



THIRD ITEM ON THE AGENDA

**Reports of the Committee on
Freedom of Association****357th Report of the Committee
on Freedom of Association***Contents*

	<i>Paragraphs</i>
Introduction	1–120
<i>Case No. 2701 (Algeria): Report in which the Committee requests to be kept informed of developments</i>	
Complaint against the Government of Algeria presented by the National Union of Vocational Training Workers (SNTFP)	121–142
The Committee's conclusions	133–141
The Committee's recommendation	142
<i>Case No. 2702 (Argentina): Interim report</i>	
Complaint against the Government of Argentina presented by the Congress of Argentine Workers (CTA)	143–164
The Committee's conclusions	160–163
The Committee's recommendations	164
<i>Case No. 2698 (Australia): Report in which the Committee requests to be kept informed of developments</i>	
Complaint against the Government of Australia presented by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)	165–229
The Committee's conclusions	213–228
The Committee's recommendations	229

Case No. 2722 (Botswana): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Botswana presented by Education International (EI) and the Botswana Teachers' Union (BTU) supported by the International Trade Union Confederation (ITUC).....	230–265
The Committee's conclusions	256–264

The Committee's recommendations.....	265
--------------------------------------	-----

Case No. 2522 (Colombia): Report in which the Committee requests to be kept informed of developments

Complaints against the Government of Colombia presented by the National Union of State Employees of Colombia (UTRADEC, formerly UNETE), the Joint Union of Workers in Decentralized Institutions of the Municipality of Buenaventura (SINTEDMUNICIPIO), the Union of Workers of the Municipality of Buenaventura, the General Confederation of Labour (CGT), the Union of Labour Inspectors and Public Employees of the Ministry of Social Protection (SINFUMIPROS) and the Association of Public Servants of the Ministry of Defence and the Health Service Institutions of the Armed Forces and the National Police (ASEMIL)	266–282
The Committee's conclusions	277–281

The Committee's recommendations.....	282
--------------------------------------	-----

Case No. 2676 (Colombia): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Colombia presented by the Colombian Trade Union Association of Road Transport Workers (ASCOTRACOL)	283–300
The Committee's conclusions	296–299

The Committee's recommendations.....	300
--------------------------------------	-----

Case No. 2719 (Colombia): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Colombia presented by the National Union of Food Industry Workers (SINALTRAINAL)	301–345
The Committee's conclusions	330–344

The Committee's recommendations.....	345
--------------------------------------	-----

Case No. 2720 (Colombia): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Colombia presented by the General Confederation of Labour (CGT)	346–362
The Committee's conclusions	357–361

The Committee's recommendation	362
--------------------------------------	-----

Case No. 2731 (Colombia): Definitive report

Complaint against the Government of Colombia presented by the National Union of State Public Servants (SINTRAESTATALES)	363–372
The Committee’s conclusions	369–371

The Committee’s recommendation	372
--------------------------------------	-----

Case No. 2707 (Republic of Korea): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU), and its affiliate, the Korean Professors Trade Union (KPU)	373–400
The Committee’s conclusions	392–399

The Committee’s recommendations	400
---------------------------------------	-----

Case No. 2728 (Costa Rica): Definitive report

Complaint against the Government of Costa Rica presented by the Industrial Trade Union of Agricultural Workers, Cattle Ranchers and Other Workers of Heredia (SITAGAH)	401–414
The Committee’s conclusions	411–413

The Committee’s recommendation	414
--------------------------------------	-----

Case No. 2755 (Ecuador): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Ecuador presented by the National Union of Educators (UNE) and Education International (EI)	415–429
The Committee’s conclusions	426–428

The Committee’s recommendation	429
--------------------------------------	-----

Case No. 2683 (United States): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of the United States presented by the Association of Flight Attendants – Communications Workers of America (AFA–CWA) and the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO)	430–590
The Committee’s conclusions	575–589

The Committee’s recommendations	590
---------------------------------------	-----

Case No. 2516 (Ethiopia): Interim report

Complaint against the Government of Ethiopia presented by the Ethiopian Teachers’ Association (ETA), Education International (EI) and the International Trade Union Confederation (ITUC)	591–628
The Committee’s conclusions	615–627

