act was enacted in response to a request from the elected officials of the City of Toronto to address the unique and specific circumstances of Toronto and its transit system and the needs of its residents and those who visit. Those circumstances include the critical role the TTC plays in the life of the city and in assuring the health and safety of its people. The Government of Ontario recalls, in particular, that: (i) Toronto is Canada's largest city; (ii) the TTC is the largest transit system in Canada and

the third largest in North America; (iii) the Greater Toronto Area has the highest concentration of health-care facilities in Canada, including 40 hospitals, 84 long-term care homes and 21 community care centres; (iv) approximately 1.5 million people rely on the TTC each business day, including many health-care workers; and (v) a 2008 report commissioned by the ATU, Local 113, itself pointed to the environmental and health related impacts associated with a full disruption of TTC services. Among other things, that report estimated that without TTC services there would be over 178,000 additional cars on the road in Toronto and about 350,000 new car trips on any business day (with consequent health and environmental impacts related to outcomes such as traffic accidents, smog, etc.).

- 235.** The Government of Ontario stresses that it is committed to balanced, stable and productive labour relations. It considers that the Act does not interfere with the employees' right to associate or bargain collectively. Indeed, the Act specifically encourages the parties to continue to negotiate with a view to making a new collective agreement. The Government indicates that it had carefully considered the request of the elected officials of the city of Toronto and consulted with the city, the TTC and its bargaining agents, including the ATU, Local 113. Stakeholders, including the ATU, Local 113 and the general public were able to express their views about the proposal by direct communication with the Government and through the legislative process. The legislative process in Ontario is public and democratic. During the legislative process, a Standing Committee of the Legislature, consisting of members of all the political parties, held hearings to receive public input. The ATU, Local 113, among others, made submissions at these hearings. All of those submissions were taken into consideration by the Government. After carefully reviewing the request from the city, the reasons for it, the reality of the circumstances and the input from stakeholders, including the ATU, Local 113, the Government responded in a way that is fair and measured.
- 236.** The Government of Ontario concludes that the TTC plays a vital, unique and critical role in the lives of Torontonians; to lose the services of the TTC is much more than an inconvenience or simple economic issue. It considers that the Act respects the freedom to associate and engage in collective bargaining, and indeed encourages freely negotiated solutions. It provides a fair, neutral and independent means to resolve impasses that cannot be resolved through collective bargaining.

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

- 237.** *The Committee notes that in its communication dated 5 December 2014, the ATU, Local 113 alleges that its members employed by the TTC have been deprived of their fundamental right to strike and their right to freely negotiate the terms and conditions of their employment by virtue of a legislation (Toronto Transit Commission Labour Dispute Resolution Act, 2011) declaring the TTC to be an essential service and thus prohibiting any recourse to strike action.*
- 238.** *The Committee notes that pursuant to section 15 of the Act, "employees to whom this Act applies shall not strike". Pursuant to section 1 of the Act, this legislation applies to the employees of the TTC.*
- 239.** *The Committee notes the information provided by the Government of Ontario to justify the prohibition of strikes in the Toronto transit system and, in particular, on the role the TTC plays in the life of the city.*
- 240.** *The Committee recalls that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. It further recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which*

would endanger the life, personal safety or health of the whole or part of the population). The Committee has considered that metropolitan transport does not constitute an essential service in the strict sense of the term. It recalls that the transportation of passengers and commercial goods is not an essential service in the strict sense of the term; however, this is a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified. In this respect, a minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met or that facilities operate safely or without interruption [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 522, 576, 587, 607 and 621].

- 241.** *With regard to the compulsory arbitration (section 4 of the Act), the Committee observes that this case does not concern a one-time recourse to compulsory arbitration but rather a global prohibition of the right to strike in a sector that cannot be considered to be, as a whole, essential, contrary to the above principles. The Committee recalls that a system of compulsory arbitration through the labour authorities, if a dispute is not settled by other means, can result in a considerable restriction of the right of workers' organizations to organize their activities and may even involve an absolute prohibition of strikes, contrary to the principles of freedom of association. It further recalls that compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Furthermore, the Committee considers that provisions which establish that, failing agreement between the parties, the points at issue in collective bargaining must be settled by arbitration are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No.98 [see **Digest**, op. cit., paras 568,564, and 993] .*
- 242.** *The Committee further notes the complainant's additional allegation, dealing with issues beyond those raised above, that section 10(2) of the Act limits the arbitrator's discretion and flexibility by providing for certain criteria that "the arbitrator shall take into consideration". The Committee considers that the criteria which the arbitrator is obliged to take into consideration under the Act would appear to allow for sufficient discretion and flexibility, bearing in mind that reference to arbitration should only be taken in accordance with the abovementioned principles.*
- 243.** *In light of the review to be carried out on the operation of the Act in the very near future, the Committee urges the Government to take the necessary steps so that the Government of Ontario will review the Toronto Transit Commission Labour Dispute Resolution Act, 2011, in consultation with the social partners, in a manner so as to ensure the rights of TTC workers in accordance with the abovementioned principles. It requests the Government to keep it informed in this respect.*

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

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

***In light of the review to be carried out on the operation of the Act in the very near future, the Committee urges the Government to take the necessary steps so that the Government of Ontario will review the Toronto Transit***

*Commission Labour Dispute Resolution Act, 2011, in consultation with the social partners, in a manner so as to ensure the rights of TTC workers. It requests the Government to keep it informed in this respect.*

CASE No. 3017

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

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

– **the Third Federation of Workers of the Chilean Chemical  
and Mining Enterprise**

**supported by**

- **the Federation of Copper Workers (FTC)**
- **the Confederation of Metal, Industry and Service  
Workers (CONSTRAMET) and**
- **the Single Confederation of Workers of Chile (CUT)**

*Allegations: the complainant organization alleges restrictions to its president's access to workplaces, unilateral reductions and discrimination in relation to union leave, non-compliance with collective agreements, anti-union dismissals, exclusion and questioning of trade union work, the use of a bonus to promote early, unregulated collective bargaining and impediments to the exercise of the right to strike by the Chilean Chemical and Mining Enterprise (SQM) and its subsidiaries*

245. The complaint is contained in communications of 28 March, 21 May and 9 October 2013 from the Third Federation of Workers of the Chilean Chemical and Mining Enterprise.

246. The Government sent its observations in a communication dated 26 February 2015.

247. Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

**A. The complainant's allegations**

248. In its communications of 28 March, 21 May and 9 October 2013, the Third Federation of Workers of SQM alleges restrictions to its president's access to workplaces, discrimination in relation to union leave, non-compliance with collective agreements, anti-union dismissals, exclusion and questioning of trade union work, the use of a bonus to promote early, unregulated collective bargaining and impediments to the exercise of the right to strike, by SQM and its subsidiaries. Furthermore, the complainant alleges passivity and failure to respond on the part of the competent authority.

- 249.** First, the complainant alleges that for the last eight years, the enterprise has denied the President of the Third Federation of Workers of SQM, Mr Nelson Pérez, access to SQM work facilities, which not only constitutes anti-union conduct but also discrimination, given that the presidents of the other two union federations are allowed access.
- 250.** Second, the complainant alleges unilateral reductions and discrimination by the enterprise in granting union leave. It indicates that it was the enterprise's ongoing and constant practice over more than thirty years – which, it considers, constitutes a tacit clause – to grant and pay union leave exceeding the minimum amounts provided for under the law. The complainant reports that in December 2010, the enterprise announced unilateral changes to the contractual conditions of union officials, changing the requirements for requesting union leave and indicating that hours of union leave would thereafter be deducted from wages. The complainant alleges that those deductions have only been applied to its officials.
- 251.** Third, the complainant alleges dismissals of its members and officials on account of their union membership and participation in union activities through the indiscriminate reliance on the provisions of article 161 of the Labour Code (enterprise requirements). The complainant alleges that when its members participate in an assembly and express their opinion regarding working conditions in the enterprise, they are dismissed the following day on the grounds of enterprise requirements and non-existent restructuring, with a view to intimidating workers into not expressing their opinion or participating in unions that belong to the complainant organization. Furthermore, the complainant organization alleges that, following the collective bargaining procedure entered into by two of its member unions (the first and second unions of the Antofagasta carbonate and lithium hydroxide plants), which concluded with an agreement in May 2013 with the mediation of the labour inspectorate, and after the union members' immunity had expired, 36 workers were dismissed progressively at the beginning and the end of each shift to intimidate the remaining workers (the complainant provides many records of conciliation meetings before the labour inspectorate in which dismissed workers allege the unjustified application of the provisions under article 161 of the Labour Code). The complainant adds that in 2012, another member union in the federation (the Trade Union of Nueva Victoria de Iquique) had been subject to the same treatment, whereby 28 union members were dismissed once their trade union immunity for collective bargaining expired. The complainant considers that, although the enterprise relies on the clause on enterprise requirements, these are measures of anti-union discrimination against officials and trade unions that report bad practices. Lastly, the complainant reports that in the Salar del Carmen worksite, workers were threatened with dismissal if they refused to transfer to another union, which is what happened to the workers who did not (the complainant provides as an example the dismissal of three union members and notes that the workers who did transfer to another union retained their jobs). The complainant organization alleges that, as a result of these dismissals, in Salar del Carmen the union officials are the only workers who have remained in their unions.
- 252.** Fourth, the complainant alleges various instances in which the enterprise has not complied with the collective agreement in relation to: the obligation to provide work clothing for its members (using sizing problems as an excuse for not providing workwear); the provisions on wages (non-compliance and unilateral amendments); and the payment of sick leave.
- 253.** Fifth, the complainant alleges that the enterprise implemented a “General Role Target Compliance Bonus” with a view to impeding the free exercise of the right to strike, by making payment of the bonus conditional on collective bargaining taking place early and on an unregulated basis. The complainant points out that the possibility of recourse to strike action is an element of regulated collective bargaining. Trade union organizations are entitled to bargain collectively within a stipulated period (40 to 45 days) prior to the expiry of a collective agreement, and as part of such bargaining, workers can vote on whether they will accept the last offer made by the employer or take strike action (this is not a possibility

in early, unregulated bargaining). The complainant alleges that introducing a bonus contingent on early, unregulated bargaining violates the exercise of freedom of association by limiting the possibility of resorting to strike action. The complainant indicates that, as a result of this payment incentive, union representatives have felt obligated to enter into early, unregulated bargaining, under pressure from members who wish to receive the bonus. It adds that the bonus has even been paid in advance, on the condition that if early bargaining did not occur, the bonus paid would then be deducted from the worker's earnings. The complainant organization indicates that this practice was reported to the labour inspectorate and that, on 18 January 2013, the Labour Court of Antofagasta ruled that the condition for the payment of the bonus was illegal and that the enterprise had committed anti-union practices by restricting the workers' right to choose freely and voluntarily whether or not they wished to engage in regulated collective bargaining. The complainant organization adds that the enterprise filed an appeal against this ruling before the Court of Appeal.

**254.** Sixth, the complainant reports that the enterprise is constantly questioning union work and excludes its federation from dialogue relating to the adoption of measures affecting all workers. In this regard, the complainant indicates that, in order to come to an agreement on the aforementioned bonus, the enterprise met with two other federations but, in discriminatory manner, did not invite the complainant. Furthermore, the complainant alleges that a supervisor has constantly discredited its members and officials, setting managers against workers by making untrue and distorted statements and disclosing confidential information. It indicates that this allegation was reported to the labour inspector.

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

**255.** In its communication of 26 February 2015, the Government transmitted the observations of the Labour Directorate, of the Ministry of Mining and of the SQM enterprise in response to the complainant's allegations.

**256.** As regards the allegation of the unilateral change to a tacit clause established through the ongoing practice of granting and paying union leave exceeding the minimum legal amounts, the enterprise denies any discriminatory treatment. The enterprise recognizes that, for a long time, it granted union leave exceeding the legal minimum and that it covered the costs of the leave. The enterprise indicates that as a result of this practice, many union officials had stopped performing their work duties and that it had therefore decided to end the practice and, without any discrimination, require that all union officials effectively perform their duties. The Government reports that, in the complaint filed on 16 May 2013 by three officials of a member union of the complainant organization, the Provincial Labour Inspectorate ruled that there was evidence of anti-union practices and, after legal action was taken, the proceedings were concluded on 10 March 2014 through conciliation. Under these conciliation proceedings, the parties agreed that: (i) union officials would thereafter only use union leave in accordance with the provisions set out in the Labour Code, without prejudice to union leave established under collective agreements; (ii) union leave taken until that time which exceeded the legal minimum would not be considered as unjustified absences, and would not result in sanctions or affect the payment of wages; and (iii) full effect would be given to the communications sent by the enterprise regarding the use of union leave. Moreover, the President of the complainant organization, Mr Nelson Pérez, reached these same agreements with the enterprise through a mediation agreement on 8 April 2014. These mediation proceedings also considered the complaint filed by the president of the complainant organization, alleging that the enterprise was not assigning him his contractual work, or the necessary means to perform it; the parties agreed under the mediation agreement that the enterprise would assign Mr Nelson Pérez his contractual work, and provide the other means to enable him to access the workplace to perform his duties.

- 257.** Concerning the allegations of dismissals of union members and officials on account of their union membership and participation in union activities through the indiscriminate application of the provisions of article 161 of the Labour Code (enterprise requirements), the Government transmits the enterprise's observations, which indicates that the dismissals were to adjust to business requirements. The enterprise recognizes that in 2013, it reduced its staff from 5,700 to 4,600 direct employees, having paid the respective compensation to those dismissed, and that in the disputes arising from those dismissals, the courts had ruled in favour of the enterprise in some cases and in favour of the workers in others (no further details are provided regarding the court proceedings in question). The Government provides an information table regarding the handling of the complaints filed by the complainant organization, including references to two complaints for the indiscriminate or unjustified use of the provisions of article 161 of the Labour Code where it is indicated that no records had been found for their registration.
- 258.** As regards the allegations of non-compliance with the collective agreement, the information table provided by the Government regarding the handling of the complaints filed by the complainant organization refers to three complaints for non-compliance with the collective agreement and lists all the complaints that were investigated and which resulted in the issuance of fines.
- 259.** As to the allegation of the use of a bonus to encourage early, unregulated collective bargaining and to impede the exercise of the right to strike, the enterprise declares in its observations that the bonus had been paid since 2004 and that it had been analysed by the enterprise and all of the workers' organizations, none of which had interpreted it as an attack on freedom of association, and that the enterprise had never prevented or impeded regulated collective bargaining. The Government indicates that: (i) the allegation was submitted to the courts, which ruled in January 2013 that the enterprise had committed anti-union practices by making the payment of the bonus conditional on workers engaging in unregulated bargaining, ordered the enterprise to pay a fine of 150 monthly tax units and stated that the enterprise should restrict the payment of the bonus to objective circumstances relating to the performance of the enterprise, thereby excluding conditions relating to collective bargaining; and that (ii) the enterprise filed an appeal for annulment before the Antofagasta Court of Appeal, which was dismissed, followed by an appeal for the unification of judicial precedent before the Supreme Court, which was declared inadmissible. The Government concludes, therefore, that the court decision upheld the main complaint submitted by the complainant to the Committee and states that the decision ordering the enterprise to pay a fine was registered by the Labour Directorate and published in national journals.
- 260.** As regards the allegations of the constant questioning of trade union work and the exclusion of the complainant organization from discussions relating to the adoption of measures affecting all workers, the Committee notes that, in general, the enterprise indicates that its matrix structure enables constant interaction between the enterprise and its workers and their representatives, and that it applies an "open door" policy equally to everyone. As for the establishment of the bonus, the enterprise indicates that it was analysed in detail and without discrimination by the enterprise and all of the trade unions and federations, including the complainant organization. As to the allegation of constant efforts by a supervisor to discredit workers, setting their managers against them, the Government indicates that the competent authority invited the union officials to a meeting on 21 March 2013 and that, in the meeting that they held with the lawyer handling the case, they indicated that the document containing said allegation should be taken as a statement rather than as a complaint.
- 261.** The Government ends by highlighting that, as is apparent from the information supplied and the actions taken, the acts reported by the complainant organization were penalized by the labour inspectorate and the competent courts.

### C. The Committee's conclusions

262. *The Committee observes that the complaint concerns allegations of restrictions on the access of the President of the complainant organization to workplaces, unilateral reductions and discrimination in relation to union leave, non-compliance with collective agreements, anti-union dismissals, exclusion and questioning of trade union work and the use of a bonus to promote early, unregulated collective bargaining and to impede the exercise of the right to strike.*
263. *As regards the allegation that the president of the complainant organization was denied access to the mining sites of the SQM enterprise, the Committee observes that the complainant organization provides no further information in this regard and that neither the Government nor the enterprise have responded. The Committee can only observe that, under the mediation agreement of 8 April 2014, signed by the enterprise and the president of the complainant organization, it was agreed that the enterprise would assign him his agreed work, and provide the means to enable him to carry out his professional activities (without specifically addressing the allegation of the denial of access to the various mining sites in his capacity as trade union leader). The Committee wishes to recall the principle by which “workers’ representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation function” [see **Digest of decisions and principles of the Committee of Freedom of Association**, fifth (revised) edition, 2006, para. 1104]. The Committee requests the complainant organization to provide additional information to the Government concerning this allegation, so as to enable the Government to investigate should the concern persist. The Committee further invites the Government to obtain information in this respect from the enterprise through the employers’ organization concerned, and requests the Government to keep it informed in that regard.*
264. *As regards the allegation of unilateral and discriminatory change in the practice of granting of union leave, the Committee notes that, according to the information provided by the Government, the parties decided under court conciliation procedures and mediation that union leave would only be used in accordance with the provisions set out in the Labour Code, without prejudice to provisions on union leave in collective agreements; that union leave taken until that date exceeding statutory leave would not be considered as unjustified absences, and would not result in sanctions or affect payment of wages, and that full effect would be given to communications sent by the enterprise regarding the use of union leave.*
265. *As to the allegations of many dismissals of union members and officials on account of their union membership and participation in union activities, through indiscriminate reliance on enterprise requirements, and which, according to the complainant organization, have resulted in a considerable reduction in its membership, the Committee notes the enterprise’s explanation that the dismissals were to adjust to business requirements and that the disputes arising from them had gone before the courts, which had found in favour of the enterprise in some cases and in favour of the workers in others. The Committee regrets that, despite the gravity of the allegations, beyond providing the observations made by the enterprise, the Government has not provided further information on these allegations, or on the proceedings before the competent authorities in this regard, only indicating that no records had been found for the registration of two complaints. Furthermore, the Committee wishes to recall the principle that the “application of staff reduction programmes must not be used to carry out acts of anti-union discrimination” [see **Digest**, *op. cit.*, para. 796]. The Committee urges the Government to provide detailed information regarding the handling of these allegations, including any relevant administrative or court decisions, expecting that, if acts of anti-union discrimination have been committed, adequate compensatory measures and sufficiently dissuasive sanctions are imposed. The Committee invites the complainant*

organization to provide any additional information that it may have in connection with these proceedings, including any legal action taken in that regard.