The Committee’s recommendations	628
---------------------------------------	-----

Case No. 2678 (Georgia): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Georgia presented by the Georgian Trade Unions Confederation (GTUC) and supported by Education International (EI) 629–660

The Committee's conclusions 651–659

The Committee's recommendations 660

Case No. 2361 (Guatemala): Interim report

Complaints against the Government of Guatemala presented by the Union of Workers of the Chinautla Municipal Authority (SITRAMUNICH), the National Federation of Trade Unions of State Employees of Guatemala (FENASTEG), the Union of Workers of the Directorate General for Migration (STDGM) and the Union of Workers of the National Civil Service Office (SONSEC)..... 661–676

The Committee's conclusions 668–675

The Committee's recommendations 676

Case No. 2508 (Islamic Republic of Iran): Interim report

Complaint against the Government of the Islamic Republic of Iran presented by the International Trade Union Confederation (ITUC) and the International Transport Workers' Federation (ITF) 677–692

The Committee's conclusions 683–691

The Committee's recommendations 692

Case No. 2567 (Islamic Republic of Iran): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of the Islamic Republic of Iran presented by the International Organisation of Employers (IOE) 693–708

The Committee's conclusions 700–707

The Committee's recommendations 708

Cases Nos 2177 and 2183 (Japan): Interim report

Complaints against the Government of Japan presented by the Japanese Trade Union Confederation (JTUC–RENGO) and the National Confederation of Trade Unions (ZENROREN)..... 709–730

The Committee's conclusions 724–729

The Committee's recommendations 730

Case No. 2679 (Mexico): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Mexico presented by the Union of General Insurance Sales Agents in the State of Jalisco (SAVSGEJ) supported by the National Workers' Union (UNT) 731–758

The Committee's conclusions 753–757

The Committee's recommendations 758

Case No. 2638 (Peru): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Peru presented by the General Confederation of Workers of Peru (CGTP), the National Federation of Miners, Metalworkers and Steelworkers of Peru (FNTMMSP) and the Trade Union of Miners of Shougang Hierro Peru SAA (SOMSHP)	759–801
The Committee's conclusions	790–800

The Committee's recommendations.....	801
--------------------------------------	-----

Case No. 2664 (Peru): Interim report

Complaint against the Government of Peru presented by the National Federation of Miners, Metalworkers and Steelworkers of Peru (FNTMMSP).....	802–815
The Committee's conclusions	810–814

The Committee's recommendations.....	815
--------------------------------------	-----

Case No. 2671 (Peru): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Peru presented by the General Confederation of Workers of Peru (CGTP)	816–835
The Committee's conclusions	829–834

The Committee's recommendations.....	835
--------------------------------------	-----

Case No. 2675 (Peru): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Peru presented by the General Confederation of Workers of Peru (CGTP)	836–875
The Committee's conclusions	871–874

The Committee's recommendation	875
--------------------------------------	-----

Case No. 2687 (Peru): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Peru presented by the Autonomous Confederation of Peruvian Workers (CATP).....	876–892
The Committee's conclusions	888–891

The Committee's recommendation	892
--------------------------------------	-----

Case No. 2688 (Peru): Definitive report

Complaint against the Government of Peru presented by the National Federation of Judicial Employees of Peru (CEN–FNTPJ).....	893–908
The Committee's conclusions	902–907

The Committee's recommendation	908
--------------------------------------	-----

Case No. 2689 (Peru): Definitive report

Complaint against the Government of Peru presented by the Peruvian Unitary Confederation of Workers (CUT)	909–924
The Committee’s conclusions	921–923

The Committee’s recommendation	924
--------------------------------------	-----

Case No. 2690 (Peru): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Peru presented by the Autonomous Confederation of Peruvian Workers (CATP).....	925–948
The Committee’s conclusions	941–947

The Committee’s recommendations.....	948
--------------------------------------	-----

Case No. 2697 (Peru): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Peru presented by the Autonomous Confederation of Peruvian Workers (CATP).....	949–985
The Committee’s conclusions	979–984

The Committee’s recommendations.....	985
--------------------------------------	-----

Case No. 2703 (Peru): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Peru presented by the General Confederation of Workers of Peru (CGTP)	986–1010
The Committee’s conclusions	1005–1009

The Committee’s recommendation	1010
--------------------------------------	------

Case No. 2748 (Poland): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Poland presented by the Independent Self-Governing Trade Union “Solidarnosc” (NSZZ “Solidarnosc”)	1011–1070
The Committee’s conclusions	1052–1069

The Committee’s recommendations.....	1070
--------------------------------------	------

Case No. 2712 (Democratic Republic of the Congo): Interim report

Complaint against the Government of the Democratic Republic of the Congo presented by the Congolese Labour Confederation (CCT).....	1071–1087
The Committee’s conclusions	1077–1086

The Committee’s recommendations.....	1087
--------------------------------------	------

Case No. 2713 (Democratic Republic of the Congo): Interim report

Complaint against the Government of the Democratic Republic of the Congo presented by the National Union of Teachers in Registered Schools (SYNECAT)	1088–1103
The Committee’s conclusions	1095–1102

The Committee’s recommendations.....	1103
--------------------------------------	------

Case No. 2714 (Democratic Republic of the Congo): Interim report

Complaint against the Government of the Democratic Republic of the Congo presented by the Congolese Labour Confederation (CCT).....	1104–1120
The Committee's conclusions	1110–1119

The Committee's recommendations.....	1120
--------------------------------------	------

Case No. 2738 (Russian Federation): Definitive report

Complaint against the Government of the Russian Federation presented by the Russian trade Union Staff (and Students) of Educational and Cultural Institutions, State, Municipal and not-for-profit Organizations, Communal Services and Trade (RPRiU).....	1121–1136
The Committee's conclusions	1132–1135

The Committee's recommendation	1136
--------------------------------------	------

Case No. 2744 (Russian Federation): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of the Russian Federation presented by the Federation of Trade Unions of Russia (FTU/R).....	1137–1158
The Committee's conclusions	1150–1157

The Committee's recommendations.....	1158
--------------------------------------	------

Case No. 2711 (Bolivarian Republic of Venezuela): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of the Bolivarian Republic of Venezuela presented by the National Press Trade Union (SNTP).....	1159–1189
The Committee's conclusions	1178–1188

The Committee's recommendations.....	1189
--------------------------------------	------

Case No. 2736 (Bolivarian Republic of Venezuela): Report in which the Committee requests to be kept informed of developments

Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Single Organized National Trade Union of Workers of the Judiciary (SUONTRAJ), supported by Public Services International (PSI).....	1190–1265
The Committee's conclusions	1251–1264

The Committee's recommendations.....	1265
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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 27, 28 May and 4 June 2010, under the chairmanship of Professor Paul van der Heijden.
2. The members of American, Argentinian, Australian, Colombian, Japanese, Mexican and Peruvian nationality were not present during the examination of the cases relating to the United States (Case No. 2683), Argentina (Case No. 2702), Australia (Case No. 2698), Colombia (Cases Nos 2522, 2676, 2719, 2720 and 2731), Japan (Cases Nos 2177 and 2183), Mexico (Case No. 2679), and Peru (Cases Nos 2638, 2664, 2671, 2675, 2687, 2688, 2689, 2690, 2697 and 2703), respectively.

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3. Currently, there are 126 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 39 cases on the merits, reaching definitive conclusions in 29 cases and interim conclusions in 10 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 2508 (Islamic Republic of Iran), 2516 (Ethiopia), 2567 (Islamic Republic of Iran), 2664 (Peru) and 2712 (Democratic Republic of the Congo) because of the extreme seriousness and urgency of the matters dealt with therein.