- 266.** *As to the allegations of non-compliance with the collective agreement, the Committee notes that the Government indicates that inquiries have been carried out into the three complaints filed and that they all resulted in the issuance of fines. The Committee expects that the collective agreement is now being fully respected.*
- 267.** *With regard to the allegations that a bonus was used to encourage early, unregulated collective bargaining and to impede the exercise of the right to strike, the Committee notes that a court ruling of January 2013 found that the enterprise had committed anti-union practices by making the payment of the bonus conditional on workers engaging in unregulated bargaining, ordered the enterprise to pay a fine of 150 monthly tax units (equivalent to approximately US\$9,000), and stated that the payment of the bonus should be restricted to objective circumstances relating to the performance of the enterprise, thereby excluding conditions relating to collective bargaining. The Committee has not received any information from the complainant to indicate that the court ruling has not been fully applied.*
- 268.** *Concerning the general allegations that the enterprise constantly questions trade union work and excludes the complainant organization, the Committee observes that they are at odds with the observations made by the enterprise, which claims that it is in constant interaction with workers and their representatives, and that it applies an “open door” policy equally to everyone. The Committee further observes from the Government’s indications that many of the acts reported by the complainant were penalized by the Provincial Labour Inspectorate of Antofagasta and by the competent courts, and invites the Government to take the necessary initiatives to enhance dialogue between the enterprise and the complainant organization, with a view to preventing similar disputes in the future and promoting the exercise of freedom of association, and to keep it informed in that regard.*
- 269.** *As regards the allegation of constant efforts by a supervisor to discredit workers, setting their managers against them, the Committee notes that, according to the Government, the union officials have indicated that the communication containing that allegation should be considered as a statement rather than as a complaint. In the absence of further information or evidence, unless the complainant organization provides sufficient additional information reaffirming and substantiating this allegation, the Committee will not pursue its examination of this allegation.*

## **The Committee’s recommendations**

- 270.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *The Committee requests the complainant organization to provide additional information to the Government concerning the allegation that its president has been denied access to the mining sites of the enterprise, so as to enable the Government to investigate should this concern persist. The Committee also invites the Government to obtain information in this respect from the enterprise through the employers’ organization concerned, and requests the Government to keep it informed in that regard.*
- (b)** *While acknowledging the efforts made by the competent authorities to resolve the issues relating to trade union leave, the Committee urges the Government to provide detailed information regarding the handling of the allegations of anti-union dismissals through indiscriminate reliance on the provisions of*

*article 161 of the Labour Code, including any relevant administrative or court decisions, expecting that, if acts of anti-union discrimination have been committed, adequate compensatory measures and sufficiently dissuasive sanctions are imposed. The Committee invites the complainant organization to provide any additional information that it may have in connection with these proceedings, in particular any legal action taken in that regard.*

- (c) *The Committee invites the Government to take the necessary initiatives to enhance dialogue between the enterprise and the complainant organization, with a view to preventing similar disputes in the future and promoting the exercise of freedom of association, and to keep it informed in that regard.*

CASE NO. 3053

DEFINITIVE REPORT

**Complaint against the Government of Chile  
presented by  
the No. 1 Trade Union of Carozzi Enterprises SA  
supported by  
the Amalgamated Workers' Union of Chile (CUT)**

***Allegations: The complainant organization  
alleges dismissals and other anti-union practices  
by Carozzi Enterprises SA***

271. The complaint is contained in a communication from the No. 1 Trade Union of Carozzi Enterprises SA dated 24 May 2013, supported by the Amalgamated Workers' Union of Chile (CUT) in a communication of 12 November 2013.
272. The Government sent its observations in a communication dated 26 February 2015.
273. 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 complainant organization's allegations**

274. In its communication of 4 May 2013, the No. 1 Trade Union of Carozzi Enterprises SA alleges anti-union practices by Carozzi Enterprises SA, beginning in August 2010 (following a collective bargaining procedure as a part of which the complainant organization held a strike between 14 July and 6 August 2010) with the aim of undermining the existence of the trade union and disrupting its continuity.
275. The complainant organization states that, on 11 March 2011, it filed an administrative complaint with the labour inspectorate for the following anti-union practices: economic discrimination and pressure from the enterprise to dissuade individuals from joining the trade union or to encourage its existing members to resign or to switch trade unions, as well as dismissals on the basis of participation in the 2010 strike, or of opposition to the enterprise's demand that employees should change into and out of their working clothes outside of working hours.

- 276.** The complainant organization states that the labour inspectorate (inspection report No. 0506/2011/578) noted the following: (i) the trade union exercised its right to strike as a part of a collective bargaining process, from 14 July to 6 August 2010, when it invoked its right under Section 369 of the Labour Code to call on the employer to sign a new collective agreement with the same terms as those in the contracts in force; (ii) in January 2011, the trade union and the enterprise entered into a new collective bargaining process arising from a complaint of anti-union practices filed by the trade union with the labour inspectorate, which led to the signing of a collective agreement on 17 January, under which a number of benefits were agreed on, including a 200,000 Chilean peso (CLP) end-of-dispute bonus; (iii) between the end of the strike in August 2010 and February 2011, the enterprise terminated 123 labour relationships – 83 owing to alleged business needs (affecting 53 members of the complainant organization), 16 by mutual agreement, 16 on the basis of voluntary redundancy (affecting four members) and eight for alleged dereliction of duty (affecting three members); (iv) during the same period, 168 individuals were recruited (including 141 protection agents, at a time when the employment contracts of 53 workers carrying out that same role had been terminated); (v) from August 2010 to February 2011, 126 workers resigned from the complainant organization and the number of members fell from 552 to 345; (vi) in 2010, there were two wage adjustments relating to another trade union organization present within the enterprise. The first readjustment was carried out in July 2010 (according to the enterprise, it was a legal readjustment that was applied to all the workers, except for those belonging to the complainant organization, who were excluded on the basis that Section 369 of the Labour Code, which had provided the grounds for the extension of the agreement requested by the complainant organization, establishes that the extension shall not include the terms relating to the readjustment of wages and other benefits). The second wage readjustment was carried out in December 2010 (the result of collective bargaining involving the second trade union, referred to above, which led to the signing of a collective agreement on 16 December 2010. That agreement provided for a number of benefits, including a CLP320,000 end-of-dispute bonus for the trade union's members); and (vii) on examining the wages for the month of January 2011 paid to ten workers who resigned from the complainant organization, it becomes clear that they were each paid the sum of CLP200,000 but that the 75 per cent of the union dues corresponding to the complainant organization was collected from only one of those workers. In the case of the other workers, the dues were collected for the other trade union organizations present within the enterprise.
- 277.** The complainant organization refers to the following legal conclusions of the lawyer responsible for the inspection carried out by the labour inspectorate: (i) the enterprise did not have any grounds for not paying the July 2010 wage readjustment to the complainant organization's members, given that, contrary to the enterprise's claims, the Labour Code regulation invoked (Section 369) does not contain any prohibitions relating to the application of readjustments; (ii) the 75 per cent of the union dues of all of the workers who received the CLP200,000 bonus negotiated by the complainant organization should have been collected for that same organization, the enterprise having therefore acted in an unreasonable manner in that regard; and (iii) he stated that the fact that 53 of the 70 dismissals carried out by the enterprise had been based on business needs and circumstances, when those very same conditions had necessitated the recruitment of 168 new workers during the same period, gave cause for concern.
- 278.** The complainant organization states that, during a subsequent mediation session on 10 May 2011, the enterprise pleaded ignorance of the events and evidence noted by the labour inspectorate and, consequently, a complaint was filed with the competent court on 17 May 2011. The complainant organization attaches the corresponding legal ruling of 12 December 2011, in which the Labour Court of First Instance of Valparaíso concluded that the enterprise had engaged in anti-union practices relating to the complainant organization, it having been proven that most of the workers dismissed had belonged to the complainant organization,

that pressure had been put on members to resign from the trade union and that economic discrimination had been employed, undermining the functioning of the trade union, discouraging potential members and encouraging existing members to resign. Consequently, the Court ruled that the enterprise must pay a fine of 30 tax units.

- 279.** Furthermore, the complainant organization states that a number of its members were dismissed for having exercised their right to change into their work clothes during working hours (the enterprise claimed that workers should change their clothes prior to entering the workplace). In support of its position, the complainant organization refers to a legal opinion of the Legal Department of the Labour Directorate of 4 January 2011, according to which workers must be paid for time spent changing into regulation work clothes. In support of its allegations, the complainant organization refers to a ruling of the Labour Court of First Instance of Valparaíso of 27 November 2012, according to which three members of the complainant organization (Mr Torres Gajardo, Mr Azúa Flores and Ms Silva Flores), whose work contracts had been terminated after three warnings for having continued to clock in and out of work while wearing non-work clothes, had been wrongfully dismissed.
- 280.** Lastly, the complainant organization refers to a further example of anti-union discrimination in the form of the dismissal of a worker (Ms Tabilo Cisternas) on 19 October 2011, 13 days after she joined the complainant organization (at the time, she was the only person to have done so since the 2010 strike). The complainant organization refers to the ruling of the Labour Court of First Instance of Valparaíso of 21 June 2012, in which the Court held the dismissal to be an act of anti-union discrimination and ordered the enterprise to pay a fine of 30 per cent for wrongful dismissal, amounting to CLP929,162 and CLP3,786,474 in compensation (adding up to approximately US\$6,400).

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

- 281.** In its communication of 26 February 2015, the Government states that, in addition to the complaint of 11 March 2011 referred to in the preceding paragraphs, between 2012 and 2014, the complainant organization filed the following complaints for violation of fundamental rights, resulting in a number of administrative and judicial procedures: (i) a complaint dated 18 July 2012 of dismissal of union members for having joined the complainant organization and failure to collect the 75 per cent of the trade union dues (in that regard, the labour inspectorate only found that the trade union members had been dismissed and the Labour Court of First Instance of Valparaíso, in its ruling of 29 June 2013, found that it had not been proven that anti-union practices had been carried out); (ii) a complaint of 24 May 2012 of illegal dismissal of workers covered by trade union immunity during collective bargaining (with regard to which the court ordered that such conduct should cease and that the workers should be reinstated and paid their wages; requirements that the enterprise subsequently met); (iii) a complaint of 5 August 2013 of failure to pay trade union leave in full (the labour inspectorate did not find any evidence of the practice in question); (iv) a complaint of 26 September 2013 of discrimination on the basis of trade union membership (the labour inspectorate noted that there was a special clocking-in system for workers who were members of the complainant organization and, although no agreement was reached, the Office of the Public Prosecutor deemed that the reparations offered by the enterprise were sufficient and decided not to bring the matter before the competent court); (v) a complaint of 28 October 2013 of acts of discrimination (the labour inspectorate found evidence of harmful practices in the form of an agreement to include in a collective instrument a clause on the payment of trade union leave on terms that were more favourable for one of the three trade unions concerned than for the other two; that situation led to judicial conciliation resulting in an undertaking from the enterprise to treat all trade unions equally); and (vi) a complaint of 26 February 2014 of anti-union practices and discrimination on the basis of trade union membership (in its ruling of 26 January 2015, the Labour Court of First

Instance of Valparaíso stated that it had not been proven that anti-union activities had been carried out).

- 282.** Furthermore, the Government reports that, in a letter of 5 February 2015, the enterprise refuted the complainant organization's allegations relating to the dismissals, that two other trade unions are present within the enterprise in addition to the complainant organization and that the enterprise has a policy of respecting its workers' forms of organization, allowing them every opportunity to carry out trade union activities and providing them with the necessary facilities.
- 283.** The Government concludes by stating that the labour inspectorate carried out all its duties in compliance with the law, bringing any cases in which it had uncovered evidence of violations of freedom of association before the competent courts. Moreover, it adds that the competent court rejected the complaints following deliberations carried out in line with due process.
- 284.** Lastly, the Government states that it proposed that the regulations governing the classification and sanctioning of anti-union and unfair practices in collective bargaining should be revised as a part of the bill modernizing the labour relations system that was submitted as a part of the legislative process on 29 December 2014. It is hoped that the bill will provide an opportunity to address the shortcomings affecting the legislation safeguarding freedom of association.

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

- 285.** *The Committee notes that the allegations of anti-union practices raised by the complainant were investigated by the labour inspectorate and were the subject of a number of judicial rulings. As to the results of those procedures, the Committee notes that the labour inspection reports established that there was evidence of anti-union discrimination on various occasions. While in two of the rulings referred to by the Government relating to previous complaints not mentioned by the complainant, the competent court ruled that there was no evidence of anti-union discrimination, in a number of other rulings, provided by the complainant organization, the competent court ruled that the enterprise had carried out acts of anti-union discrimination – both in general, referring to various practices designed to impede the functioning of the organization and to reduce its membership, and to specific cases of dismissal of its members.*
- 286.** *While observing that the complainant's allegations were submitted to the competent national administrative and judicial bodies and expressing concern at the acts of anti-union discrimination established in the rulings of those bodies, the Committee requests the Government to take the necessary steps (such as facilitating dialogue between the enterprise and the complainant organization) to help prevent any new conflicts of a similar nature, in particular, any act of anti-union discrimination, from arising within the enterprise in question.*
- 287.** *The Committee notes that the competent court ordered the enterprise in question to pay a fine which, according to the Government, amounted to the equivalent of approximately US\$2,000, deeming that it had been proven that most of the workers dismissed had been members of the complainant, that members had been put under pressure to resign from the complainant and that economic discrimination had been employed; forms of conduct which had impeded the functioning of the trade union, reducing its membership. Given the serious nature of the allegations, the Committee expresses its concern at the failure to impose a sanction sufficiently dissuasive to prevent such acts from being carried out again in the future, in particular taking into account the fact that the court considered that the enterprise had engaged repeatedly in anti-union practices. In this regard, the Committee welcomes the*

willingness expressed by the Government to revise the regulations governing the classification and sanctioning of anti-union practices in order to address any shortcomings in the legislation in full consultation with the social partners, and requests the Government to inform the Committee of Experts on the Application of Conventions and Recommendations, to which it refers the legislative aspects of this case, of the measures taken in this regard.

## The Committee's recommendations

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

- (a) *While observing that the complainant's allegations were submitted to the competent national administrative and judicial bodies, and expressing its concern at the acts of anti-union discrimination established in the rulings of those bodies, the Committee requests the Government to take the necessary steps, such as facilitating dialogue between the enterprise and the complainant organization, to help prevent any new conflicts of a similar nature, in particular, acts of anti-union discrimination, within the enterprise in question.*
- (b) *The Committee welcomes the willingness expressed by the Government to revise the regulations governing the classification and sanctioning of anti-union practices in order to address any shortcomings in the legislation in full consultation with the social partners, and requests the Government to inform the Committee of Experts on the Application of Conventions and Recommendations, to which it refers the legislative aspects of this case, of the measures taken in this regard.*

CASE NO. 2620

DEFINITIVE REPORT

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

- the Korean Confederation of Trade Unions (KCTU) and
- the International Trade Union Confederation (ITUC)

***Allegations: The complainants allege that the Government refused to register the Migrants' Trade Union (MTU) and carried out a targeted crackdown on this union by successively arresting its Presidents Anwar Hossain, Kajiman Khapung and Toran Limbu, Vice-Presidents Raj Kumar Gurung (Raju) and Abdus Sabur, and General Secretary Abul Basher Moniruzzaman (Masum), and subsequently deporting many of them. The complainants allege that this has taken place against a background of generalized***

***discrimination against migrant workers geared to create a low-wage labour force that is easy to exploit***

289. The Committee last examined this case at its March 2015 meeting, when it presented an interim report to the Governing Body [see 374th Report, paras 286–305, approved by the Governing Body at its 323rd Session].
290. The Government sent its observations in a communication dated 18 September 2015.
291. The Republic of Korea has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

292. At its March 2015 meeting, the Committee made the following recommendations [see 374th Report, para. 305]:
- (a) Deploring that the Government’s appeal against the Seoul High Court’s decision in favour of the MTU’s registration is still pending more than eight years after it was lodged, the Committee once again firmly expects that the Supreme Court judgment concerning the MTU’s status will be rendered without further delay and will duly take into account the allegations that the failure to register the MTU has been accompanied by a targeted crackdown against its leaders and members. In the meantime, the Committee once again urges the Government to ensure that the Committee’s conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the Court’s consideration, and to provide a copy of the Supreme Court’s decision once it is handed down.
  - (b) The Committee once again expresses its firm expectation that the Government will make every effort to proceed with the registration of the MTU without further delay and requests it to provide full particulars in this regard.
  - (c) The Committee once again urges the Government to undertake an in-depth review of the situation concerning the status of migrant workers in full consultation with the social partners concerned, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation and in conformity with freedom of association principles, and to prioritize dialogue with the social partners concerned as a means to find negotiated solutions to the issues faced by these workers. The Committee once again requests to be kept informed of the progress made in this regard.
  - (d) The Committee invites the complainants to provide any additional information they consider may assist the Committee’s understanding of the current functioning of the MTU.
  - (e) The Committee reminds the Government that, if it so wishes, it may avail itself of technical assistance from the Office in relation to the matters raised by this case.

**B. The Government’s reply**

293. In its communication dated 18 September 2015, the Government indicates that on 25 June 2015, the Supreme Court handed down a judgment related to the rejection of the registration of the Migrants’ Trade Union (MTU). According to the Government, the Supreme Court decided *en banc* that “persons living on wages, salary or other equivalent form of income earned in pursuit of any type of job constitute workers under the Trade Union and Labour Relations Adjustment Act (TULRAA), and even if he/she is a foreigner not eligible for employment, he/she cannot be seen as being beyond the scope of workers as prescribed by

the TULRAA, and thus a foreign worker who does not have the status of sojourn eligible for employment may organize or join trade unions”. The Government states that the Supreme Court also specified in its judgment that allowing foreign workers without legitimate sojourn status to join trade unions does not mean that permission for employment was granted or that their stay in the Republic of Korea was legalized. A press release on the decision, prepared by the Supreme Court Public Relations Bureau, is attached to the Government’s report. The Government further provides that, after the ruling, it examined whether the new bylaw submitted by the MTU was in conformity with the TULRAA and issued a certificate of registration on 20 August 2015. It further asserts that since the MTU became a legal trade union by registration, further review of the complaint was no longer necessary.

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

- 294.** *The Committee recalls that this case concerns allegations that the Government refused to register the MTU and carried out a targeted crackdown on the MTU by successively arresting its officers and subsequently deporting many of them, against a background of allegedly generalized discrimination against migrant workers.*
- 295.** *With regard to recommendation (a), the Committee welcomes the long-awaited judgment rendered by the Supreme Court on 25 June 2015, in which it dismissed the Government’s appeal against the Seoul High Court decision in favour of the MTU’s registration and ruled that a foreign worker who does not have the status of sojourn may organize or join trade unions. In particular, the Committee notes with interest the following extracts of the Supreme Court Public Relations Bureau press release: (i) “persons living on wages, salary or other equivalent form of income earned in pursuit of any type of job constitute workers under the Trade Union and Labour Relations Adjustment Act (TULRAA), and even if he/she is a foreigner not eligible for employment, he/she cannot be seen as being beyond the scope of workers as prescribed by the TULRAA, and thus a foreign worker who does not have the status of sojourn eligible for employment may organize or join trade unions”; and (ii) “the act of organizing or joining a trade union cannot be prohibited simply because the person concerned is a foreign worker who does not have legitimate status of sojourn”. The Committee further notes that the Supreme Court differentiates between “applying laws on immigration control and employment of foreigners, such as carrying out employment restriction or deportation on foreigners ineligible for employment” and “ensuring workers’ rights under the TULRAA”, and observes the Supreme Court’s reasoning: “in accordance with the Immigration Control Act, foreigners should attain the status of sojourn eligible for employment to be employed in the Republic of Korea, and a foreigner employed without the legitimate status of sojourn for employment is subject to deportation and punishment; [t]he purpose, however, is deemed to prohibit employers from hiring foreigners who do not have the status of sojourn eligible for employment, not to deny foreigners ineligible for employment the rights that come with the service they have actually provided, or all the rights they deserve as workers under the TULRAA”.*
- 296.** *As regards recommendation (b), the Committee notes with satisfaction the Government’s indication that following the Supreme Court judgment, the Ministry of Employment and Labour examined the new bylaw submitted by the MTU and issued a certificate of registration on 20 August 2015.*
- 297.** *As regards recommendation (c), while firmly expecting that the Supreme Court ruling on the right of all migrant workers to organize and join trade unions will be given full effect in practice, the Committee trusts that the Government will pursue a review of the situation concerning the status of migrant workers in full consultation with the social partners concerned, including the MTU, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation.*

## The Committee's recommendation

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

*While firmly expecting that the Supreme Court ruling on the right of all migrant workers to organize and join trade unions will be given full effect in practice, the Committee trusts that the Government will pursue a review of the situation concerning the status of migrant workers in full consultation with the social partners concerned, including the MTU, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation.*

CASE NO. 2923

INTERIM REPORT

### Complaint against the Government of El Salvador presented by

- the Union of Municipal Workers of Santa Ana (SITRAMSA) and
- the Autonomous Confederation of Salvadorian Workers (CATS)

#### *Allegation: Murder of a trade union leader*

**299.** The Committee last examined this case at its June 2015 meeting, when it presented an interim report to the Governing Body [see 375th Report, paras 268–282, approved by the Governing Body at its 324th Session (June 2015)].