Urgent appeals

5. As regards Cases Nos 2602 (Republic of Korea), 2620 (Republic of Korea), 2646 (Brazil), 2648 (Paraguay), 2660 (Argentina), 2661 (Peru), 2715 (Democratic Republic of the Congo), 2729 (Portugal), 2730 (Colombia), 2732 (Argentina), 2734 (Mexico) and 2740 (Iraq), the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

New cases

6. The Committee adjourned until its next meeting the examination of the following cases: Nos 2769 (El Salvador), 2770 (Chile), 2771 (Peru), 2772 (Cameroon), 2773 (Brazil), 2774 (Mexico), 2775 (Hungary), 2776 (Argentina), 2777 (Hungary) and 2778 (Costa Rica), 2779 (Uruguay), 2780 (Ireland), 2781 (El Salvador), 2782 (El Salvador), 2783 (Cambodia), 2784 (Argentina), 2785 (Spain), 2786 (Dominican Republic) and 2787

(Chile) since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

Observations requested from governments

7. The Committee is still awaiting observations or information from the governments concerned in the following cases: 2203 (Guatemala), 2241 (Guatemala), 2445 (Guatemala), 2450 (Djibouti), 2528 (Philippines), 2533 (Peru), 2571 (El Salvador), 2609 (Guatemala), 2673 (Guatemala), 2708 (Guatemala), 2709 (Guatemala), 2717 (Malaysia), 2741 (United States), 2743 (Argentina); 2745 (Philippines), 2746 (Costa Rica), 2747 (Islamic Republic of Iran), 2749 (France), 2750 (France), 2752 (Montenegro), 2753 (Djibouti), 2754 (Indonesia), 2757 (Peru), 2758 (Russian Federation), 2761 (Colombia), 2762 (Nicaragua), 2764 (El Salvador), 2765 (Bangladesh), 2766 (Mexico), 2767 (Costa Rica) and 2768 (Guatemala).

Partial information received from governments

8. In Cases Nos 2265 (Switzerland), 2318 (Cambodia), 2341 (Guatemala), 2522 (Colombia), 2576 (Panama), 2594 (Peru), 2613 (Nicaragua), 2639 (Peru), 2644 (Colombia), 2655 (Cambodia), 2684 (Ecuador), 2704 (Canada), 2706 (Panama), 2710 (Colombia), 2716 (Philippines), 2723 (Fiji), 2725 (Argentina), 2733 (Albania), 2735 (Indonesia), 2756 (Mali) and 2760 (Thailand), the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

Observations received from governments

9. As regards Cases Nos 2254 (Bolivarian Republic of Venezuela), 2422 (Bolivarian Republic of Venezuela), 2576 (Panama), 2674 (Bolivarian Republic of Venezuela), 2724 (Peru), 2726 (Argentina), 2727 (Bolivarian Republic of Venezuela), 2737 (Indonesia), 2739 (Brazil), 2742 (Plurinational State of Bolivia), 2751 (Panama), 2759 (Spain) and 2763 (Bolivarian Republic of Venezuela), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

Article 26 complaints

10. The Committee is awaiting the observations of the Government of Belarus in respect of its recommendations relating to the measures taken to implement the recommendations of the Commission of Inquiry.
11. As regards the article 26 complaint against the Government of the Bolivarian Republic of Venezuela, the Committee recalls its recommendation for a direct contacts mission to the country in order to obtain an objective assessment of the actual situation.

Admissibility of a complaint

12. As regards Case No. 2694 (Mexico), the Committee has considered that the complaint is admissible. In order for it to examine the case in full knowledge of the facts, the Committee requests the complainant organizations to provide concrete and detailed

information and, with respect to the legislative aspects referred to, to specify the provisions which violate freedom of association and the manner in which they do so.

13. Furthermore, the Committee examined the admissibility of a communication of the Mexican Electricians Union (SME) dated 26 November 2009 and, before reaching a decision in this regard, requests the organization to further clarify its allegations, indicating specifically the manner in which the principles of freedom of association and collective bargaining are being breached.

Transmission of cases to the Committee of Experts

14. The Committee draws the legislative aspects of the following cases to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Australia (Case No. 2698), Canada (Case No. 2173), Ethiopia (Case No. 2516), Japan (Cases Nos 2177 and 2183) and Peru (Case No. 2690).