**300.** The Government sent new observations in a communication dated 29 September 2015.

**301.** 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**

**302.** In its previous examination of the case in June 2015, the Committee made the following recommendations [see 375th Report, para. 282]:

- The Committee, deeply deploring and condemning the murder of union leader Mr Victoriano Abel Vega, once again requests the Government to provide information on the criminal proceedings initiated and to take all measures at its disposal to ensure that investigations are intensified to clarify the facts, identify the guilty parties and impose commensurate punishment in accordance with the law, with a view to preventing such types of criminal offences. The Committee requests the Government and the competent authorities to take all available measures in accordance with the law to identify the perpetrators of this murder and to investigate further into its alleged anti-union motives.
- In this connection, as the complainant organizations have linked the murder of the union leader to his union activities, and in particular to his advocacy for the establishment of a union in the municipal services of San Sebastián (allegedly impeded through dismissals of the union's founding members and the silence of the labour administration concerning

the trade union complaints), the Committee urges the Government to carry out an investigation in this regard and to keep it informed.

- Lastly, the Committee once again draws the Governing Body's attention to the extremely serious and urgent nature of this case.

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

**303.** In its communication of 29 September 2015, the Government states that the murder of Mr Victoriano Abel Vega has been repeatedly condemned in El Salvador, that it respects and guarantees freedom of association, and that the Office of the Public Prosecutor and the National Civil Police are still investigating the case. Although, on account of the separation of powers, the prosecution service has complete operational independence, in the interests of speeding up the investigation and complying with the Committee's recommendations, the Government notified the Office of the Public Prosecutor of the present complaint, emphasizing its seriousness and placing the highest priority on its resolution, and again requested information on the progress of the investigation. In a note of 12 May 2015, the Chief Public Prosecutor reported on the investigative work carried out, including various expert opinions and interviews with witnesses, stating however that the perpetrators of the offence had not yet been identified and that the investigation was still ongoing, with requests having been made to the Central Investigation Department of the National Civil Police for new investigations, the results of which are still pending. In that regard, in July 2015, the Ministry of Labour and Social Welfare met with the Chief Public Prosecutor to emphasize the extremely serious and urgent nature of the case and the importance of moving ahead with and concluding the investigation. Consequently, the Chief Public Prosecutor expressed his wish that the investigation should be expedited. The Government states that it will keep the Committee informed of any developments in this regard.

**304.** As to the complainants' allegations linking the murder of the union leader to his union activities, and in particular to his advocacy for the establishment of a union in the municipal services of San Sebastián Salitrillo, the Government again states that such allegations are unsubstantiated given that, according to the records of the National Department of Social Organizations, the creation of the Union of Municipal Workers of San Sebastián Salitrillo was registered on 18 November 2010 and that, to date, the union and its executive committee remain active.

**305.** As to the alleged silence of the labour administration referred to by the complainants in their complaint, the Government states that it has not found any processed files in the relevant Ministry of Labour and Social Welfare archive. Indeed, the Labour Code does not cover municipal administrative careers, the municipal commissions having the power to hear any complaints filed by municipal officials or employees concerning violations of the rights enshrined in the relevant legislation (the Municipal Administrative Careers Act). The Government states that the Ministry of Labour and Social Welfare does not have the right to deal with requests for inspections into violations of labour rights within municipal services. Lastly, the Government reports that there are a number of other bodies competent to deal with the complaints of municipal service workers – namely, the Office of the Attorney-General, the Office of the Human Rights Ombudsman and the Office of the Public Prosecutor.

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

**306.** *The Committee recalls that the allegations in the present case refer to the murder, on 16 January 2010, in the city of Santa Ana, of Mr Victoriano Abel Vega (general secretary of the Union of Municipal Workers of Santa Ana (SITRAMSA)). He died from multiple gunshot wounds received as he was leaving the City Sanitation Services office, where he had gone to*

submit a letter requesting permission to attend a union meeting of the Autonomous Confederation of Salvadorian Workers (CATS). The complainant organizations highlighted that, upon leaving the office, Mr Victoriano Abel Vega, who had already received death threats for his union activities, was killed by five persons who were waiting for him, and who fled in a vehicle that was waiting for them. In its last examination of the case, the Committee took note of the Government's statement to the effect that it had not yet been possible to identify the perpetrator or perpetrators and that the investigation remained open and the Central Investigation Department continued to search for sources to enable it to identify the perpetrators of the crime.

307. The Committee wishes to recall that [t]he killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 48].
308. The Committee takes note of the Government's additional observations, according to which: (1) it has contacted the Office of the Public Prosecutor on various occasions to emphasize the serious and urgent nature of the case; and (2) despite the various steps taken, it has not been possible to identify the perpetrators, the investigation remains open and the Public Prosecutor has expressed the wish that the investigation be expedited.
309. The Committee deeply regrets that, although the murder of union leader Mr Victoriano Abel Vega took place on 16 January 2010, more than six years later the authorities have not identified the perpetrators of, or parties to, this abject murder. Noting that, despite the steps taken, it seems that no tangible progress has been made regarding the investigation, the Committee firmly urges the Government and all the competent authorities to take without delay all possible steps to identify the perpetrators of the murder.
310. The Committee again highlights the seriousness of the allegations, deeply deplores and condemns the murder of the trade union leader and again reiterates the recommendation made at its June 2014 meeting firmly urging the Government to provide information on the criminal proceedings initiated, and trusts that tangible progress will be made in the near future that will lead to clarification of the facts, identification of the guilty parties and the imposition of commensurate punishment in accordance with the law, with a view to preventing such types of criminal offences.
311. As to the allegations linking the murder of the union leader to his union activities, and in particular to his advocacy for the establishment of a union in the municipal services of San Sebastián Salitrillo, the Committee noted, in its previous examination of the case, the Government's statements to the effect that the Union of Municipal Workers of San Sebastián Salitrillo (SITMASSS) was created on 18 November 2010 and that both the trade union and its executive committee remain active. Taking into account the information provided by the complainant organizations relating to the union activities of Mr Victoriano Abel Vega, reflected in his request to attend a meeting of the CATS on the day he was killed, and to the fact that he had received death threats as a result of his union activities, the Committee considers that the subsequent creation of SITMASSS and the continued existence to date of its executive committee do not constitute sufficient grounds for rejecting the allegations linking the murder to union activities and, in particular, to advocacy for the establishment of SITMASSS. The Committee has already recalled in this regard that union official Mr Victoriano Abel Vega was murdered on 16 January 2010 and that, prior to his murder, he carried out advocacy relating to SITMASSS. Consequently, the Committee is bound to request the Government once again to ensure that the statements of the complainant

organizations concerning the anti-union motives for the murder are examined in greater depth within the criminal investigations.

- 312.** *As to the allegations of dismissal of the union's founding members and the silence of the labour administration (the complainants alleged in their complaint that the Ministry of Labour and Social Welfare failed to follow up their requests for an inspection), the Committee notes the Government's statement that there is no record of any files being processed by the Ministry of Labour and Social Welfare because inspections at the municipal level are not the competence of the Ministry but rather of municipal bodies (the municipal commissions) and other state entities. However, the Committee regrets the fact that, apart from providing that information, the Government has not reported having taken any action to comply with the Committee's recommendation that the allegations of the dismissal of the union's founding members should be investigated, for example, by making inquiries with the competent bodies referred to in the Committee's most recent observations. The Committee urges the Government to refer the allegations relating to the dismissal of the trade union founders to the competent authorities and, to this end, invites the complainant organizations to provide further information relating to the allegations and to any complaints filed in connection with them. The Committee requests the Government to keep it informed in this regard.*

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

- 313.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee, deeply deploring and condemning the murder of trade union leader Mr Victoriano Abel Vega, firmly urges the Government to provide information on the criminal proceedings initiated, and trusts that tangible progress will be made in the near future that will lead to clarification of the facts, identification of the guilty parties and the imposition of commensurate punishment in accordance with the law, with a view to preventing such types of criminal offences. The Committee firmly urges the Government and all the competent authorities to take without delay all possible steps in accordance with the law to identify the perpetrators of this murder and to ensure that the alleged anti-union motives behind it are investigated in greater depth.*
  - (b) Accordingly, as the complainant organizations have linked the murder of the trade union leader to his union activities, and in particular to his advocacy for the establishment of a union in the municipal services of San Sebastián, the Committee urges the Government to refer the allegations relating to the dismissal of the union's founding members to the competent authorities and, to this end, invites the complainant organizations to provide further information relating to the allegations and to any complaints filed in connection with them. The Committee requests the Government to keep it informed in this regard.*
  - (c) Lastly, the Committee once again draws the Governing Body's attention to the extremely serious and urgent nature of this case.*

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CASE NO. 3136

DEFINITIVE REPORT

**Complaint against the Government of El Salvador  
presented by  
the Trade Union of Workers of the Salvadoran Institute for Comprehensive  
Rehabilitation (SITRAISRI)**

***Allegations: Refusal to register the general executive committee of the trade union through the imposition of discretionary guidelines***

- 314.** The complaint is contained in a communication from the Trade Union of Workers of the Salvadoran Institute for Comprehensive Rehabilitation (SITRAISRI) dated 3 June 2015.
- 315.** The Government sent its observations in a communication dated 28 September 2015.
- 316.** 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) and the Labour Relations (Public Service) Convention, 1978 (No. 151).

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

- 317.** In its communication of 3 June 2015, the Trade Union of Workers of the Salvadoran Institute for Comprehensive Rehabilitation (SITRAISRI) alleges that the Ministry of Labour and Social Security imposed discretionary guidelines relating to the registration of the general executive committee of SITRAISRI and the issuing of accreditation and cards to its elected members, thus violating the right to a guarantee of trade union immunity.
- 318.** The complainant organization states that, on 24 March 2015, it submitted a request for the registration of its general executive committee and the issuing of accreditation and cards to the officials of SITRAISRI to the National Department of Social Organizations of the Ministry of Labour and Social Security. According to the complainant organization, the response time set for such a request is 15 working days. The complainant organization adds that 19 working days later, on 29 April 2015, it received a resolution from the National Department of Social Organizations stating, prior to ruling on the request for registration, that based on the documentation submitted, it was not possible to verify compliance with a number of the requirements set for membership of the executive committee in light of section 225 of the Labour Code, i.e. that members should: (i) be a national of El Salvador by birth; (ii) be over the age of 18 years; and (iii) not be employees in positions of trust or representatives of the employer. Consequently, as a part of the resolution, the trade union was called on to submit photocopies of individual identity documents and recent payslips, or certificates of employment setting out the duties performed by the elected officials.
- 319.** The complainant organization considers that the resolution essentially constitutes a refusal to register the new committee, thereby violating and preventing the enjoyment of the constitutional right to trade union immunity. The complainant organization considers that the applicable legislation does not establish an obligation to provide the documents requested in the contested resolution. SITRAISRI alleges that the resolution has no legal basis and that it introduces a discretionary requirement which consequently left the trade union leaderless.

320. SITRAISRI also alleges that the request for additional documents required by the Ministry of Labour constitutes an arbitrary change in criteria that undermines legal security. The complainant organization states that, since the founding of SITRAISRI in 2010, five requests for registration and the issuing of accreditation and cards had been submitted and granted without any requirement to provide copies of the individual identity documents and payslips of the persons elected.

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

321. In its communication of 28 September 2015, the Government emphasizes that the resolution of 29 April 2015 contested by the complainant organization did not constitute a refusal but was, rather, an invitation to address the shortcomings of the request through the submission of the documents required. In that regard, the Government states that SITRAISRI was instructed to submit copies of the individual identity documents and payslips of the persons elected solely in order to enable verification: (i) through the individual identity documents, that the requirements relating to nationality and the age of majority had been met; and (ii) through the payslips, or, where required, certificates of employment, for the posts held by the persons concerned within the institution, in order to ensure that they were not employees in positions of trust or representatives of the employer.

322. The Government states that, in light of the national case law, registration of executive committees is not a discretionary act but rather a regulated function of the administration and that, as a part of the process, checks must be completed to ensure that the legal requirements have been met. Furthermore, although the relevant provisions do not explicitly require the submission of the documents in question, this step is necessary in order to enable verification of compliance with the requirements set out in the national Constitution (Salvadoran nationality – article 47) and in the Labour Code (among other things, attainment of age of majority and the fact of not being employed in a position of trust or a representative of the employer – section 225).

323. The Government admits that previous administrations did not check compliance with some of the legal requirements for membership of executive committees. The Government considers, however, that this approach led to grave problems in practice, including the existence of executive committees made up of foreign nationals or employees in positions of trust and representatives of the employer.

324. Lastly, the Government reports that, on 26 June 2015, the complainant organization addressed the shortcomings in the request submitted by providing the national identity documents and payslips required by the resolution of 29 April 2015. The Government states that, once the documentation required was submitted, steps were taken to register the executive committee of SITRAISRI and its members were issued with their accreditation on 6 July 2015. Consequently, the Government considers that the complaint is without merit or foundation.

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

325. *The Committee observes that, in the present case, the complainant organization alleges the refusal to register the general executive committee of SITRAISRI through the imposition of discretionary guidelines in a resolution of the National Department of Social Organizations of the Ministry of Labour and Social Security. The Committee also observes that, according to the Government, the contested resolution did not constitute a discretionary refusal to register the committee, but rather merely a request for the necessary documentation to be submitted (national identity documents and payslips) in order to enable verification of compliance with the requirements applicable to the members of the executive committee, in*

light of the Constitution of El Salvador and the Labour Code. Furthermore, the Committee observes that, according to the Government, once the complainant organization submitted the national identity documents and the respective payslips, steps were taken, a few days later, to register the executive committee and to issue its members with their accreditation.

- 326.** *In this regard, the Committee wishes to recall that the requirements established in national law relating to the registration of executive committees must be in conformity with the principles of freedom of association, in particular the right of the workers freely to elect their representatives. The Committee notes that the Government states that it required the submission of copies of individual identity documents and payslips in order to verify compliance with the legal requirements that members of executive committees should: be nationals of El Salvador by birth; have attained the age of majority; and not be employed in positions of trust or representatives of the employer. As to the requirement that members should be nationals of El Salvador by birth, the Committee recalls the principle that legislation should be made flexible so as to permit the organizations to elect their leaders freely and without hindrance, and to permit foreign workers access to trade union posts, at least after a reasonable period of residence in the host country [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paragraph 420]. Furthermore, the Committee observes that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has requested the Government to take measures to amend article 47(4) of the national Constitution, section 225 of the Labour Code and section 90 of the Civil Service Act, which establish the requirement to be “a national of El Salvador by birth” in order to hold office on the executive committee of a trade union. As to the requirement that members of an executive committee must have attained the age of majority, the Committee considers that its imposition constitutes a restriction of the right of the workers freely to elect their representatives.*
- 327.** *In view of the fact that El Salvador has ratified Convention No. 87, the Committee requests the Government to send detailed information to the CEACR on the measures taken to adapt the regulations on the formation and registration of executive committees in line with the principles of freedom of association, and draws the attention of the CEACR to the legislative aspects of this case.*

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

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

***In view of the fact that El Salvador has ratified Convention No. 87, the Committee requests the Government to send detailed information to the CEACR on the measures taken to adapt the regulations on the formation and registration of executive committees in line with the principles of freedom of association, and draws the attention of the CEACR to the legislative aspects of this case.***

CASE NO. 3094

INTERIM REPORT

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

- **the Federation of Bank, Service and State Employees of Guatemala (FESEBS)**  
**and**
- **the Trade Union of Workers of the Institute of Municipal Development (SITRAINFOM)**

*Allegations: The complainant organizations allege that the Institute of Municipal Development and the Ministry of Labour and Social Security refuse to recognize the validity of the collective agreement signed by the Institute of Municipal Development, thereby refusing to acknowledge the right to collective bargaining of the workers of the aforementioned institution*

- 329.** The complaint is contained in communications dated 14 July 2014, 12 November 2014, 4 May 2015 and 28 of January 2016 jointly presented by the Federation of Bank, Service and State Employees of Guatemala (FESEBS) and the Trade Union of Workers of the Institute of Municipal Development (SITRAINFOM).
- 330.** The Government sent its observations in a communication dated 5 August 2015.
- 331.** 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 complainants' allegations**

- 332.** In their communication of 14 July 2014, the complainant organizations report that the Institute of Municipal Development (INFOM) and the Ministry of Labour and Social Security refuse to recognize the validity of the collective agreement signed by INFOM and SITRAINFOM, thereby refusing to recognize the right to collective bargaining of the workers of the aforementioned institution.
- 333.** In this regard, the complainant organizations indicate that: (i) between 2008 and 2012, SITRAINFOM and INFOM were engaged in a socio-economic collective dispute in relation to the negotiation of INFOM's seventh collective agreement on working conditions, before the First Labour and Social Security Court; (ii) in October 2012, both parties signed an agreement undertaking to appoint their respective bargaining committees for the collective agreement on working conditions and to negotiate the agreement through direct bargaining, whereby the trade union withdrew from the conciliation proceedings before the First Labour and Social Security Court; (iii) on 13 June 2013, the President of the Republic appointed the new Director of INFOM, Mr German Estuardo Velásquez Pérez; (iv) on 13 September 2013, the Director of INFOM and the representatives of the trade union signed an agreement in which the parties undertook to establish their respective bargaining committees with a view to continuing with the bargaining process and signing the seventh collective agreement on

working conditions no later than 20 October 2013; (v) on 19 September 2013, in an official act, the Director appointed the new INFOM bargaining committee; (vi) on 20 October 2013, five years after the beginning of the bargaining process, the duly accredited representatives of INFOM and SITRAINFOM publicly signed INFOM's seventh collective agreement on working conditions; (vii) in December 2013, claiming technical difficulties related to the end of the financial year, the Director, who was aware that the agreement was valid and enforceable, proposed an addendum to the agreement whereby the obligations undertaken therein would become effective as of January 2014; (viii) on 16 December 2013, both parties signed the aforementioned addendum; (ix) in January 2014, the INFOM executive committee refused to recognize the signed agreement claiming that, despite having authorized the Director to negotiate the new agreement with the trade union under Decision No. 255-2012, it had no knowledge of the negotiation and that the Director was not authorized to conduct it; (x) on this basis, the INFOM executive committee ordered the Director to renegotiate the previously signed agreement; (xi) on 13 March 2014, in accordance with the regulations in force, SITRAINFOM presented the collective agreement to the Ministry of Labour and Social Security for its registration; (xii) on 18 March 2014, under Decision No. 87-2014, the Ministry of Labour approved the registration of the agreement, the clauses of which came into force on 20 October 2013; (xiii) INFOM filed an appeal for the reversal of Decision No. 87-2014, requesting the removal of the agreement from the public register; and (xiv) in violation of article 275 of the Labour Code, which provides that appeals for reversal are to be rejected in the absence of a decision by the Ministry of Labour within a maximum period of eight days, on 6 May 2014 the Ministry of Labour issued Decision No. 141-2014, upholding the appeal for reversal filed by INFOM, thereby revoking Decision No. 87-2014 and removing the collective agreement from the public register.