Procedural questions

15. Following numerous discussions throughout the last few years on the Committee's methods of work, its effectiveness and visibility, the Committee held a special session to begin its review of some aspects of its procedure and to reflect on the most effective manner of communicating with the parties to complaints. At this session, the Committee first focused on the manner in which it could ensure that it had the most complete and relevant information available to it from all those affected by the complaint. While recalling that it is the responsibility of governments to ensure respect for the principles of freedom of association and that complaints can only be brought against governments, the Committee observed the importance of having available to it the views of enterprises where complaints also concern them. The Committee approved the steps taken on a trial basis when it reviewed its procedure in March 2002 (see 327th Report, para. 26) which allowed the Office to specifically ask governments to request information from the employers' organizations concerned so that it might also have the views of the enterprise in question. In addition, the Committee underlined the need to receive the most complete information from the complainants and suggested that the Office should specify, where appropriate, the further information needed. The Committee thought it might be helpful in this regard to produce an easy-to-use brochure or guidelines for ILO constituents so that all interested parties are informed of the most effective way of engaging in the Committee's procedures.
16. The Committee also looked at the question of the use of available national mechanisms and procedures in relation to its own examination of complaints. In this regard, the Committee concluded that paragraphs 28–30 of its current procedures for the examination of complaints alleging violations of freedom of association provided it with the appropriate amount of flexibility and good judgement to be borne in mind in such cases. There were many different scenarios encountered in this regard and the Committee felt that it should continue to address such situations on a case-by-case basis. It considered that information on the use of national procedures would clearly assist it in its analysis. The Committee would be continuing its discussions on other aspects of its procedure, its visibility and its impact at its meeting in November 2010 and report back to the Governing Body accordingly.

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

Case No. 2382 (Cameroon)

17. At its last examination of this case, during its June 2009 meeting [see 354th Report, paras 19 to 34], the Committee recalled once again the need for the Government to conduct an inquiry without delay into the conditions surrounding the detention of Mr Joseph Ze, General Secretary of the Single National Union of Teachers and Professors in the Teachers Training Faculty (SNUIPEN), on 16 April 2004, taking into account the serious allegations of torture and extortion of which Mr Ze is said to have been the victim when in custody. The Committee also invited the Government or the complainant organization to keep it informed of any possible appeal before a competent court concerning the legality of calling a second SNUIPEN congress on 4 August 2004, as well as of any court rulings handed down in this case.
18. In a communication dated 2 September 2009, the complainant claims that the Government is continuing to disregard the Committee's recommendations and that Mr Ze's salary payments remain suspended for the eighth consecutive month, a situation which has adverse consequences for his private life especially just before the end of the school holiday.
19. In a communication dated 12 October 2009, the Government provided some observations. First, the Government considers that it is not its responsibility to hold an inquiry into Mr Ze's detention because this is a matter of general law. The Government recalls that Mr Ze was the subject of an inquiry for financial irregularities, and that he was questioned in connection with suspected offences under the Code of Criminal Investigations (since then repealed by the new Code of Criminal Procedure). The Government indicates that, if there has in fact been abuse of authority and torture, the victim is able to seek redress before the courts. Lastly, recalling that with criminal legislation as it stands no one may be held in custody without a hearing, the Government states that there should be a preliminary inquiry dossier, which Mr Ze appears to be disregarding for the sake of advancing his own cause.
20. As regards the suspension of Mr Ze's salary payments, the Government states that this will cease once he takes appropriate action, namely by returning to his post and obtaining confirmation of his presence from the competent authority, applying for resumption of salary, and formally and regularly requesting release from normal work obligations where his status as an elected union official does not automatically entail such a discharge.
21. The Government also reiterates that it has always refrained from interfering in trade union activities and considers that the allegations made against it have resulted from the bad faith of union officials who lack any legitimacy from their own union. Lastly, the Government states that it will communicate any court ruling handed down in the case to the Committee.
22. In a communication dated 24 February 2010, the Government states that it has no new information on the case.
23. *The Committee notes the information provided by the complainant organization and the Government's response to certain points. The Committee recalls that the present case, which it has been examining since 2005, concerns the arrest, detention and interrogation of the General Secretary of the SNUIPEN, Mr Joseph Ze, and interference by the authorities in an internal union dispute.*