- 334.** As regards the above, the complainant organizations allege that the removal of the collective agreement from the public register does not comply with the grounds provided by the current regulations on registration, and that the delay by the Ministry of Labour in issuing Decision No. 141-2014 points to influence-peddling in taking the decision. In the light of the above, the complainant organizations request that the collective agreement signed on 20 October 2013 be recognized as valid.
- 335.** In its communication of 12 November 2014, the complainant organizations allege that the INFOM management has been exerting pressure on SITRAINFOM and its members to make them renounce once and for all the contents of the collective agreement signed in October 2013. In this regard, the complainant organizations indicate that: (i) on 28 July 2014, the INFOM management launched a campaign against the agreement and unilaterally offered all workers supposed economic benefits, replacing those already negotiated under the agreement; (ii) as of 13 August 2014, various communications appeared, both on social networks and in the company's premises, signed by a group of "proactive colleagues", containing anonymous accusations against the representatives of the trade union and calling for a general assembly at which SITRAINFOM should abandon its claims for the application of the agreement; (iii) no reply was made to the requests made by representatives of SITRAINFOM for INFOM to conduct inquiries to identify those responsible for the anonymous attacks and to install security cameras in the institute; and (iv) when INFOM made no reply, the trade union representatives filed a complaint before the Public Prosecutor's Office on 28 August 2014, claiming harassment, coercion, threats and trade union repression. The complainant organizations consider that, being in violation of ILO Conventions Nos 98 and 154, which have been ratified by Guatemala, the reported acts constitute anti-union discrimination and are evidence of the barriers to the right to collective bargaining in INFOM.
- 336.** In its communication of 4 May 2015, the complainant organizations add that, on 24 October 2014, SINTRAINFOM submitted an appeal to the Ministry of Labour and Social Security

for the reconsideration of Decision No. 141-2014, which removed INFOM's seventh collective agreement from the public register, but that the authorities have not yet made any reply.

337. In an additional communication of 28 January 2016, the complainant organizations state that, as of July 2015, with the support of the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining, the negotiating committees of the SINTRAINFOM and INFOM have taken additional steps to achieve a final agreement on the content and modalities of the entry into force of the seventh collective agreement on working conditions but that, over this period of time, the board of the institution has continued to violate the right to collective bargaining. The complainant organizations specifically allege that, despite having approved a modified version of the Agreement on 14 September 2015, the board of INFOM has been using time delaying tactics to refuse to give effect to the Agreement, ignoring the requests made by the Committee for the Settlement of Disputes before the ILO and by the Ministry of Labour and Social Welfare.

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

338. In its communication of 5 August 2015, the Government refers to the annulment by the Ministry of Labour and Social Security of the registration of the seventh collective agreement on working conditions signed by SITRAINFOM and INFOM. In this regard, the Government indicates that the technical complexity of the case is the reason why the Ministry of Labour took several weeks to issue a decision on the appeal for reversal filed by INFOM against the registration of the agreement. The Government adds that the agreement's registration was annulled on the grounds that, although the agreement had been signed by the bargaining committees of the trade union and INFOM, it had not been approved by the executive committee of that autonomous public institution, contrary to the provisions of the second clause of Decision No. 1 of 24 September 2013 and the third clause of Decision No. 10 of 18 October 2013, signed by both bargaining committees. The Government indicates that both decisions clearly specify that the process of collective bargaining ends once the agreement reached by the bargaining committees has been approved by the INFOM executive committee, as the highest body of that institution. The Government indicates that, in a resolution of 20 February 2014, based on an opinion by the institution's financial department, the INFOM executive committee requested the Director to appoint a new bargaining committee with a mandate to ensure that the contents of the collective agreement were compatible with the institution's financial sustainability. The Government indicates lastly that: (i) the initial registration of the agreement by the Ministry of Labour and Social Security (which was subsequently annulled) was due to the trade union's failure to present documents setting out the process for the approval of the agreement reached by the parties and the failure to include in the application for registration the addendums to the agreement signed after its adoption; (ii) once the decisions relating to the procedure for approval of the agreement were communicated, the Ministry was able to ascertain that the bargaining process had not culminated in the approval of the agreement by the competent INFOM authority; (iii) the appeal for reconsideration submitted by the trade union was addressed in a decision by the Ministry of Labour, dated 19 November 2014, indicating that Guatemalan legislation only recognizes administrative appeals for revocation or reversal, but not for reconsideration; (iv) the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining has submitted this case to mediation, whereby a first meeting was held between the parties on 9 July 2015; (v) as a result of that meeting, the INFOM executive committee made a financial proposal seeking to ensure the viability of the institution's seventh collective agreement on working conditions, and is awaiting a reply from the trade union; and (vi) in view of the complaint brought by SITRAINFOM before the Office of the Human Rights Ombudsman on 4 August 2014, the Ministry of Labour and Social Security issued a detailed report within the stipulated

timeframe regarding the negotiation of INFOM's seventh collective agreement on working conditions.

### C. The Committee's conclusions

- 339.** *The Committee observes that this case refers to the negotiation and signature of a collective agreement on working conditions at the Institute of Municipal Development (INFOM), an autonomous public institution; the annulment of its registration by the Ministry of Labour and Social Security; and to allegations of pressure on the representatives of SITRAINFOM to accept the renegotiation of the agreement.*
- 340.** *The Committee observes that the information provided by both the complainant organizations and the Government indicate that: (i) in 2012, after several years of a dispute in relation to the negotiation of INFOM's seventh collective agreement on working conditions, the parties decided to withdraw from the proceedings before the courts and return to direct bargaining; (ii) to that end, each party appointed its own bargaining committee and, on 20 October 2013, they signed INFOM's seventh collective agreement on working conditions; (iii) in December 2013, the bargaining committees signed an addendum to the agreement concerning the date of its actual entry into force; (iv) on 13 March 2014, the trade union submitted the collective agreement to the Ministry of Labour and Social Security for its registration; (v) on 18 March 2014, the Ministry of Labour and Social Security issued a decision registering the agreement, which was appealed by the INFOM executive committee; (vi) on 6 May 2014, the Ministry of Labour and Social Security upheld the appeal filed by INFOM and annulled the registration of the collective agreement; (vii) the appeal for reconsideration filed by SITRAINFOM was declared inadmissible; and (viii) there is no mention of a possible challenge to the aforementioned decisions of the Ministry of Labour and Social Security in the courts.*
- 341.** *Furthermore, the Committee notes that the complainant organizations allege that: (i) the negotiation and signature of the collective agreement fully met the legal requirements, as attested by its initial registration by the Ministry of Labour and Social Security; (ii) the signature, in December 2013, of an addendum to the agreement in relation to the date of actual entry into force indicates that both parties to the negotiation clearly accepted the full validity of the agreement; and (iii) the delay by the Ministry of Labour and Social Security in issuing a decision regarding the appeal for reversal filed by INFOM (a month and a half instead of the eight working days provided under article 275 of the Labour Code) proves that the decision by the Ministry to revoke the registration of the agreement is the result of influence-peddling and is not in conformity with the law.*
- 342.** *The Committee notes that the Government indicates that: (i) in its application for registration, the trade union did not attach the documents relating to the process for approval of the agreement established by the parties indicating that once the agreement was signed by the bargaining committees, it would only enter into force after it was approved by the institution's executive committee; (ii) under a resolution of 20 February 2014, on the basis of an opinion by the institution's financial department, the INFOM executive committee requested the institution's Director to appoint a new bargaining committee with a mandate to ensure that the contents of the collective agreement were in line with the institution's financial sustainability; and (iii) the Ministry was therefore able to ascertain that the bargaining process had not culminated in the approval of the agreement by the INFOM executive committee, the competent authority in that regard.*
- 343.** *In view of the above, the Committee in particular observes that: (i) the agreements signed by the bargaining committees and the decisions issued by INFOM, adopted as of 2012 to resume and advance direct bargaining on the seventh collective agreement on working conditions, indicate that the agreements signed by the INFOM bargaining committee must*

be approved by the institution's executive committee (*ad referendum bargaining*), and (ii) the practice of reaching collective agreements "*ad referendum*", making a definitive agreement dependent on subsequent approval by the highest body of the bargaining party, is reflected in Guatemalan law, namely in certain provisions of the Labour Code. However, the Committee also observes that: (i) the text of the collective agreement on working conditions, signed on 20 October 2013, does not expressly indicate that its definitive adoption is dependent on its approval by the INFOM executive committee; (ii) the signature, in December 2013, of an addendum to the collective agreement regarding the date of its actual entry into force, is indicative of the definitive, rather than "*ad referendum*", nature that the bargaining committees assigned to the agreement that they signed in October 2013, and (iii) the INFOM executive committee took several months to issue a statement regarding the contents of the agreement signed by its bargaining committee, and finally to opt for the renegotiation of the agreement.

344. In the light of the above, the Committee observes firstly that there is a dispute regarding the validity of the collective agreement signed on 20 October 2013, which revolves around the question of whether the approval of the agreement by the INFOM executive committee was necessary for its entry into force. In that regard, the Committee observes that the Ministry of Labour and Social Security first decided to register the agreement, before finally revoking that decision. The Committee also observes that the dispute has not yet been the subject of judicial proceedings but has been submitted to mediation before the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining. In this respect, the Committee takes note of the additional information submitted by the complainant organizations through a communication dated 28 January 2016, denouncing that the board of INFOM is not complying with the agreements reached before the Committee for the Settlement of Disputes. The Committee therefore requests the Government to send, without delay, its observations in this respect, and to keep it informed of the outcome obtained by the Committee for the Settlement of Disputes with respect to this conflict. In the event that the mediation process does not succeed in reaching an agreement, the Committee stresses that the dispute regarding the validity of the collective agreement should be ruled upon by a judicial body and not by the Ministry of Labour and Social Security, especially in so far as INFOM is a public institution and the Ministry is therefore not independent from the parties.

345. Secondly, the Committee wishes to underscore that, while it is fully legitimate for the negotiation and signature of a collective agreement in an autonomous public institution to require a prior financial opinion and the approval of the agreement by the institution's competent authorities, it should also be noted that the process of collective bargaining should be clear and enable bargaining in good faith between the parties. In this regard, the Committee recalls that 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 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 940]. Furthermore, the Committee draws the Government's attention to Paragraph 6 of the Collective Bargaining Recommendation, 1981 (No. 163), according to which parties to collective bargaining should provide their respective negotiators with the necessary mandate to conduct and conclude negotiations, subject to any provisions for consultations within their respective organizations. On the basis of these principles, and with a view to promoting collective bargaining in good faith and the harmonious development of labour relations in the public sector, the Committee considers that there must be clarity at the outset on the articulation of the distinct stages of collective bargaining and that the studies on the verification of the financial viability of the contents of negotiations should precede the conclusion of the collective agreement. In so far as it understands that the use of "*ad referendum*" bargaining is not an isolated practice in the public sector, the Committee requests the Government, in consultation with the trade unions concerned, to take the

measures required to ensure that collective bargaining procedures in the public sector follow clear guidelines which meet both the requirements of financial sustainability and the principle of bargaining in good faith. Recalling that it can avail itself of the technical assistance of the International Labour Office, the Committee requests the Government to keep it informed in that regard.

346. As regards the allegations by the complainant organizations regarding pressure and acts of anti-union discrimination against the representatives of SITRAINFOM to make them accept the renegotiation of the collective agreement, the Committee notes that the Government indicates that in relation to the complaint brought by SITRAINFOM before the Office of the Human Rights Ombudsman on 4 August 2014, the Ministry of Labour and Social Security issued a detailed report within the stipulated timeframe. The Committee observes, however, that the Government does not provide information regarding the complaint brought by SITRAINFOM before the Public Prosecutor's Office on 28 August 2014 for harassment, coercion, threats and trade union repression. 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 take the necessary measures to ensure that the complaint filed by SITRAINFOM gives rise to all the necessary inquiries as soon as possible and to keep it informed of their outcomes.

### The Committee's recommendations

347. 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 send, without delay, its observations in relation to the additional information submitted by the complainant organizations and to keep it informed of the outcome of the mediation process before the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining in relation to INFOM's seventh collective agreement on working conditions. In the event that the mediation process does not succeed in reaching an agreement, the Committee stresses that the dispute regarding the validity of the collective agreement should be ruled upon by a judicial body and not by the Ministry of Labour and Social Security.*
  - (b) *Recalling that it may avail itself of the technical assistance of the International Labour Office, the Committee requests the Government to take, in consultation with the trade unions concerned, the necessary measures to ensure that collective bargaining procedures in the public sector follow clear guidelines which meet both the requirements of financial sustainability and the principle of bargaining in good faith. The Committee requests the Government to keep it informed in that regard.*
  - (c) *The Committee requests the Government to take the necessary measures to ensure that the complaint brought before the Public Prosecutor's Office by SITRAINFOM gives rise to all the necessary inquiries as soon as possible and to keep it informed of their outcomes.*

CASE NO. 3100

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

**Complaint against the Government of India  
presented by  
the West Bengal Civic Police Association (WBCPA)**

***Allegations: Threats, acts of intimidation and anti-union discrimination against leaders and affiliates of the WBCPA, arrest, detention and criminal prosecution of WBCPA leaders, violent repression of protests, attempt at raiding meetings of workers' organization, interference in the right of the organization to freely organize its activities and formulate its programmes***

348. The complaint is contained in a communication dated 12 August 2014, submitted by the West Bengal Civic Police Association (WBCPA).
349. The Government sent its observations in communications dated 22 April and 2 July 2015.
350. India has neither ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

351. In its communication of 12 August 2014, the WBCPA describes itself as an association of men and women who are employed by the State Government of West Bengal in India to supplement mainstream policing and to provide short-duration routine guarding duties. The complainant indicates that, on 10 October 2013, the Government of West Bengal recruited 130,000 men and women between the ages of 18 and 28 as "civic police volunteers" and provides copies of Government Order No. 752-PL/PB/3P-31/12, dated 28 February 2013 and the *Guidelines for Eligibility, Mode of Induction, Training, Duties and Termination of voluntary services*, etc. (Annexure to Government Order. No. 4129-PL/PB/3P-29/11, dated 26 September 2011), referred to in the former, as the legal basis for recruitment of 130,000 civic police volunteers and their working conditions.
352. The complainant organization indicates that the job consisted of 120 days of work during a period of six months, with a daily payment of 141.82 rupees (INR) (US\$2.30), which is much lower than the Government's lowest rate of minimum wage that stands at INR206 or \$3.35. The complainant states that even this low wage was paid irregularly, often with delays of two to three months. The WBCPA further indicates that no appointment letters were given to the recruits, payments were made on muster rolls and no uniform was provided in most districts. The young men and women were given risky duties without any training or any legal security or protection. Six recruits died while on duty, including Saphikul Sheikh of Behrampur police station in Murshidabad, who was thrown from a bridge by angry lorry drivers when he was trying to control the traffic. No compensation was paid to the families

of those who died. The recruits who get injured have no guarantee of getting medical treatment.

- 353.** The complainant indicates that the civic police started organizing itself in November 2013, with the help of the Asanghatit Kshetra Shramik Sangrami Manch (Struggle Platform for Unorganized Sector Workers). The WBCPA was formed in December 2013 for the betterment of its members' working conditions. During the May 2014, Lok Sabha elections, the civic police were on duty. However, on 30 June they were dismissed. Subsequently, they organized a large protest in Kolkata on 10 July 2014, which was attended by 35-40,000 persons. A delegation of the protestors met with the Minister of Labour who immediately passed an order to enrol the civic police under a social security scheme for unorganized sector workers. The Minister also asked for information on those who were injured or killed while on duty so as to arrange for compensation and medical treatment and promised to confer on the other demands of the civic police with the Chief Minister within a month. These other demands included continuation of duty, issuance of appointment letters, payment of minimum wage, provident fund, gratuity, Employment State Insurance Scheme (ESIS) coverage, proper training and protection at work. On 14 July 2014, the State Government issued Order No. 1940-PL/PB/3P-31/12 that sanctioned 120 days of work at INR141.82 for the "Civic Police Volunteer Force" from July to December 2014. The Order clearly declared that no new candidates will be hired and the old 130,000 forces would be taken for work. The WBCPA considered this decision of the Government of West Bengal as a victory for itself.
- 354.** However, following these developments, once the leaders and members of the WBCPA went back to their home regions, they had to face threats and acts of intimidation on the part of their superiors in the police force and local party leaders. Various incidents were reported in this regard from almost all districts of West Bengal.
- 355.** On 16 July at noon, Mr Sanjay Poria, the President of the WBCPA, was summoned to his local police station in Keshpur, Paschim Medinipur district, and was held at the office of the district superintendent of police until 12.30 a.m., without being allowed to communicate his whereabouts to his family or fellow WBCPA members. During this time a group of senior police officers interrogated and threatened him numerous times. The complainant considers that it was only because of the repeated phone calls of the trade union leaders supportive of the WBCPA who had managed to trace Mr Poria's whereabouts that he was released unharmed that night. Mr Poria was not readmitted to work after this incident. Additionally, a criminal case has been filed against him.
- 356.** On the same day, the officer in charge of Khatra police station in Bankura district, threatened that he would not hire the leadership of the WBCPA. This led to an altercation with all recruits on the rolls there and the police ultimately resorted to a lathi (*baton*) charge. Police cases were instituted against two leaders, Mr Arijit Mitra and Mr Chandranath Bid.
- 357.** The complainant indicates that, on 17 July, the police invaded the Badu Collective, described as a commune where 12 families live together and whose premises are used by many activists, including the WBCPA, for overnight stays and as an unofficial meeting place. Agents of the District Intelligence Branch first inquired about a meeting of the civic police that they believed was to take place in the premises. They were later followed by a massive police force led by the subdivisional police officer, armed with tear-gas shells and equipped with prison vans to break the purported meeting. The community living in the Badu Collective was taken by surprise, as they had no information about such a meeting and remained surrounded by the police all day.
- 358.** The complainant indicates that, on 19 July, the superintendent of the district of Malda was reported to have declared that all 4,800 civic police in the district would be replaced by fresh

recruits. This was contrary to the clear declaration of the Government of West Bengal that the old 130,000 forces would be taken back for work and no new candidates would be hired. Massive protests erupted in many police stations after this announcement. In Harishchandrapur police station protesters were *lathi* charged, 12 were detained until midnight and then released without charge as a result of the intervention of a local MP. In Baishnabnagar police station in the same district, about 500–600 civic police presented themselves after the new circular of 19 July was issued. The local police decision to replace them by a new panel led to protests that were violently repressed. In relation with these protests a police case was instituted against 13 civic police recruits, including five young women and eight young men (Khairul Islam, Sadirul Islam, Souvik Mondal, Dipali Mondal, Champa Mondal, Poly Rani Mondal, Noeti Mondal, Salim Mian, Kunal Singha, Sridam Mondal, Mobarak Hossain, Pijush Kranti Ghosh, Jharna Ghosh).

**359.** The complainant mentions reports of similar treatment of WBCPA leaders and members in the aftermath of 10 July 2014 mobilization from almost all districts of West Bengal and provides a detailed list of 111 police stations where this kind of treatment has occurred: in Bankura, Birbhum, Burwan, Cooch Behar, Darjeeling, Hooghly, Jalpaiguri, Murshidabad, Nadia, North 24 Parganas, North Dinajpur, Paschim Medinipore, Purba Medinipore, Purulia and South 24 Parganas civic police recruits were demobilized (29 recruits in total); their employment was terminated on grounds of misconduct (742 recruits in total), or simply terminated without any justification (171 recruits in total). Others were threatened with termination or criminal action (2,491 recruits in total). The complainant indicates that officers in charge were saying that they have been ordered not to hire the leadership of the Association. The WBCPA members and leaders were told verbally or in writing that they were being punished for organizing their fellow workers and leading the movement and the demonstration of 10 July; that video recordings have been made of their participation in the demonstration and that the police's intelligence branch has collected the names of the leaders. Police station-level organizers reported that many members were threatened and the complainant indicates that about 1,500 were forced to pledge in writing to immediately cut off all relations with the WBCPA before being taken back on duty.

**360.** The complainant further indicates that on 20 July 2014 the leading Bengali daily *Bartaman Patrika* reported that the Chief Minister of West Bengal had allocated INR6,5 million for an intelligence operation to find out who is behind the WBCPA. The report added that the Home Department had asked its intelligence bureau to make a secret inquiry on this issue and deploy informers in every district to collect information regarding the activity of the Association. The complainant affirms that, as its supporters have all been functioning openly, have asked for and obtained a police permission to hold a mass meeting and press conferences, and have met with the Minister of Labour and corresponded with the Government, the attempt at attributing it a secret backing can only be ill-intentioned.