24. *As regards the recommendations which it has been making since 2005 regarding an inquiry by the Secretary of State for Defence into the events surrounding the interrogation and detention of Mr Ze from 16 April 2004, the Committee once again regrets the absence of information from the Government in this regard. The Committee notes with concern the Government's statement to the effect that it is not responsible for holding an inquiry because the allegations are matters of general law that, if there has in fact been abuse of authority and torture, the victim is able to seek redress before the courts, and that, with legislation as it now stands, there should exist a preliminary inquiry dossier which the complainant appears to be disregarding in the interests of furthering its own cause. The Committee wishes to recall that, in a previous examination of the case, it had observed that Mr Ze was questioned by the police, kept in custody and was brutally and summarily interrogated, without a court having had the opportunity to give a ruling as to the accusations brought against him. Furthermore, the Government had acknowledged that what it referred to as a "procedure to recover" these funds had entailed the complainant being taken into custody illegally. The Committee had also noted that one of the officers involved in the detention (Captain Mengfo Fai) had been suspended pending the conclusions of an investigation by the Secretary of State for Defence into the conditions of detention of Mr Ze. Lastly, the Committee, noting that certain police officers had effectively taken the side of the dissident faction of SNUIPEN and, following pressure during the interrogations and the detentions, had forced Mr Ze to release funds belonging to the union in order to give them to the dissidents, had indicated that such action was tantamount to seizure and confiscation of union funds, without any court ruling, to profit a third party [see 338th Report, paras 528, 530 and 531].*
25. *The Committee recalls that it has since that time been requesting information on the outcome of the inquiry by the Secretary of State for Defence because, in the light of the serious allegations concerning acts of torture and extortion of which Mr Ze is said to have been the victim, such an inquiry would make it possible to ascertain the facts and responsibilities, punish those responsible, and above all prevent any future recurrence of such acts. The Committee is surprised at the Government's most recent and somewhat terse reply in this regard, and recalls that the Government had itself acknowledged that abuse had occurred. In this regard, the Committee emphasizes that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected. In the event of assaults on the physical or moral integrity of individuals, the Committee has considered that an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. The absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights. [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 44, 50 and 52]. Consequently, the Committee reiterates yet again its request for information on the outcome of any inquiry by the Secretary of State for Defence into the conditions surrounding the detention of Mr Ze in April 2004 and, if such an inquiry has not already been carried out, the Committee expects that the Government will take the necessary steps to carry out such an inquiry into the complainant organization's allegations in this regard, in particular in the light of what it refers to as the existing preliminary inquiry dossier on the detention.*
26. *The Committee notes with regret that the Government provides no information on the complainant's allegations concerning interrogations of Mr Ze by the police in March 2007 and March 2008 and his detention from 17 to 24 March 2008, without any hearing. The Committee urges the Government to provide its observations in this regard.*

27. *As regards the allegations concerning the suspension of Mr Ze's salary on the grounds of his periodic absences from work, the Committee recalls that it had requested the Government to examine without delay, in light of the underlying facts, the possibility of releasing Mr Ze from work for the purpose of carrying on his trade union duties, if necessary explaining to Mr Ze the procedures for obtaining such a discharge. The Committee notes that the Government in its reply confines itself to stating that the suspension in the payment of salary will cease as soon as the person concerned takes appropriate action by returning to work and obtaining confirmation of his presence from the competent authority, applying for a resumption of salary payments, and formally and regularly requesting release from his normal work duties where his union office does not automatically allow for such a dispensation. The Committee requests the Government and the complainant to indicate whether Mr Ze has returned to his post and has engaged in the established procedure for requesting release from work and, if so, whether the suspension of salary payments has been ended and the release from normal duties has been granted.*
28. *The Committee has taken note of the Government's statement to the effect that it has always refrained from any interference in union activities, and the accusations made against it reflect the bad faith of union officials lacking legitimacy in their own union. Recalling the background to this case, in which it noted that certain police officers took up the cause of one faction in SNUIPEN, and the allegations that the Government clearly favoured one faction of SNUIPEN in the media, the Committee trusts that the Government will, as it has claimed, maintain a position of strict neutrality with regard to internal union disputes, and in particular within SNUIPEN.*
29. *Lastly, the Committee again invites the Government and the complainant to keep it informed of any proceedings before the competent judicial authorities that would allow to clarify the situation with regard to the legitimate representation of SNUIPEN, of any definitive ruling handed down in this respect, and of any other mechanisms invoked by the parties to resolve the dispute.*

Case No. 2173 (Canada)

30. The Committee last examined this case, which concerns violations of freedom of association principles on collective bargaining in respect of public employees through several pieces of legislation in the education sector (Bills Nos 15, 18, 27 and 28), at its June 2009 meeting [see 354th Report, paras 35–46]. The Committee recalls that it had previously noted measures undertaken by the Government of British Columbia to support and facilitate the bargaining process between teachers and school employers. In particular, it noted the appointment of an Industrial Inquiry Commission to make recommendations on the issue, expressed the hope that the final report of the Commission would prove helpful in further ameliorating the collective bargaining process and requested the Government to keep it informed of the implementation of the report. The Committee also expressed the hope that the settlement reached in the health-care sector, following a Supreme Court of Canada decision dated 8 June 2007 (*Health Services and Support – Facilities Bargaining Association v. British Columbia*, 2007 SCC27), would serve as an inspiration for the settlement of grievances prevailing in the education sector between the Government of the Province of British Columbia and the unions concerned with regard to the law in force (Skills Development and Labour Statutes Amendment Act and the Education Services Collective Agreement Act).
31. In a communication dated 8 March 2010, the Government sent information on the measures taken to give effect to the Committee's recommendations. In this regard, the Government reiterates that various actions undertaken which were responsive to the Committee's recommendation included:

- the appointment of a Commission which helped the collective bargaining of a five-year collective agreement effective 1 July 2006;
 - the establishment of a learning round table to provide a forum for education partners (including the complainant organization) to discuss critical issues related to conditions in the public school system; and
 - the passage of the Education (Learning Enhancement) Statutes Amendment Act (Bill No. 33) establishing new class size limits, accountability measures and requirements for consulting parents and teachers on class size and composition.
- 32.** With regard to the Committee's recommendation that the provisions of the Skills Development and Labour Statutes Amendment Act that make education an essential service be repealed, the Government indicates that the provisions do not take away the right of teachers or other employees in the education sector to strike or engage in other job action as part of the collective bargaining process, and that decisions on essential services levels take place at the Labour Relations Board which consults with workplace parties in setting these levels, taking into consideration a variety of factors including the duration of the job action.
- 33.** *The Committee takes note of the reply of the Government which, for a part, merely repeats its previous report. In its latest reply, the Government underlines measures undertaken up to 2006 to support and facilitate the bargaining process between teachers and school employers. The Committee wishes to recall that in its previous recommendation it referred to the final report (namely the Vince Ready Report) issued by the Industrial Inquiry Commission in February 2007 and requested to be kept informed of the implementation of the said report. The Committee once again requests the Government to keep it informed of any measures taken to implement the final report of the Industrial Inquiry Commission, in particular in relation to steps to be taken prior to the expiry of the 2006 collective agreement.*
- 34.** *The Committee takes due note of the indication of the Government according to which the provisions of the Skills Development and Labour Statutes Amendment Act that make education an essential service do not take away the right of teachers or other employees in the education sector to strike or engage in other job action as part of the collective bargaining process and observes that this matter is being addressed by the Committee of Experts on the Application of Conventions and Recommendations.*

Case No. 2356 (Colombia)

- 35.** The Committee last examined this case at its November 2009 meeting [see 355th Report, paras 401–432]. On that occasion, the Committee formulated the following conclusions:
- (a) With regard to the case concerning the lifting of the trade union immunity of Mr Pedro Sánchez Romero as part of the process of restructuring SENA, the Committee requests the Government to inform it of the final outcome of the appeal against the declaration of the time bar brought before the High Court of Cartagena District.
 - (b) With regard to the allegations concerning SENA's refusal to bargain collectively with SINDESENA, the Committee notes with interest that Decree No. 535 concerning section 416 of the Labour Code was adopted on 24 February 2009, setting out the procedure to be followed with regard to collective bargaining in the public sector and requests the Government to take the necessary measures to ensure that the trade union organization is able to bargain collectively within SENA.
 - (c) With regard to the allegations relating to the disciplinary proceedings under way, initiated by SENA with regard to Ms María Inés Amézquita, Mr Jesús Horacio Sánchez,

Mr Carlos Arturo Rubio and Mr Gustavo Gallego, the Committee expects that the trade union rights of those concerned will be fully respected, and that these proceedings will be concluded rapidly. The Committee requests the Government to keep it informed in this regard.