**361.** The complainant organization indicates that, so far, 3,000 of its members have given individual petitions to the officers in charge of their police stations, to the district superintendents of the police, to the Director General and Inspector General of the police and the Home Secretary of West Bengal. It states its intention of complaining about all these individuals to the Home Secretary, the chief secretary, the Minister of Labour, the Home Minister and the Chief Minister. The WBCPA concludes by requesting the Committee to take up its complaint with the Governments of India and West Bengal in order to ensure that the following requests are addressed:

- (a) all cases against its members are withdrawn;
- (b) its members who have been arbitrarily terminated are taken back into work;
- (c) threats and intimidation of its members and leaders are stopped; and

- (d) the WBCPA members are allowed to pursue their right to organize and to collectively fight for better working conditions.

## B. The Government's reply

- 362.** In its communication dated 22 April 2015, the Government of India indicates that, as per the inputs received from the West Bengal Labour Department, it appears that the WBCPA is not registered under the Trade Union Act, 1926. The State Government has further indicated that, since the allegation is basically against some police officials, the matter has been taken up with the State Home Department. A meeting has been held under the chairmanship of the Additional Secretary, Home Department, Government of West Bengal with the concerned Director General, Inspector General of Police, Commissioner of Police of Kolkata and authorities were requested to submit a comprehensive report with regard to the complaint. It is also stated that the report of the West Bengal State Home Department will be transmitted to the ILO upon reception.
- 363.** In its communication dated 2 July 2015, the Government of India provides further detail in response to certain allegations of the complainant organization, as per the information received from the State Government of West Bengal. With regard to the status of civic police, the Government indicates that Civic Volunteers earlier known as Civic Police Volunteers, were enrolled to supplement the workforce for policing on special occasions such as festivals and emergency situations for traffic management, providing routine guarding duties for short duration deployment as and when required. The Government states that, contrary to what has been made out in the complaint, this is not regular employment for which there can be claims relating to payment of wages. It has been conceived as purely voluntary service to involve the community in some police-related duties on certain occasions. For the duties rendered by the volunteers, an honorarium is paid to them. The Civic Volunteers are not under any obligation to work for the Government in this capacity. They are free to take up any employment with any government or private agency at any point of time. The Government further indicates that, since it is a purely voluntary service, during the process of recruitment there was no provision in the *Gazette* notification by West Bengal Government for continuation of duties, giving appointment letters, payment of wages and provision for provident fund, gratuity, Employment State Insurance Scheme (ESIS) coverage, etc. The Government refers to a *Gazette* notification by the Home Department, the Government of West Bengal which clearly mentions that no volunteer shall render voluntary service for a period exceeding six months at a stretch and that the selected volunteers from the first panel will be deployed for six months and then be replaced by the volunteers selected in the next panel for the next six months with the usual break.
- 364.** The Government of West Bengal rejects the complainant's allegation regarding the death of Saphikul Sheikh on duty, stating that no such civic volunteer of the Behrampur police station died, as alleged in the complaint.
- 365.** The Government of West Bengal denies that Mr Sanjay Poria, President of the WBCPA, was subjected to any forceful confinement and threats by senior police officers and states that the allegations are baseless and malicious. The Government indicates that, in fact, Mr Poria has been absent from duty as of 1 July 2014 and despite being called, has not reported to work thereafter. The Government further states that Mr Poria has been involved in instances of criminally intimidating the local public under the jurisdiction of the Keshpur police station of the district. The matter has been duly investigated and prosecution has been launched against Mr Poria for committing offences under section 506 IPC. He was terminated as a civic volunteer on 30 August 2014 for corruption/extortion, under terms of government guidelines for termination of voluntary service.

- 366.** With regard to the allegations in respect of Mr Arijit Mitra and Mr Chandranath Bid of the Khatra police station, district of Bankura, the Government states that, on 16 July 2014, they demanded equal treatment as regular police officers, sat in front of the main gate of the Khatra police station and obstructed the movement of police personnel and the general public. This amounted to breaking the law and order and creating massive indiscipline, disrupting the normal life in public area. Over this incident, Khatra Police Station Case No. 56/14 dated 16 July 2014 under sections 341, 186 and 34 of Indian Penal code was registered and a First Information Report (FIR) was drawn up against them. They both surrendered before the Court of Additional Chief Judicial Magistrate on 17 July 2014. A charge sheet was filed before the court. The Government further indicates that Mr Arijit Mitra and Mr Chandranath Bid's enrolment as civic volunteers has since been terminated for gross indiscipline and misconduct.
- 367.** With regard to the allegations pertaining to the Malda district, the Government indicates that two panels each comprising 4,800 civic volunteers were prepared in the district for their engagement by rotation of six months. On 19 July 2014, the civic volunteers resorted to agitation and blocked roads in different parts of the district. Over these incidents, two cases were filed and legal action was initiated.

### C. The Committee's conclusions

- 368.** *The Committee observes that, in this case, the complainant, the West Bengal Civic Police Association (WBCPA), describes itself as an association of persons employed by the Government of West Bengal as members of the civic police volunteer force to perform routine police and guarding duties for short-duration deployment. The Committee notes that civic police recruitment has been carried out on the basis of Government orders that establish the daily honorarium, conditions of eligibility, mode of induction, training, duties and grounds for termination of services of civic police volunteers. The Committee further observes that the WBCPA raises certain concerns of civic police volunteers with regard to their working conditions, including employment insecurity, daily honoraria inferior to the Government's lowest rate of minimum wage, irregular payment, assignment of risky duties without any protection that in certain cases resulted in injury and loss of life, lack of medical insurance and absence of compensation for injuries and loss of life. The WBCPA states that it was formed in order to seek the improvement of the working conditions of its members and that, in the wake of their dismissal on 30 June 2014, it organized a large protest in Kolkata on 10 July during which its delegation met with the Labour Minister of the Government of West Bengal and informed him of the grievances of the civic police volunteers. The Committee observes that, according to the complainant, this meeting delivered an immediate victory for the WBCPA since the Minister issued an order to enrol the civic police volunteers under a social security scheme for unorganized sector workers and promised to confer with the Chief Minister in respect of their other demands including continuation of duty and minimum wage. Only four days later, on 14 July, a new Government Order ensured them continuity of duty between July and December 2014. However, the complainant organization reports acts of intimidation and massive dismissals of its leaders and affiliates starting as early as 16 July 2014, contrary to the 14 July Government Order.*
- 369.** *The Committee notes the Government's observation that the work of civic volunteers is not a regular employment for which there can be claims relating to payment of wages and that it has been conceived as a purely voluntary service to involve the community in some police-related duties on certain occasions. The Government further emphasizes that civic volunteers are not under any obligation to work for the Government under this capacity and are free to take up any employment with any Government or private agency at any point of time. The Government further states that since this service is purely voluntary, during the process of recruitment there was no provision in the Gazette notification of the West Bengal Government for continuation of duties, giving appointment letters, payment of wages and*

*provision for provident fund, gratuity, ESIS coverage, etc., and it is mentioned that the selected volunteers from the first panel will be deployed for six months and then be replaced by the volunteers selected in the following panel for the next six months.*

- 370.** *The Committee wishes first to observe that it considers that the activities carried out by the West Bengal civic police volunteers constitute work and as such are covered by the principles of freedom of association. It further notes that the focus of the Government's concern relates to whether or not they have the right to bring claims relating to payment of wages and continuation of duties due to the purely voluntary nature of their service. The complainant organization however contends that these issues constitute important elements of the working conditions of its affiliates towards the improvement of which it is committed to work and in respect of which it has negotiated – with partial success – with the Minister of Labour of the Government of West Bengal on 10 July 2014.*
- 371.** *With regard to the statement of the Government that the work of civic volunteers is not regular employment, the Committee recalls that according to the principles of freedom of association, all workers have the right to establish and join organizations of their own choosing. The Committee observes that the Government does not appear to challenge the right of civic volunteers to organize per se, and indeed the Government of West Bengal has engaged with the West Bengal Civic Police Association. The Government does however challenge the complainant's right to make claims with regard to wages and thus implicitly challenges its right to organize with a view to further and defend its members' occupational interests through collective bargaining and other collective action.*
- 372.** *As regards the voluntary nature of the work of the civic police in this case, the Committee observes that the State of the World Volunteerism Report (2011) drawn up by UN Volunteers, states that the "three criteria of free will, non-pecuniary motivation, and benefit to others can be applied to any action to assess whether it is volunteerism". The Committee notes that the Government Order. No. 752-PL/PB/3B-31/12, dated 28 February 2013 fixes an honorarium for Civic Police Volunteers at INR141.81 per day, while according to the allegation of the complainant, unchallenged by the Government, the Government's lowest rate of minimum wage for the same period was INR206. The Committee observes that the honorarium fixed for the volunteers, while inferior to the minimum wage, would appear to be beyond a symbolic compensation to cover expenses. While the Government states that West Bengal civic volunteers are free to take up any job at any moment and the work of civic police volunteers has been conceived as a purely voluntary service to involve the community in some police-related duties on certain occasions, it appears from the complaint that the civic police volunteers mainly attract unemployed young people who enrol in the force precisely in order to collect an honorarium in the absence of other sources of income and thus can be considered to have pecuniary motivations.*
- 373.** *While noting the Government's indication that "the purely voluntary" character of the service and the fact that civic volunteers can take up any employment at any time excludes any legitimate claims on their part to wages, the Committee also notes that clause 4 of Government Order No. 752-PL/PB/3P-31/12 dated 28 February 2013 opened the way to successive and continued enrolment of civic volunteers, as it excluded the condition laid down in the previous Government Order according to which each panel would be deployed for six months and then replaced by the next panel. In this regard, the Committee also notes the complainant's allegation (unchallenged by the Government) according to which on 14 July 2014 the State Government issued Order No. 1940-PL/PB/3P-31/12 that established 120 days of work at INR141.82 for the "Civic Police Volunteer Force" from July to December 2014. The Order clearly declared that no new candidates would be taken on and the previous 130,000 forces would be taken back for work. In light of the above, the Committee considers that the work of civic volunteers, which entails compensation,*

determination of working hours, and continuity of service must similarly afford these workers with the protection afforded by freedom of association principles, including the right to collective bargaining.

374. With regard to the alleged deprivation of liberty and interrogation of the President of the WBCPA, Mr Poria, on 16 July 2014, the Committee notes that the Government completely denies the allegations of the complainant, and affirms that Mr Poria has not been subjected to any forceful confinement or threats by senior police officers. However, the Government does acknowledge the allegation of the complainant according to which criminal charges have been laid against Mr Poria. The Committee further notes that the complainant and the Government do not concur on the grounds for these charges: while the complainant contends that the case was brought up as a reaction to Mr Poria's activity in his position as President of the WBCPA, the Government maintains that he has been involved in instances of criminally intimidating the local public, an offence subject to section 506 of the Indian Penal Code. Similarly with regard to police cases instituted against Mr Arijit Mitra and Mr Chandranath Bid, leaders of the WBCPA in Bankura district, the Committee notes that the complainant contends that the charges are baseless, while the Government maintains that the defendants have broken the law and order and disrupted normal life in a public area, thus committing offences subject to sections 341 and 186 of Indian Penal Code. In view of the divergence between the statements of the complainant and the Government and in order to be able to examine these allegations in full knowledge of the facts, the Committee requests the Government to submit detailed information on the development and outcome of the legal proceedings instituted against the abovementioned leaders of the WBCPA and to transmit the texts of the judgements delivered together with the grounds adduced therefor.
375. With regard to the termination of enrolment of WBCPA leaders Mr Sanjay Poria, Mr Arijit Mitra and Mr Chandranath Bid, the Committee notes that the Government invokes grounds such as corruption/extortion and gross indiscipline and misconduct, while the complainant links these dismissals to the activities of these persons as WBCPA leaders and the demands they had made on behalf of its members. The Committee further notes the complainant's references to reports of officers in charge of police stations saying that orders not to hire the leadership of the WBCPA were received from police stations of almost all districts of the State of West Bengal. The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 799].
376. The Committee notes the allegations of the complainant organization with regard to widespread anti-union discrimination against members of the WBCPA that in certain cases was accompanied by threats and acts of intimidation. The complainant indicates in particular that WBCPA members were told verbally or in writing that they were being punished for organizing their fellow workers and leading the movement and the demonstration of 10 July; that video recordings have been made of their participation in the demonstration and that the intelligence branch of the police has collected the names of the leaders. The Complainant further indicates that 29 recruits were demobilized, 742 were terminated on grounds of misconduct, 171 were terminated without any justification, and 2,491 were threatened with termination or criminal action, while 1,500 were forced to

*pledge in writing to immediately cut off all relations with the WBCPA before being taken back to duty. The Committee notes with concern that the Government has not provided any observation in response to these allegations. The Committee observes that direct threat and intimidation of members of a workers' organization and forcing them into committing themselves to sever their ties with the organization under the threat of termination constitutes a denial of these workers' freedom of association rights.*

- 377.** *With regard to the events in the Malda district, the Committee notes that the complainant indicates that, on 19 July 2014, it was declared that the 4,800 civic volunteers of the district would all be replaced in contradiction with the Government order, issued five days earlier, guaranteeing the continuation of duty of those already enrolled. With regard to the same process, the Government indicates that two panels each comprising 4,800 civic volunteers were prepared in the district for their engagement by rotation of six months. The Government and the complainant both indicate that unrest erupted in the district as a result of the decision to replace the civic volunteers of the first panel. The Government indicates generally that civic volunteers resorted to agitation and blocked roads in different parts of the district and two cases were filed and legal action was initiated in respect of these incidents. The complainant indicates in particular that, in Harishchandrapur, protesters were lathi charged, 12 were detained until midnight and then released without charge as a result of the intercession of a local MP; in Baishnabnagar protests were also violently suppressed and a police case was initiated against 13 civic police recruits. The complainant further alleges that, on 16 July 2014, in the Khatra police station in the Bankura district, the officer in charge's refusal to hire the leadership of the WBCPA equally led to an altercation with all recruits on the rolls and the police ultimately resorted to a lathi charge. The Committee notes with concern that the Government has not provided any information in response to the allegation of the complainant organization concerning violent repression of demonstrations and arrest of demonstrators. The Committee recalls that workers should enjoy the right to peaceful demonstration to defend their occupational interests; that the police authorities should be given instructions so that, in cases where public order is not seriously threatened, people are not arrested simply for having organized or participated in a demonstration; and 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., paras 133, 151 and 140]. The Committee requests the Government to conduct an investigation into the allegations of the use of force by the police in response to demonstrations of civic volunteers and to keep it informed of the outcome. The Committee further requests the Government to provide detailed information on the development and outcome of the legal proceedings instituted against 13 protestors from Baishnabnagar named in paragraph 11 of the present report, and to transmit a copy of the judgments delivered.*
- 378.** *As regards the allegation of the death of Saphikul Sheikh of Behrampur police station, the Committee notes that the Government states that no such civic volunteer died as alleged in the complaint. In view of the gravity of the matter the Committee requests the Government to look into this particular allegation in order to ensure that the facts are duly elucidated and to keep it informed in this regard.*
- 379.** *The Committee notes the allegation of the complainant, according to which the police invaded the Badu Collective, a commune where 12 families live together and whose premises were used by the WBCPA for overnight stays and as an official meeting place, apparently to break up a meeting of the organization that they expected would take place there. Noting that the Government has not replied to this allegation, the Committee expects that the right*

*of the workers' organizations to hold meetings to discuss their occupational interests without interference by the authorities will be fully ensured in the future.*

**380.** *In the light of the divergence of information provided and views expressed on a number of allegations in this case, the Committee requests the Government to facilitate the engagement of the Government of West Bengal and the WBCPA in constructive social dialogue and collective bargaining with a view to resolving all outstanding issues.*

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

**381.** *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 submit detailed information on the outcome of the legal proceedings instituted against leaders of the WBCPA, Mr Sanjay Poria, Mr Arijit Mitra and Mr Chandranath Bid and to transmit a copy of the judgments delivered.*
- (b) The Committee requests the Government to conduct an investigation into the allegations of use of force by the police, in response to demonstrations of civic volunteers in the Malda and Bankura districts and to keep it informed of the outcome. It further requests the Government to provide detailed information on the development and outcome of legal proceedings instituted against 13 protestors from Baishnabnagar named in paragraph 11 of the present report, and to transmit a copy of the judgments delivered.*
- (c) The Committee requests the Government to look into the allegations of the WBCPA relating to the death of civic volunteer, Saphikul Sheikh, and to keep it informed in this regard.*
- (d) The Committee requests the Government to facilitate the engagement of the Government of West Bengal and WBCPA in constructive social dialogue and collective bargaining, with a view to resolving all outstanding issues.*

CASE No. 3140

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

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

*Allegations: The complainant organization denounces the dismissal by the Aluminium Plant Podgorica (KAP) of Ms Sandra Obradovic, President of the Trade Union of KAP and member of the executive committee of the Union of Free Trade Unions of Montenegro*

***(UFTUM), for the exercise of trade union activities***

- 382.** The complaint is contained in a communication from the International Trade Union Confederation (ITUC) dated 7 July 2015.
- 383.** The Government sent its observations in communications dated 3 September and 6 November 2015.
- 384.** Montenegro has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

**A. The complainant's allegations**

- 385.** In its communication dated 7 July 2015, the complainant alleges that the Aluminium Plant Podgorica (KAP) dismissed Ms Sandra Obradovic, President of the Trade Union of KAP and member of the executive committee of the Union of Free Trade Unions of Montenegro (UFTUM), for the exercise of her trade union activities, in violation of the existing collective agreement, national law and ILO Conventions Nos 87 and 98. In particular, the complainant states that, prior to her dismissal, Ms Obradovic had repeatedly protested the fact that, due to bankruptcy proceedings initiated against the company, KAP workers had been denied their annual leave. The complainant also claims that the dismissal of Ms Obradovic was published by the Montenegrin media even before she was formally dismissed on 31 March 2015 and that the KAP management subsequently made a range of unconvincing (and illegal) justifications for her dismissal, such as the need to downsize the department where Ms Obradovic was employed, even though her replacement was immediately hired, and the need to hire younger staff and put Ms Obradovic into early retirement although she was only 47 years old. The complainant further indicates that Ms Obradovic appealed the decision on the termination of her employment contract to the Commercial Court of Montenegro and that two communications, one by the complainant and one by the European Trade Union Confederation (ETUC), were addressed to the Ministry of Labour and Social Welfare in June 2015, requesting it to intervene with the KAP management in order to ensure the immediate reinstatement of Ms Obradovic and the full payment of back pay. According to the complainant, the Ministry replied that, although it had submitted a request to the labour inspectorate to perform an inspection in KAP regarding the termination of employment contracts of several employees, the labour inspectorate reported that, since the enterprise was in bankruptcy, an executive authority could not interfere in the work of the judicial authorities charged with supervision of the bankruptcy proceedings, and, therefore, labour inspection, which is an administrative proceeding, could not be performed. In a communication dated 10 August 2015, the complainant provides additional information, in particular a judgment of the Commercial Court of Montenegro dated 24 July 2015, in which the Court rejects the complaint of Ms Obradovic requesting to annul the decision of the bankruptcy trustee on the termination of her employment contract.
- 386.** The complainant also indicates in its communication dated 7 July 2015 that the Executive Board of the Trade Union of KAP, in consultation with the UFTUM, adopted a decision on 27 April 2015, according to which Ms Obradovic was to continue to perform her duties of President of the Trade Union of KAP until the resolution of the court dispute relative to the legality of her dismissal. However, the complainant asserts that when Ms Obradovic tried to enter the premises of the union on the worksite on 30 April 2015 in her capacity as President of the Trade Union of KAP, private security at the entrance of the plant did not allow her to enter the building. As a result, Ms Obradovic addressed a written request to the management to provide her with access to the premises of the trade union from 7 a.m. to 3 p.m. every

working day until the final judgment in the abovementioned case. According to the complainant, the management stated that they could not meet the request because Ms Obradovic was no longer an employee of KAP and could, therefore, not have access to the premises of the trade union which are located on the private property of the enterprise. Accordingly, the UFTUM appealed to the Montenegrin Ombudsman in order to enable Ms Obradovic to enter the buildings and perform her duties as President of the Trade Union of KAP. The complainant specifies that she has not yet been able to enter the trade union premises.

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

**387.** In its communication dated 3 September 2015, the Government indicates that the Ministry of Labour and Social Welfare sent a letter to KAP dated 26 June 2015, in which it requested information on the labour legal status of Ms Obradovic. In its reply to the Ministry dated 2 July 2015, KAP states that: (i) bankruptcy proceedings against the enterprise were initiated by the decision of the Commercial Court of Montenegro of 8 July 2013; (ii) under the authorizations of article 32 of the Bankruptcy Law, the bankruptcy trustee issued a decision which deems ineffective all general acts or ordinances of the enterprise; (iii) according to the Bankruptcy Law, the trustee may at any stage of the bankruptcy proceeding terminate a labour contract *ex lege*, regardless of the general protective clause under the Labour Law and the Collective Agreement, the decision being final; (iv) in accordance with the Bankruptcy Law, the trustee terminated more than 600 employment contracts of persons who, after the opening of the bankruptcy were temporarily employed, including Ms Obradovic, whose work engagement was no longer required in the course of the bankruptcy proceedings; (v) the exclusive criterion for the termination of employment was the cessation of the need for further engagement of an individual, and not union activities or any other reasons; (vi) the Bankruptcy Law is *lex specialis* regulating bankruptcy proceedings in an imperative manner (section 7(1) of the Bankruptcy Law); (vii) trade union activities in bankruptcy do not enjoy special protection; and (viii) the bankruptcy proceedings are under the authority of the Commercial Court and any pressure on the bankruptcy authorities under the pretext of alleged discrimination against Ms Obradovic constitutes impermissible interference with the judicial process. In its letter, KAP further explains that, in accordance with section 20 of the Bankruptcy Law, any person who has a legal interest in it, may submit within five days of learning of it, an objection to the court (bankruptcy judge) against any action carried out by the bankruptcy trustee or to the Court of Appeal to contest a bankruptcy judge's decision. It also points out that Ms Obradovic initiated proceedings before the Commercial Court of Montenegro in order to assess the legality of the decision on the termination of her employment contract and that all persons whose employment contracts were terminated in the course of the bankruptcy exercised one of the rights under the Social Programme, choosing either severance pay or retirement, including Ms Obradovic who met the required conditions and is entitled to a pension.

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

**388.** *The Committee notes that this case concerns allegations of anti-union dismissal of Ms Sandra Obradovic, President of the Trade Union of the Aluminium Plant Podgorica (KAP) and member of the executive committee of the UFTUM, as well as the alleged refusal of the company management to allow Ms Obradovic to enter trade union premises after her dismissal.*

**389.** *In relation to the allegations of anti-union dismissal, the Committee notes that the complainant argues that Ms Obradovic was dismissed on 31 March 2015 because, in her role as President of the trade union, she had repeatedly protested against the refusal of the management to grant annual leave to employees after bankruptcy proceedings had been*

initiated against the enterprise. The Committee observes that, as asserted by the complainant, the management provided a range of justifications for the dismissal of Ms Obradovic, including the need to downsize the department where she worked and the need to hire younger staff. The complainant further alleges, however, that a replacement was immediately hired on her post – an allegation to which the company has not replied. The Committee also notes the complainant's indications that Ms Obradovic appealed the decision on the termination of her employment contract to the Commercial Court of Montenegro and that two communications, one by the complainant and one by the ETUC, were addressed to the Ministry of Labour and Social Welfare in June 2015 requesting it to intervene with the company management to ensure the immediate reinstatement of Ms Obradovic and the full payment of back pay. The Committee further observes that the complainant explains that although the Ministry of Labour and Social Welfare requested the labour inspectorate to perform a labour inspection in the company regarding the termination of employment contracts of several employees, including Ms Obradovic, such inspection, which is an administrative measure, could not be performed as it would be considered as interference in the work of judicial authorities charged with supervision of the bankruptcy proceedings.

**390.** *The Committee notes the information from the company, provided by the Government, concerning the allegations of anti-union dismissal of Ms Obradovic, indicating that: (i) bankruptcy proceedings against the enterprise were initiated by the decision of the Commercial Court of Montenegro of 8 July 2013; (ii) under the authorizations of article 32 of the Bankruptcy Law, the bankruptcy trustee issued a decision which deemed ineffective all general acts or ordinances of the enterprise; (iii) according to the Bankruptcy Law, the trustee may at any stage of the bankruptcy proceeding terminate a labour contract ex lege, regardless of the general protective clause under the Labour Law and the Collective Agreement, the decision being final; (iv) in accordance with the Bankruptcy Law, the trustee terminated more than 600 employment contracts of persons who, after the opening of the bankruptcy were temporarily employed, including Ms Obradovic, whose work engagement was no longer required in the course of the bankruptcy proceedings; (v) the exclusive criterion for the termination of employment was the cessation of the need for further engagement of an individual, and not union activities; (vi) the Bankruptcy Law is lex specialis regulating bankruptcy proceedings in an imperative manner (section 7(1) of the Bankruptcy Law); (vii) trade union activities in bankruptcy do not enjoy special protection; (viii) the bankruptcy proceedings are under the authority of the Commercial Court and any pressure on the bankruptcy authorities under the pretext of alleged discrimination against Ms Obradovic constitutes impermissible interference with the judicial process; (ix) in accordance with section 20 of the Bankruptcy Law, any person who has a legal interest in it, may submit within five days of learning of it, an objection to the court (bankruptcy judge) against any action carried out by the bankruptcy trustee or to the Court of Appeal to contest a bankruptcy judge's decision; (x) Ms Obradovic initiated proceedings before the Commercial Court of Montenegro in order to assess the legality of the decision on the termination of her employment contract; and (xi) all persons whose employment contracts were terminated in the course of the bankruptcy exercised one of the rights under the social programme, choosing either severance pay or retirement, including Ms Obradovic who met the required conditions and is entitled to a pension.*

**391.** *Finally, the Committee notes the judgment of the Commercial Court of Montenegro dated 24 July 2015, in which the Court rejected the complaint of Ms Obradovic requesting to annul the decision of the bankruptcy trustee on the termination of her employment contract. The Committee observes that, while Ms Obradovic claimed before the Court that the decision on the termination of her contract was taken solely as a revolt against her trade union activities, the company asserted that the reason for her dismissal was the fact that her employment was no longer needed and the minimization of the costs of the bankruptcy proceedings but not redundancy or any other reasons, and that 12 other employment contracts were also*

terminated in the same sector. The Committee further notes the Court's summary of the company's arguments: (i) after the opening of the bankruptcy on 8 July 2013, employment contracts of all employees were terminated and the employees were subsequently reinstated on a temporary basis, including Ms Obradovic, who was employed until her dismissal on 31 March 2015; (ii) since she did not use the legal means stipulated in the Bankruptcy Law to contest the decision on the termination of her employment contract (objection to the bankruptcy judge) but instead those under the Labour Law, her complaint before the Commercial Court of Montenegro is unauthorized; and (iii) neither the Bankruptcy Law nor positive national legislation require the employer to protect the rights of trade union activists and their representatives to a greater extent than those of other employees. The Committee also notes the Court's reasoning: (i) bankruptcy proceedings are imperatively governed by the Bankruptcy Law, which determines the conditions and modalities concerning the termination of employment of employees working for the debtor in bankruptcy proceedings; and (ii) the Bankruptcy Law does not allow for a complaint to be filed against the decisions of the bankruptcy trustee but, in accordance with section 23.1.6, only an objection can be filed with the bankruptcy judge, and, in line with section 19, an appeal to the competent court against the decision in the bankruptcy proceedings can be made within eight days. The Committee notes the Court's conclusion that the complaint for annulment of the decision of the bankruptcy trustee on the termination of employment of Ms Obradovic is unauthorized and must be rejected and observes that since the complaint was rejected on procedural grounds, the Commercial Court did not address the allegations of anti-union dismissal.

392. In this regard, the Committee wishes to draw attention to the Workers' Representatives Convention, 1971 (No. 135) and Recommendation (No. 143), 1971, in which it is expressly established that workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives 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 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 800]. The Committee also wishes to emphasize the advisability of giving priority to workers' representatives with regard to their retention in employment in case of reduction of the workforce, to ensure their effective protection [see **Digest**, op. cit., para. 833]. The Committee considers that these principles are also relevant with regard to bankruptcy proceedings, where the enterprise continues to operate.
393. The Committee expresses its deep concern that the allegations of anti-union dismissal in this case were never addressed by the Government. The labour inspectorate was not able to examine this matter purportedly due to the pending bankruptcy proceedings, while appeal to the Commercial Court was rejected on procedural grounds which included a consideration that there is no requirement to protect workers' representatives beyond that of regular employees. The Committee further notes that the bankruptcy proceedings began in 2013 and led to all workers being placed on temporary contracts, that Ms Obradovic and 12 other workers were dismissed in 2015 due, according to the company, to the cessation of the need for their further engagement, and that the company has not responded to the allegation that the replacement of Ms Obradovic was immediately hired. The Committee further expresses its concern that, despite very serious allegations of the anti-union nature of her dismissal, no case has been made by the company to rebut directly the specific claims made.
394. In light of the above principles and the circumstances in this case, in which the enterprise continues to operate, the Committee considers that efforts should have been made to retain the workers' representative – in this case Ms Obradovic – in employment. The Committee therefore requests the Government to ensure that bankruptcy proceedings do not lead to a

situation where allegations of anti-union dismissal cannot be addressed and to fully review the claims of Ms Obradovic without delay with a view to ensuring her reinstatement as a primary remedy, should her dismissal be found to have been motivated by her trade union activities. If reinstatement is not possible, the Government should ensure that the workers concerned are paid adequate compensation which would represent a sufficient dissuasive sanction for anti-trade union dismissals [see *Digest*, op. cit., para. 845]. The Committee requests the Government to keep it informed of any developments in this regard.

- 395.** Concerning access to trade union premises, the Committee notes the complainant's indication that when Ms Obradovic tried to enter the premises of the union on 30 April 2015 in her capacity as President of the trade union (a function which the union mandated her to continue to perform even after her dismissal and until the resolution of the court dispute relative to the legality of her dismissal), private security at the entrance of the plant did not allow her to enter the building. The Committee notes that, as indicated by the complainant, Ms Obradovic addressed a written request to the management to provide her with access to the premises of the trade union from 7 a.m. to 3 p.m. every working day until the final judgment in the abovementioned case but that the company management refused the request stating that Ms Obradovic was no longer an employee and could thus not have access to the premises of the trade union which are located on the private property of the enterprise. The Committee also observes that, in August 2015, the UFTUM appealed to the Montenegrin Ombudsman to allow Ms Obradovic to enter the company buildings in order to enable her to perform her duties as President of the trade union but that Ms Obradovic has not yet been able to enter the trade union premises. The Committee regrets that the Government does not provide any comments on the alleged refusal of the management to allow Ms Obradovic to enter the trade union premises and expresses its concern that, if true, this could support the complainant's allegation that her dismissal was motivated by her trade union activity. Recalling that workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representative function [see *Digest*, op. cit., para. 1104], the Committee requests the Government to take the necessary measures without delay to ensure that the bankruptcy proceedings underway do not lead to any anti-union discrimination and that Ms Obradovic, for as long as she holds the function of President of the trade union or any other representative function, has reasonable access to the workplace and the union premises for the exercise of her functions and to facilitate agreement between the union and the employer in this regard. The Committee requests the Government to keep it informed of any developments in this respect.

## **The Committee's recommendations**

- 396.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government to ensure that bankruptcy proceedings do not lead to a situation where allegations of anti-union dismissal cannot be addressed and to fully review the claims of Ms Obradovic without delay with a view to ensuring her reinstatement as a primary remedy, should her dismissal be found to have been motivated by her trade union activities, or if the judicial authority determines that reinstatement is not possible for objective and compelling reasons, award adequate compensation to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests the Government to keep it informed of any developments in this regard.*

- (b) *The Committee requests the Government to take the necessary measures without delay to ensure that the bankruptcy proceedings underway do not lead to any anti-union discrimination and that Ms Obradovic, for as long as she holds the function of President of the trade union or any other representative function, has reasonable access to the workplace and the union premises for the exercise of her functions and to facilitate agreement between the union and the employer in this regard. The Committee requests the Government to keep it informed of any developments in this respect.*

CASE NO. 2889

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

**Complaint against the Government of Pakistan  
presented by  
the Pakistan Telecom Employees Union (CBA) (PTEU)  
supported by  
UNI Global Union**

*Allegations: The complainant organization alleges anti-union dismissals and anti-union tactics by the management of the Pakistan Telecommunication Company Ltd and the Government's inability to protect the employees*

397. The complaint is set out in communications by the Pakistan Telecom Employees Union (CBA) (PTEU) dated 27 July and 4 September 2011, and 31 January 2012. UNI Global Union associated itself with the complaint in a communication dated 7 June 2011.
398. The Government sent its observations in communications dated 14 March and 7 June 2012, and 11 September 2015.
399. Pakistan has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

400. In its communications dated 27 July and 4 September 2011, and 31 January 2012, the PTEU explains that it is a national industry-wide trade union which had been registered with the National Industrial Relations Commission (NIRC) and declared as collective bargaining agent following nationwide referendums. It represents the workers of the Pakistan Telecommunication Company Ltd (PTCL). The complainant and UNI Global Union explain that in 2006, the Government partially privatized the said company by selling 26 per cent of its shares to a foreign company, Etisalat International, which also gained management rights through obtaining 53 per cent of the voting rights. As part of the sale, the new management agreed to settlement terms which included that the company would continue to apply pay and allowances, terms and conditions, and other benefits which may be awarded by the Government of Pakistan to government and semi-government employees.

- 401.** According to the PTEU, the company applied the pay rises announced from time to time by the Government after demands were made by the Union to that effect. In 2010, due to severe inflation, the Government announced a 50 per cent increase in basic pay rates. The Union submitted demands for this to be applied to the workers in the PTCL. According to the complainant, the company refused and instead approached the High Court to stop lawful trade union activities. The High Court (Order in W.P. No. 17832/10) ruled against the company and directed the management to conduct negotiations with the Union. The complainant provides a copy of the said order.
- 402.** The PTEU alleges that instead of complying with the Court order, the management filed false cases under the Anti-Terrorism Act against its office bearers, including Mr Hassan Muhammad Rana, Secretary-General. Mr Rana and others were arrested, tried and acquitted. The complainant further submits that the management of the company registered criminal cases against the three office bearers of the Union and transmits a copy of the Court order, dated 24 December 2011, in which the Court considered that the “allegation levelled against the petitioners is groundless, false and baseless as the petitioners were behind the bars [in relation to the arrest under the Anti-Terrorism Act] when the alleged occurrence was stated and there was no involvement of the petitioners in the said occurrence as possible”. The Court acquitted the three office bearers.
- 403.** According to the PTEU and UNI Global Union following a demonstration, the company dismissed/terminated 313 active office bearers, including the Secretary-General, and suspended/show caused more than 250 trade unionists. Those dismissed were PTCL union leaders and members who were active in the campaign for decent work and enforcement of their working conditions. According to the complainant, the company gave no sound reason as to why the workers were either dismissed or suspended and the Government has failed to step in to assist in bringing the parties to the table and ending the impasse even though they are the majority shareholders. The complainant submits a list of 81 trade union officials who were still not reinstated following termination or dismissal.
- 404.** The PTEU further alleges that the company management’s strategy is to “teach a lesson” to the office bearers and trade union activists so that the latter do not indulge in trade union activities. The complainant submits a copy of internal email exchanges regarding five employees whose termination cases were pending adjudication in the Labour Court and five other employees whose salaries were suspended. In the first case, a manager writes “it is also a fact that few are the big heads ... and we could not spare them without teaching a proper lesson as per strategy of management”. In the second exchange of emails, concerning employees’ request that their cases for release of salaries be considered sympathetically, the management asked for a certificate confirming that these workers “are not involved in any union activity and affidavit from officials that they will not participate in any sort of union activity”.

## **B. The Government’s reply**

- 405.** In its communications dated 14 March and 7 June 2012 the Government indicates that the management of the company was asked to report on the allegations in this case. According to the Government, the management has informed that Mr Rana was no longer the Secretary-General of the complainant organization and that a new Secretary General had been elected. The Government attaches a copy of a communication signed by the new leadership of the PTEU in which the latter explains that Mr Rana lost his position on 18 May 2010 when the majority of the representatives of the PTEU passed a resolution against him for misappropriation of funds. In this communication, addressed to the Central Labour Advisor of the Ministry of Inter Provincial Coordination, Government of Pakistan, the PTEU leadership indicates that the ILO would be informed of the above accordingly.

406. The Government indicates that this matter was referred to the Registrar (NIRC) for inquiry, who has informed that various cases regarding election proceedings and meetings of the General Body of the PTEU are pending in different Benches of the NIRC, and it was up to the parties to pursue their cases. According to the Government, a meeting was held with Mr Rana on 2 March 2012. He confirmed that various cases, including concerning trade union election, were pending before the NIRC. He also informed that cases of unfair labour practice were pending before the labour courts, dismissals and terminations cases were pending in Lahore and Islamabad High Courts, and that Multan Labour Court has decided in favour of the complainant.
407. In its communication dated 11 September 2015, the Government conveys that the NIRC has reported the following progress;
- 226 terminated workers have been reinstated;
  - 39 workers have left the job after receiving their dues;
  - 17 workers have been reinstated by the High Court. The company has appealed this decision in the Supreme Court; and
  - 18 cases are still pending before the NIRC. A majority of these cases were settled by the Single Bench of the NIRC, which the company management appealed before the NIRC Full Bench.
408. The Government requests to treat this information as interim and indicates that final decisions will be communicated to the ILO as soon as these cases are concluded.

### C. The Committee's conclusions

409. *The Committee notes that the complainant in this case, the Pakistan Telecom Employees Union (CBA) (PTEU), supported by UNI Global Union, alleges, in communications dated 27 July and 4 September 2011, and 31 January 2012, anti-union dismissals and anti-union tactics by the management of the PTCL and the Government's inability to protect the employees.*
410. *At the outset, the Committee notes that in its communication dated 14 March 2012, the Government submits that Mr Rana is no longer the Secretary-General of the complainant organization and that a new Secretary General was elected to replace him. The Government attaches a copy of a communication signed by the new leadership of the PTEU in which the latter explains that Mr Rana lost his position on 18 May 2010 when the majority of the Central representatives of the PTEU passed a resolution against him for misappropriation of funds and thus, has no authority to address the ILO on behalf of the Union. In this communication, addressed to the Central Labour Advisor of the Ministry of Inter Provincial Coordination, Government of Pakistan, the PTEU leadership indicates that the ILO would be informed of the above accordingly. The Committee further notes, however, the Government's indication that cases regarding election procedure and meetings of the General Body of the PTEU were pending before the NIRC. No further information has been provided neither by the Government on the outcome of these cases nor by any PTEU leadership indicating its intention to withdraw the complaint.*
411. *The Committee notes that according to the PTEU, following the privatisation of the company, the new management refused to apply the pay increase announced by the Government, thereby violating the terms of the settlement reached between the Union and the company under which, the company would continue to apply pay and allowances, terms and conditions, and other benefits which may be awarded by the Government of Pakistan to*

government and semi-government employees. According to the PTEU, when the High Court directed the management to conduct negotiations with the Union, the company refused and instead filed false cases under the Anti-Terrorism Act against the main office bearers of the union, including Mr Rana, Secretary-General of the Union, and a criminal case against three other officers. According to the complainant, Mr Rana and others were arrested, tried and acquitted.

412. The PTEU also alleges that the company used anti-union tactics and refers, in particular, to cases when the management asked for a certificate confirming that workers were not involved in any union activity before considering whether workers' salaries could be released.
413. Furthermore, according to the complainant, following a demonstration, the company dismissed/terminated 313 active office bearers, including the Secretary-General, and suspended/show caused more than 250 trade unionists. The complainant submits a list of 81 trade union officials who were still not reinstated following termination or dismissal.
414. In this regard, the Committee notes the information provided by the Government in its communication dated 11 September 2015 that 226 workers have been reinstated, 39 workers have left the job after receiving their dues; 17 workers have been reinstated by the High Court, but that the company has appealed this decision in the Supreme Court, and that 18 cases were still pending before the NIRC Full Bench following an appeal filed by the company. The Committee notes the Government's request to treat this information as interim pending the conclusion of these cases.
415. While noting with interest that a certain number of dismissals appear to have been resolved, the Committee regrets to note what appears to have been various tactics to undermine the union and its leadership at the company. Refusal to abide by the privatisation settlement terms; refusal, in violation of a court order, to conduct bona fide negotiation with the union; filing cases against trade union leaders under the Anti-Terrorism Act (repealed); filing criminal charges against trade unionists, which the court later found to be "groundless, false and baseless"; dismissals/terminations, suspensions of trade unionists; and demands of affidavits that employees will not take part in the union activities, appear to demonstrate that the management showed little respect for trade union rights of its employees. This conclusion is supported by the Lahore High Court in Case No: W.P. No. 60 of 2012 (Hassan Muhammad Rana v. PTCL and another), which also deals with another 14 writ petitions involving the same question of law and facts (as related by the complainant in this case). The Committee notes, in particular, paragraphs 14–16 of the said Order (publicly available):

14. ... it is nowhere established that negotiations were held even with CBA for the resolution of dispute between the parties. The letter[s] ... show that respondent No.1 is addressing the petitioners as (claiming to be a General Secretary) meaning thereby the respondents never tried seriously to negotiate amicable settlement with the petitioners, they tried to foist their own terms on the employees in spite of the fact that they have given undertaking before this Court in W.P. No. 17832/10, when this Court passed order after hearing the parties ...

15. ... The record submitted by respondents ... shows that the respondents were pre-decided to terminate the services of employees who were not surrendering before them at their terms. The demands of affidavits that employees will not take part in the union activities was against law; to form a union and become its member is fundamental right of employee/labourer and refusal to employee or to sabotage his right to become member of labour union is an offence.

16. ... The petitioners who have more than 20-year service of the institution were thrown out like a waste paper by violating their fundamental right of hearing and fair trial under Article 10-A of the Constitution. Admittedly the petitioners were not heard, no

*charge sheet was issued and their services were terminated without any lawful authority. In view of the above, the act of respondent to terminate petitioners' services is declared without lawful authority and of no legal effect and consequently the petitioners will deem to be in service ...*

**416.** *The Committee regrets the failure of the Government, as ultimately responsible for ensuring respect for the principles of freedom of association in the country, in general, and as the company majority stakeholder, in particular, to prevent and later to redress fully these violations of trade union rights, including as regards some dismissal cases that date back to 2010 and are still pending. It recalls in this respect that the government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned. It further 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 of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 817 and 826]. The Committee therefore requests the Government to take all appropriate measures, in order to avoid a denial of justice, to ensure that the remaining pending cases are concluded without delay. It requests the Government to keep it informed in this respect.*

**417.** *Noting that the number of trade unionists that the complainant alleges had been dismissed/terminated or suspended differs from the numbers referred to by the Government in its reply, the Committee requests the Government and the complainant to provide detailed information on the number of dismissed/terminated and suspended trade unionists in relation to the events alleged in this case, and their current employment status.*

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

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

- (a) The Committee requests the Government to take all appropriate measures, in order to avoid a denial of justice, to ensure that the remaining pending cases are concluded without delay. It requests the Government to keep it informed in this respect.*
- (b) The Committee requests the Government and the complainant to provide detailed information on the number of dismissed/terminated and suspended trade unionists in relation to the events alleged in this case, and their current employment status.*

CASE NO. 2949

INTERIM REPORT

## Complaint against the Government of Swaziland

presented by

- the Trade Union Congress of Swaziland (TUCOSWA) and
- the International Trade Union Confederation (ITUC)

*Allegations: The complainant denounces its deregistration by the Government and the systematic interference by security forces against the its activities*

419. The Committee last examined this case at its October 2014 meeting where it presented an interim report to the Governing Body [see 373rd Report, approved by the Governing Body at its 322nd Session (October 2014), paras 427–470].
420. The International Trade Union Confederation (ITUC) sent additional information in relation to the complaint in communications dated 13 March 2015 and 26 February 2016.
421. The Government sent its observations in a communication dated 7 October 2015.
422. Swaziland 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

423. In its previous examination of the case at its October 2014 meeting, the Committee made the following recommendations [see 373rd Report, para. 470]:
- (a) The Committee expects the immediate adoption of amendments to the IRA by Parliament in a manner so as to ensure fully the freedom of association rights of the TUCOSWA and of all workers' and employers' federations that have historically represented their members' interests in the country. The Committee urges the Government to take steps immediately to preserve the workers' and employers' federations and allow them to operate while awaiting the amendment of the IRA by the Parliament so as to ensure the continuity of these organizations. The Committee urges the Government to keep it informed of the progress made in this regard.
  - (b) In the meantime, the Committee once again strongly urges the Government to take all necessary measures to ensure that the TUCOSWA is able to fully exercise its trade union rights, including the right to engage in protest action and peaceful demonstrations in defence of its members' occupational interests, and to prevent any interference or reprisal against its leaders, in accordance with the principles of freedom of association. The Committee expects that all workers' and employers' federations working within the country will be fully assured their freedom of association rights until such time as they may register under the amended law.
  - (c) The Committee requests the Government and the complainant to keep it informed of the decision of the High Court of Swaziland on the constitutional challenge to the Government's refusal to register the federation.
  - (d) The Committee urges the Government to take steps immediately for the unconditional release of Mr Maseko and to provide compensation for the damages suffered.

- (e) The Committee is deeply concerned by the complainant's allegations that Justice Mumcy, who ordered the release of Mr Maseko, was also threatened with arrest. Observing that an independent judiciary is essential to ensuring the full respect for the fundamental freedom of association and collective bargaining rights, the Committee urges the Government to ensure full respect for this principle and to ensure that Justice Mumcy is not subjected to threats for discharging her duties in accordance with the mandate bestowed upon her.
- (f) The Committee expresses its deep concern over the absence of significant progress in the present case more than two years after the registration of the TUCOSWA was nullified, despite clear recommendations from the Committee and the ILO technical assistance provided. The Committee strongly urges the Government to take all necessary steps as a matter of urgency to resolve the case and to keep it informed in this regard.
- (g) The Committee draws the Governing Body's special attention to the extreme seriousness and urgent nature of this case.

## **B. Additional information from the complainants**

**424.** In a communication dated 13 March 2015, the ITUC indicates that despite the amendment of the Industrial Relations Act (IRA), the Ministry of Labour and Social Security refuses to register the Trade Union Congress of Swaziland (TUCOSWA). A new application for registration was filed on 1 December 2014 under the amended IRA, and while the Federation of Swaziland Employers and Chamber of Commerce (FSE&CC) and the Federation of the Swazi Business Community (FSBC) received confirmation of receipt and were advised on necessary changes to their by-laws, the Ministry has completely ignored applications from the workers' federation.

**425.** The complainant recalls that on 8 October 2014, the Minister of Labour and Social Security announced a Cabinet resolution suspending federations, including TUCOSWA. The Minister justified this decision by arguing that the amendment of the IRA had been referred to Parliament under a certificate of urgency and would allow for the registration of federations when adopted. In November 2014, Parliament passed Act No. 11 of 2014 amending the IRA. However, according to the ITUC, several tripartite recommendations agreed upon in the Labour Advisory Body (LAB) were discarded in the amendment and constitute serious obstacles to the registration of TUCOSWA. Section 32bis (2) of the amended Act is particularly problematic as it establishes that the Commissioner of Labour may require, in addition to the formal requirements, "any other information" she/he deems relevant in order to decide on the registration of a federation. Moreover, section 32bis (3) of the Act provides that the Commissioner of Labour shall register a federation, when she/he is satisfied that the requirements for registration are met. The Commissioner of Labour is neither bound by time limits nor by clearly defined criteria when deciding on the registration of a federation. Thus, the legislation vests her/him with discretionary powers in deciding whether or not an organization meets all the conditions required for registration creating a situation which is similar to that in which previous authorization is required. In the view of the ITUC, these discretionary powers are clearly used to continue to deny the registration of TUCOSWA effectively denying Swazi workers the right to associate freely at federal level for almost three years.

**426.** With respect of the wide discretion afforded to the Commissioner of Labour by the IRA, in its communication of 26 February 2016, the ITUC declares that this continues to constitute a hindrance for workers in practice as exemplified by the denial to register the Amalgamated Trade Unions of Swaziland (ATUSWA) for more than two years. According to the ITUC, in August 2013, ten trade unions representing manufacturing workers decided to merge in order to form the ATUSWA and approached the Commissioner to discuss the formalities needed for its registration. The constitution was reviewed together and the Commissioner pointed at certain areas that needed revision. ATUSWA implemented these recommendations and held its founding congress on 7 September 2013. The application for

registration was then submitted on 23 September 2013 in accordance with the requirements set out by law. The Commissioner did not react to the application until 2 January 2014 when the union was requested to make further amendments to its constitution. The ITUC denounces the fact that, since then and during the last two years, the Commissioner of Labour has been putting numerous requirements before ATUSWA for its registration (deletion of the term “amalgamated” in the union’s name; need for the founding members of the union to provide a letter from their employer to prove their employment) which went well beyond the statutory requirements and what has been requested from other unions for their registration.

- 427.** The ITUC denounces the fact that the police continue to interfere in trade union meetings organized by TUCOSWA. A mass meeting organized by TUCOSWA was scheduled to take place on 26 February 2015 at the Bosco Skills Centre Hall in Manzini in order to address questions related to the registration of trade unions, the loss of trade benefits under the African Growth and Opportunity Act, the recognition of trade unions for collective bargaining purposes and other democratic rights. However, according to the ITUC, the police intimidated the landlord of the Bosco Skills Centre Hall on 24 February 2015 indicating that he could not rent out the hall to TUCOSWA without the permission of the police. The trade union meeting was postponed to 28 February 2015 and was to take place at the Swaziland National Teachers Association (SNAT) Centre in Manzini. However, on that day, the police mounted roadblocks around the country and placed uniformed and plain-clothed police in front of the SNAT Centre, where the meeting was supposed to be held. Despite the intimidating police presence and roadblocks, more than 100 workers made it to the Centre. But the police, led by the regional commissioner and the senior operations officer, insisted that the meeting could not take place.
- 428.** In its communication of February 2016, the ITUC denounces other instances of police interference in public protest actions as well as in internal trade union meetings, such as local shop steward meetings (most recently: 23 January 2016; 30 January 2016). Police have started to justify this interference with the Urban Act instead of the Public Order Act which has come under repeated criticism in the ILO. Accordingly, unions now have to request a non-objection certificate from police two weeks ahead of protest action that is planned in urban areas where most of the workplaces with union representation are located. Moreover, in February 2016, two trade unionists of the Swaziland National Association of Teachers (SNAT) were arrested and charged with obstruction for participating in a protest action called by public sector unions to demand the publication of a report on the public sector pay review.
- 429.** In conclusion, the ITUC expresses its serious concerns over the Government’s systematic failure to guarantee the right to freely establish trade union organizations both in law and in practice.

### **C. The Government’s reply**

- 430.** In a communication dated 7 October 2015, the Government informs that the Parliament had adopted the Industrial Relations (Amendment) Act, 2014 (Act No. 11 of 2014 published in the *Government Gazette* of 13 November 2014), introducing provisions concerning the registration of employers’ and workers’ federations. As a consequence of this amendment, the TUCOSWA, as well as two employers’ federations – namely the Federation of Swaziland Employers and Chambers of Commerce (FSE&CC) and the FESBC, were registered in May 2015. The Government adds that another federation, the Federation of Swaziland Trade Unions (FESWATU), had been registered in June 2015.
- 431.** According to the Government, the registration of these federations has provided the foundation to establish tripartite structures and strengthen tripartite consultations and social

dialogue. Key tripartite structures, including the LAB and the National Steering Committee on Social Dialogue have been gazetted and are now operational. A programme of meetings of the Social Dialogue Committee for the next six months has been agreed, and three meetings have already been held following the reconstitution of the Committee. Furthermore, the LAB had also met and transacted its business without any hindrance and agreed on a programme of meetings. The Government adds that work is ongoing to conclude the composition of other tripartite structures.

- 432.** With regard to the release of TUCOSWA's lawyer, Mr Thulani Maseko, requested by the Committee, the Government indicates that Mr Maseko was released unconditionally on 30 June 2015 by a decision of the Supreme Court.
- 433.** With regard to the request from the ITUC to amend section 32 of the IRA to eliminate the discretion of the Commissioner of Labour to register Trade Unions, the Government indicates that this issue was only raised during the International Labour Conference in June 2015. Furthermore, the workers at the meeting of the National Steering Committee on Social Dialogue, on 24th August 2015, indicated that they will make a submission to the Government clarifying their concerns.

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

- 434.** *The Committee recalls that this case concerns serious allegations of the revocation of the registration of a workers' federation by the Government and the systematic interference by security forces against its activities, notably on the argument that it is a deregistered organization enjoying therefore limited trade union rights. In its previous conclusions, the Committee had expressed its deep concern over the absence of significant progress in the present case for more than two years after the registration of the TUCOSWA was nullified, despite clear recommendations from the Committee and the ILO technical assistance provided.*
- 435.** *The Committee welcomes the adoption by the Parliament of the Industrial Relations (Amendment) Act, 2014 (Act No. 11 of 2014 published in the Government Gazette of 13 November 2014), introducing provisions concerning the registration of employers' and workers' federations, and consequently the registration of the TUCOSWA in May 2015. The Committee also notes with interest, from the Government's report, that the two employers' federations, namely the FSE&CC and the FESBC, were also registered. Finally, the Committee observes the Government's statement that another workers' federation, the FESWATU, had been registered in June 2015.*
- 436.** *The Committee also welcomes the indication that the TUCOSWA, and the other federations, are now represented in all tripartite structures that have been established, including most importantly the Labour advisory Board and the National Steering Committee on Social Dialogue for Swaziland, and that these bodies had already met and agreed without any hindrance on programmes of meetings for the coming months.*
- 437.** *The Committee recalls its previous conclusion whereby it strongly urged the Government to take measures to ensure that the TUCOSWA may fully exercise its trade union rights, without interference or reprisal. The Committee expresses its concern over the report by the ITUC of interference by security forces in a mass meeting organized on February 2015 by TUCOSWA in Manzini to address questions related to the registration of trade unions, the loss of trade benefits under the African Growth and Opportunity Act, the recognition of trade unions for collective bargaining purposes and other democratic rights, as well as in internal trade union meetings, such as local shop steward meetings organized in January 2016, whereby the police justified its interference under the Urban Act. The Committee further notes with concern the allegation that in February 2016, two trade unionists of the Swaziland*

*National Association of Teachers (SNAT) were arrested and charged with obstruction for participating in a protest action called by public sector unions. The Committee trusts that, alongside the strengthening of tripartite consultations and social dialogue, the Government will endeavour to ensure that all the workers' and employers' federations, either seeking for registration or duly registered under the amended law, may fully exercise their trade union rights, including the right to engage in protest action and peaceful demonstrations in defence of their members' occupational interests without any interference or reprisal against their leaders, in accordance with the principles of freedom of association. Consequently, the Committee urges the Government to provide its observations on the allegations of arrest and conviction of two trade unionists of the SNAT in February 2016 for participating in a protest action called by public sector unions.*

- 438.** *Furthermore, the Committee recalls its previous conclusion whereby it had noted the arrest and imprisonment of TUCOSWA's lawyer, Mr Thulani Maseko, who was then sentenced to two years in prison by the High Court of Swaziland in relation to articles in the press whereby he questioned the impartiality and independence of the judiciary. The Committee had expressed its deep concern over the conviction of Mr Maseko and had urged the Government to take steps immediately for his unconditional release. The Committee notes with satisfaction that Mr Maseko was released unconditionally on 30 June 2015 by a decision of the Supreme Court. The Committee notes in particular that the Supreme Court observed that "what happened in this case was a travesty of justice. Whatever issues that arose with regard to the need to balance freedom of expression or of the press with the protection of fair hearing and authority of the courts; those issues were not properly handled. ... It was for these reasons why (the Court) allowed the appeal and set aside the convictions and sentences against the appellant and ordered the immediate release of the appellants in prison" (Thulani Maseko and others v Rex, Supreme Court of Swaziland, 30 June 2015).*
- 439.** *The Committee notes that the ITUC specifically addresses section 32 of the amended Act which provides that a federation seeking registration must complete a prescribed form and submit a copy of its constitution to the Commissioner of Labour who can also require the submission of any other information. According to the complainant the legislation vests the Commissioner of Labour with discretionary powers in deciding whether or not an organization meets all the conditions required for registration creating a situation which is similar to that in which previous authorization is required. The Committee also notes the observations from the Government that this issue was never brought to tripartite discussion before June 2015 and that the workers at the meeting of the National Steering Committee on Social Dialogue on 24 August 2015 indicated that they will make a submission clarifying their concerns. The Committee trusts that this issue will be brought to the relevant national tripartite structure for discussion. Noting that the Committee of Experts on the Application of Conventions and Recommendations is following this legislative matter in its latest comments, the Committee will not pursue its examination of this aspect of the case.*
- 440.** *However, the Committee observes that, according to the ITUC in a recent communication of February 2016, the wide discretion afforded to the Commissioner of Labour continues to constitute a hindrance for workers in practice as exemplified by the denial to register the Amalgamated Trade Unions of Swaziland (ATUSWA) for more than two years. According to the ITUC, in August 2013, ten trade unions representing manufacturing workers decided to merge in order to form the ATUSWA and approached the Commissioner to discuss the formalities needed for its registration. The Committee notes the ITUC allegations that since the ATUSWA applied for its registration in September 2013, the Commissioner of Labour has been putting numerous requirements before the union (deletion of the term "amalgamated" in the union's name; need for the founding members of the union to provide a letter from their employer to prove their employment) which went well beyond the statutory requirements and what has been requested from other unions for their registration. In this*

regard, the Committee wishes to recall 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. Moreover, the Committee underlines 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 of decisions and principles of the Freedom of Association Committee, fifth (revised) edition**, para. 307 and 333]. The Committee, while requesting the Government to send its observation in reply to the ITUC, trusts that the Commissioner of Labour will endeavour to finalize the registration of the ATUSWA without delay as part of the drive for the strengthening of the national social dialogue since the amendment of the IRA in May 2015, and requests the Government to keep it informed of the steps taken in this respect.

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

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

- (a) The Committee trusts that, alongside the strengthening of tripartite consultations and social dialogue, the Government will endeavour to ensure that all the workers' and employers' federations, either seeking for registration or duly registered under the amended law, may fully exercise their trade union rights, including the right to engage in protest action and peaceful demonstrations in defence of their members' occupational interests without any interference or reprisal against their leaders, in accordance with the principles of freedom of association.**
- (b) The Committee urges the Government to provide its observations on the allegations of arrest and conviction of two trade unionists of the Swaziland National Association of Teachers (SNAT) in February 2016 for participating in a protest action called by public sector unions.**
- (c) The Committee trusts that the Commissioner of Labour will endeavour to finalize the registration of the ATUSWA without delay as part of the drive for the strengthening of the national social dialogue since the amendment of the IRA in May 2015 and requests the Government to keep it informed of the steps taken in this respect.**

CASE NO. 3128

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

**Complaint against the Government of Zimbabwe  
presented by  
the Zimbabwe Congress of Trade Unions (ZCTU)  
supported by  
the International Trade Union Confederation (ITUC)**

***Allegations: The complainant organization  
alleges the refusal by the Registrar to register  
the Zimbabwe Footwear Tanners and Allied***

***Workers' Union of the Bata Shoe Company (ZFTAWU) and the banning by the police of a public demonstration***

442. The complaint is contained in communications dated 7 April and 27 May 2015 from the Zimbabwe Congress of Trade Unions (ZCTU). The International Trade Union Confederation (ITUC) associated itself with the complaint in a communication dated 9 April 2015.
443. The Government sent its observations in a communication dated 21 September 2015.
444. Zimbabwe has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

445. In its communications dated 7 April and 27 May 2015, the ZCTU explains that in 2012, 850 workers at Bata Shoe Company based in Gweru resigned from a trade union called the Zimbabwe Leather Shoe and Allied Workers Union because it was no longer acting in their interest. On 10 May 2012, these workers, led by their chosen representative, formed the Zimbabwe Footwear Tanners and Allied Workers' Union of the Bata Shoe Company (ZFTAWU) to represent the interests of employees in the Leather Footwear, Tanners Industry. The ZFTAWU adopted its Constitution, as required by section 28 of the Labour Act, and applied for registration on 21 May 2012, as per sections 29(1), 33 and 34 of the Labour Act. On 2 August 2013, the notice of application for registration was published in the Government Gazette General Notice 379/2013. On 24 October 2014, the Registrar published in the Government Gazette a notice of accreditation proceedings that was to be held on 19 November 2014, and invited any interested person to file representations in this regard. On 19 November 2014, the Zimbabwe Leather Shoe and Allied Workers Union appeared to oppose the registration of the new union. The Registrar did not furnish the ZFTAWU with copies of the opposition and the union representatives were only served on the day of the accreditation proceedings. On 19 November 2014, the ZFTAWU representatives protested over the non-receipt of the opposing papers from the Zimbabwe Leather Shoe and Allied Workers Union. The Registrar then requested the protesting union to file written submissions, which they did. On 9 January 2015, the Registrar made a decision denying registration to the ZFTAWU on the grounds that a similar application it declined earlier was upheld by the Labour Court, and that there were no changes to the declining workforce density in the industry and that the ZFTAWU members constituted a minority of workers. On 19 February 2015, the ZFTAWU filed an appeal to the Labour Court challenging the Registrar's decision and the application is still pending.
446. The ZCTU considers that the decision by the Government to refuse to register the ZFTAWU is a violation of Article 2 of Convention No. 87; section 65(2) of the national Constitution, which provides that "[e]xcept for members of the security services, every person has the right to form and join trade unions and employee or employers' organisations of their choice, and to participate in the lawful activities of those unions and organisations"; and section 27(1) of the Labour Act which provides that "[s]ubject to this Act, any group of employees may form a trade union".
447. The ZCTU explains that denial of registration deprives the union of its legal status and enjoyment of rights and privileges provided under section 29 of the Labour Act, which includes representing its members, collective bargaining and collection of union dues through a check-off system. The ZCTU regrets that section 45 of the Labour Act gives wide

discretion to the Registrar to register or refuse to register a trade union after considering certain factors which include protecting the majority union at the expense of the minority.

- 448.** The ZCTU also alleges that the National Union of Metal and Allied Industries of Zimbabwe (NUMAIZ) has remained unregistered since 21 June 2013.
- 449.** The ZCTU further alleges that on 7 and 17 March 2015 it adopted a resolution to organize and embark on a protest action to be held on 11 April 2015 in the six ZCTU regional centres of Harare, Bulawayo, Gweru, Mutare, Masvingo and Chinhoyi. The protest was to be in the form of a public demonstration and handing of a petition to the Ministry of Public Service Labour and Social Welfare. The purpose of the protest action was to draw the attention of the public and the Government to the following issues affecting workers in Zimbabwe: the Government's intended policy to freeze and cut salaries and wages, and introduce labour market flexibility; non- or late payment of workers' salaries; non-remittance of trade union dues; and the general economic decay causing job losses.
- 450.** The ZCTU, through its regional offices, notified the police of the intended protest action. The Zimbabwe Republic Police (ZRP) in Bulawayo, Masvingo, responded banning the demonstration, while the ZRP Mutare district police gave a verbal ban. The ZCTU approached the High Court seeking an order to overturn the ban. On 10 April 2015, the High Court issued an order interdicting the ZRP from interfering or stopping the demonstration. The ZCTU alleges that on the night before the protest action, unidentified people printed and distributed purported ZCTU press statements advising that the protest action was cancelled. The ZCTU indicates that it has reason to believe that the State machinery and the ruling party had a hand in the printing and distribution of the purported ZCTU press statements, because after the Government had lost in the High Court, the only available option was to disrupt the protest action by whatever means.
- 451.** The complainant further alleges that following the announcement by the ZCTU of the ban, the Government's newspaper the "Herald" published articles entitled "ZCTU is paid for demonstration" and "ZCTU, MDC-T at the pinnacle of insanity". The articles attack the ZCTU and contain lies that the ZCTU is paid for demonstrations by the ILO. The ZCTU further alleges that the Minister of Water and ZANU-PF political Commissar was quoted in the press to say that the protest action was an "attention-seeking gimmick by a cash-strapped labour federation directed at the donor community and that the union leaders must tell their western allies to remove sanctions imposed on the economy for it to grow ...". According to the ZCTU, the Zimbabwe Youth Action Alliance (ZANU-PF Youth wing) was quoted in the press warning the ZCTU not to proceed with the action and calling the ZCTU a "Trojan horse of the main opposition, MDC-T".
- 452.** The ZCTU further alleges that the ZRP in Mbare District banned the Zimbabwe Security Guards Workers Union (ZISEGU), its affiliate, from embarking on a peaceful demonstration on 30 April 2015 after wage negotiations deadlocked.
- 453.** The ZCTU submits that by banning trade union activities, the Government is violating Article 3(1)-(2) of Convention No. 87, Article 4 of Convention No. 98 and its own Constitution, section 59 of which provides that: "Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully".

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

- 454.** The Government submits that the decision not to register the ZFTAWU was made after the Registrar was duly satisfied that the leather industry was not viable enough to justify a new trade union for the sector. The decision of the Registrar is consistent with a previous decision that was upheld by the Labour Court not to register the Leather Footwear, Canvas

Manufacturing Workers Union on the same basis. The decision was made pursuant to section 45 of the Labour Act, which requires the Registrar to consider the following grounds, among others, during accreditation proceedings:

- (a) the desirability of affording the majority of the employees and employers within an undertaking or industry effective representation in negotiations affecting their rights and interests; and
- (b) the desirability of reducing, to the least possible number, the number of entities with which employees and employers have to negotiate.

The record of the accreditation proceedings shows that the Registrar was satisfied that the registration of the ZFTAWU would not further the interests of the majority of workers in the sector.

- 455.** The Government further informs that accreditation proceedings for the NUMAIZ were conducted on 21 September 2015, as required by the legislation in force. The Government argues that the applicant union stalled the registration process by delaying its payment for the gazetting of the notice for accreditation proceedings. A decision on the matter is pending and will be communicated to the parties without delay.
- 456.** The Government informs that the legislative provisions that relate to the registration of trade unions are being reviewed. The amendments seek to provide specific grounds to be considered by the Registrar in registering a trade union, such as the existence of a constitution, existence of an executive board, fixed business address, membership register and audited financial statements.
- 457.** With regard to the alleged banning of the ZCTU protest action, the Government indicates that the ZCTU was able to carry out its demonstration across the country as planned. In the case of Bulawayo Metropolitan and Masvingo Provinces, the ZRP withdrew its initial refusal. Although the ZCTU had lodged a complaint with the High Court, the police withdrew the initial refusal on its own initiative after internal consultations. In the Government's opinion, this demonstrates the capacity of the ZRP to guarantee the rights of workers to organize. The Government also explains that the timing of the protest action had presented practical and logistical challenges for the ZRP as it virtually coincided with Independence Day, which falls on 18 April. Various events to commemorate Independence Day were held throughout the country, and the police service is an integral part of the preparations, hence the lack of preparedness to guarantee police protection for the ZCTU demonstration on 11 April 2015.
- 458.** The Government submits that the ZRP acted in good faith in not granting the Zimbabwe Security Guards Union permission to demonstrate, largely due to the proposed timing of the action. As indicated above, the timing coincided with countrywide Independence Day commemorations and there was reasonable justification to believe that the demonstration would be hijacked by malicious elements to the detriment of the union's interests as well as public order. Furthermore, the Government indicates that the timing of the intended demonstration coincided with a period when the Harare municipal authorities were battling to maintain peace and order, while relocating often violent street vendors to designated sites. The Government points out that the refusal in this case does not amount to a general policy to indiscriminately ban trade union demonstrations.
- 459.** The Government dismisses the allegation that it distributed cancellation material for the ZCTU protest action and stresses that it consented to the protest action being conducted. The Government further rejects the accusations with regard to various statements allegedly quoted in newspapers, and explains that it does not use newspapers to communicate its

positions on such matters and that the correct Government's position was expressed by the High Court when it allowed the ZCTU to proceed with the protest action.

- 460.** The Government points out that the continued improvement in the enjoyment of workers' rights to organize is due to the Government's ongoing efforts to give full effect to the ratified ILO Conventions. These efforts include countrywide interfaces with law enforcement agencies on international labour standards that have been supported by the International Labour Office since 2011. The Government also submits that there has been continued improvement in the engagement of trade unionists and the ZRP in discussions and preparations of modalities for the conduct of demonstrations. It is envisaged that this dialogue and mutual cooperation will continue. The Government is still working with the Office in efforts to mainstream international labour standards in the work of the police and is confident that workers' organizations will continue to fully enjoy freedom of association and the right to organize.
- 461.** With regard to the alleged undermining of collective bargaining rights through media reports on salary cuts, wage freezes and labour market flexibility, the Government indicates that these allegations have nothing to do with its current policies or legislative reforms. It reiterates that it does not use the media to articulate its policy positions. The Government indicates that it continues to be guided by the ratified ILO Conventions in the elaboration of policies and legislation. Section 65(5) of the national Constitution upholds the right to collective bargaining. The Government underlines that it has resuscitated tripartite dialogue at the Tripartite Negotiating Forum to enable the social partners to contribute to social and economic programmes in the country.

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

- 462.** *The Committee notes that the ZCTU alleges the denial of registration of new trade unions (ZFTAWU and NUMAIZ) and the ban by the police on trade union demonstrations.*
- 463.** *The Committee notes that according to the ZCTU, the ZFTAWU was formed on 10 May 2012 to represent the interest of employees in the Leather Footwear, Tanners Industry. The union, which has a membership of 850 workers, applied for registration on 21 May 2012, as per sections 29(1), 33 and 34 of the Labour Act. On 2 August 2013, the notice of application for registration was published in the Government Gazette General Notice 379/2013. On 24 October 2014, the Registrar published in the Government Gazette a notice of accreditation proceedings and invited any interested person to file representations in this regard. The Zimbabwe Leather Shoe and Allied Workers Union appeared on 19 November 2014 to oppose the registration. On 9 January 2015, the Registrar made a decision denying registration of the ZFTAWU on the grounds that a similar application it declined earlier was upheld by the Labour Court and that there were no changes to the declining workforce density in the industry, and that the ZFTAWU members constituted a minority of workers. On 19 February 2015, the ZFTAWU filed an appeal to the Labour Court challenging the Registrar's decision. This application is still pending.*
- 464.** *The ZCTU also alleges that another union, NUMAIZ, has remained unregistered since 21 June 2013.*

465. *The Committee notes that in its reply dated 21 September 2015, the Government refers to the requirement imposed by section 45 of the Labour Act on the Registrar to consider the following grounds, among others, during accreditation proceedings:*

...

- (a) *the desirability of affording the majority of the employees and employers within an undertaking or industry effective representation in negotiations affecting their rights and interests; and*
- (b) *the desirability of reducing, to the least possible number, the number of entities with which employees and employers have to negotiate.*

...

466. *The Committee notes that the wording of section 45 of the Labour Act would appear to confer on the Registrar wholly discretionary power to grant or reject a registration request. The Committee believes that the vagueness of this legislative provision can only encourage the competent authorities to make excessive use of their discretionary powers, which is a serious obstacle to the establishment of organizations, and may amount to a denial of the right of workers and employers to establish organizations without previous authorization. Furthermore, where a Registrar has to form his or her own judgement as to whether the conditions for the registration of a trade union have been fulfilled, although an appeal lies against the Registrar's decisions to the courts, the Committee has considered that the existence of a procedure of appeal to the courts does not appear to be a sufficient guarantee; in effect, this does not alter the nature of the powers conferred on the authorities responsible for effecting registration, and the judges hearing such an appeal would only be able to ensure that the legislation has been correctly applied. The Committee has drawn attention to the desirability of defining clearly in the legislation the precise conditions which trade unions must fulfil in order to be entitled to registration and on the basis of which the Registrar may refuse or cancel registration, and of prescribing specific statutory criteria for the purpose of deciding whether such conditions are fulfilled or not [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 302].*

467. *The Committee further considers that section 45 of the Labour Act would appear to hinder the registration of a new organization if another registered organization already exists in a specific enterprise or occupation. It recalls in this respect that a provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied the right to join the organization of their own choosing, contrary to the principles of freedom of association [see **Digest**, op. cit., para. 328].*

468. *The Committee further notes that the Labour Act does not contain provisions on the time period for registration procedure. The Committee notes that the procedure lasted two and half years in the case of the ZFTAWU only to find its application ultimately rejected. The Committee considers that this in itself 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].*

469. *The Committee notes the Government's indication that the legislative provisions that relate to the registration of trade unions are being reviewed and that the amendments seek to provide specific grounds to be considered by the Registrar in registering a trade union, such as the existence of a constitution, existence of an executive board, fixed business address, membership register and audited financial statements.*

470. *The Committee regrets that the most recent amendment of the Labour Act (Labour Amendment Act No. 5 of August 2015) does not contain any modifications to section 45. The Committee encourages the Government, on the basis of the principles above, to further amend the Labour Act in consultations with the social partners so as to: (i) ensure that the conditions for the granting of registration are not tantamount to obtaining previous authorization from the public authorities for the establishment of a workers' or employers' organization; (ii) to make it clear that when a trade union already exists for the same employees as those whom a new union seeking registration is organizing, or is proposing to organize, or the fact that the existing union holds a bargaining certificate in respect of such class of employees, this cannot give rise to objections of sufficient substance to justify the Registrar in refusing to register the new union; and (iii) to ensure that the period for registering an organization is reasonable. The Committee requests the Government to keep the Committee of Experts on the Application of Conventions and Recommendations, to the attention of which it draws the legislative aspects of the case, informed of the progress made in this regard.*
471. *In the light of the above, and to give full effect to article 65 of the national Constitution providing that "every person has the right to form and join trade unions ... of their choice and to participate in the lawful activities of those unions ...", including "the right to engage in collective bargaining", the Committee requests the Government to take the necessary measures in order to review the ZFTAWU application with a view to its registration, thus guaranteeing the right of the 850 workers alleged to be its members, to establish and join the organization of their own choosing without previous authorization. The Committee requests the Government to keep it informed in this respect.*
472. *As regards the NUMAIZ request for registration, the Committee notes the Government's indication that the accreditation proceedings were conducted on 21 September 2015, as required by the legislation in force, and that a decision on the matter is pending and will be communicated to the parties without delay. The Committee recalls that free choice of workers to establish and join organizations is so fundamental to freedom of association as a whole that it cannot be compromised by delays [see **Digest**, op. cit., para. 312]. The Committee requests the Government to ensure that the procedure is expedited, if it has yet to be concluded, and to transmit the Registrar's decision.*
473. *The Committee notes the ZCTU allegations concerning the ban on three ZCTU regional marches on 11 April 2015, as well as of a peaceful demonstration by the Zimbabwe Security Guards Workers Union (ZISEGU) and the Government's reply thereon. The Committee notes that the police ban on the ZCTU protest action led to the presentation of a petition to the High Court which ordered the police not to interfere with the union action. The Committee further notes the Government's indication that the ZCTU was able to carry out its demonstrations on 11 April 2015 as planned and that the police withdrew its initial refusal with respect to demonstrations in two provinces. With regard to the ban on the ZISEGU demonstration on 30 April 2015, the Government indicates that as this activity "coincided with Independence Day commemorations" there were reasonable grounds to believe that the demonstration would be hijacked by malicious elements to the detriment of the union's interests as well as public order. Furthermore, the Government indicates that the timing of the intended demonstration coincided with a period when the Harare Municipal authorities were battling to maintain peace and order while relocating often violent street vendors to designated sites. The Government points out that the refusal in this case does not amount to a general policy to indiscriminately ban trade union demonstrations.*
474. *The Committee further notes the Government's indication that there has been continued improvement in the engagement of trade unionists and the ZRP in discussions and preparations of modalities for the conduct of demonstrations. The Government envisages that this dialogue and mutual cooperation will continue and indicates in this respect that it*

*is still working with the Office in efforts to mainstream international labour standards in the work of the police, and is confident that workers' organizations will continue to fully enjoy freedom of association and the right to organize. These efforts include the countrywide interfaces with law enforcement agencies on international labour standards that have been supported by the International Labour Office since 2011.*

- 475.** *The Committee recalls in this respect that when it examined Case No. 2862, dealing with a ban on holding International Women's Day and International Labour Day processions, at its May–June 2012 meeting, it had requested the Government to elaborate and promulgate without delay clear lines of conduct for the police and security forces. Noting with regret that this has not been done and recalling that permission to hold public demonstrations, which is an important trade union right, should not be arbitrarily refused, the Committee urges the Government to take the necessary steps for the adoption and effective implementation of the code of conduct so as to ensure that the police and security forces follow clear lines of conduct with regard to human rights and trade union rights. The Committee requests the Government to keep it informed in this respect.*

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

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

- (a)** *The Committee encourages the Government to amend the Labour Act in consultation with the social partners so as to:*

- (i)** *ensure that the conditions for the granting of registration are not tantamount to obtaining previous authorization from the public authorities for the establishment of a workers' or employers' organization;*
- (ii)** *to make it clear that when a trade union already exists for the same employees as those whom a new union seeking registration is organizing, or is proposing to organize, or the fact that the existing union holds a bargaining certificate in respect of such class of employees, this cannot give rise to objections of sufficient substance to justify the Registrar in refusing to register the new union; and*

- (iii)** *to ensure that the period for registering an organization is reasonable.*

*It requests the Government to keep the Committee of Experts on the Application of Conventions and Recommendations, to the attention of which it draws the legislative aspects of the case, informed of the progress made in this regard.*

- (b)** *The Committee requests the Government to take the necessary measures in order to review the ZFTAWU application with a view to its registration, thus guaranteeing the right of the 850 workers alleged to be its members, to establish and join the organization of their own choosing without previous authorization. The Committee requests the Government to keep it informed in this respect.*

- (c) *As regards the NUMAIZ application for registration, the Committee requests the Government to ensure that the procedure is expedited, if it has yet to be concluded, and to transmit the Registrar's decision.*
- (d) *The Committee urges the Government to take the necessary steps for the adoption and effective implementation of the code of conduct so as to ensure that the police and security forces follow clear lines of conduct with regard to human rights and trade union rights. The Committee requests the Government to keep it informed in this respect.*

Geneva, 18 March 2016

(Signed) Professor Paul van der Heijden  
Chairperson

*Points for decision:* Paragraph 118  
Paragraph 125  
Paragraph 185  
Paragraph 199  
Paragraph 214  
Paragraph 244  
Paragraph 270  
Paragraph 288  
Paragraph 298  
Paragraph 313  
Paragraph 328  
Paragraph 347  
Paragraph 381  
Paragraph 396  
Paragraph 418  
Paragraph 441  
Paragraph 476