- (d) With regard to the declaration of illegality by the administrative authority concerning a permanent assembly held by SINTRAEMCALI within EMCALI, which led to the dismissal of 45 trade union members and six trade union leaders, and taking into account that: (1) Decision No. 1696 of 2004, which declared the permanent assembly illegal, and under which the 45 trade union members and six union leaders were dismissed, was declared null and void by the Council of State; (2) the appeal for clarification against the Council's decision was rejected (even though the appeal filed by the enterprise is still pending); (3) there are no criminal charges of any kind against the trade unionists for violent acts; and (4) more than five years have passed since the events occurred, the Committee requests the Government to consider taking the necessary measures to ensure the reinstatement of the 45 trade union members and six union leaders who were dismissed, until the ordinary judicial authority pronounces definitive rulings. The Committee requests the Government to keep it informed in this regard.
- (e) With regard to the launch of 462 disciplinary proceedings against EMCALI workers as a result of the declaration of illegality concerning the permanent assembly of 2004, and the pressure placed on workers not to discuss trade union issues under threat of dismissal, the Committee recalls that the declaration of illegality concerning the permanent assembly (Decision No. 1696) was declared null and void by the Council of State and requests the Government to send a copy of the Attorney-General's report, according to which the proceedings in question were not initiated and the enterprise allows the trade union's officials and members to fully exercise their trade union rights.

36. In a communication dated 3 March 2010, the Government states that as regards the lifting of the trade union immunity of Mr Pedro Sánchez Romero as part of the process of restructuring SENA, the High Court of Cartagena (Fourth Labour Chamber) overturned the ruling of the lower court, according to which the time limit allowed for seeking the lifting of trade union immunity had expired, thereby authorizing the measure in question and allowing SENA to end its legal relationship with Mr Romero. *The Committee notes this information.*

37. As regards SENA's alleged refusal to bargain collectively, the Government states that under the terms of section 416 of the Substantive Labour Code, implemented through Decree No. 535 of 2009, SINDESENA presented a list of demands on which negotiations were concluded successfully on 15 December 2009, thereby establishing improved conditions of employment and better relations between the management of SENA and its public employees. *The Committee notes this information with interest.*

38. As regards the disciplinary proceedings against Ms María Inés Amézquita, Mr Jesús Horacio Sánchez, Mr Carlos Arturo Rubio and Mr Gustavo Gallego, which were, according to the allegations, part of a policy of repression at a number of regional departments, the Government states that an official order was given on 26 March 2009 for the definitive shelving of the investigation regarding the public employees in question. *The Committee notes this information.*

39. *Lastly, the Committee notes that the Government has not sent any information on the Committee's previous recommendations (d) and (e), and requests it to do so without delay.*

Case No. 2625 (Ecuador)

40. The Committee last examined the substance of this case at its March 2009 meeting, and on that occasion requested the Government to keep it informed of the outcome of the judicial proceedings relating to the dismissal of the members of the National Federation of Judicial

Associations of Ecuador (FENAJE): Luis Hernán Muñoz Pasquel, Girard David Vernaza Arroyo, Milton Pazmiño Soria, Josefa Clementina Mendoza Zambrano, Jaime Fabián Pérez Sánchez and Alba Rosa Quinteros Campaña. It also requested the Government to keep it informed of the outcome of the appeal lodged by the FENAJE official Girard David Vernaza Arroyo and former union president Luis Hernán Muñoz Pasquel in the context of the criminal proceedings under way against them and to inform it whether they had been placed in custody, and trusted that the judicial authority would issue a ruling as soon as possible [see 353rd Report, para. 967].

41. In a communication dated 12 November 2009, the Government reports that the Constitutional Court rejected the application for constitutional protection (*amparo*) made by Girard David Vernaza Arroyo and others against the Supreme Court of Justice ruling relating to their dismissal (the Government provides a copy of the ruling in question). According to the Government's information, the criminal proceedings against Luis Muñoz Pasquel and Girard Vernaza Arroyo have still not been concluded.
42. *The Committee notes this information, and requests the Government to communicate the result of the criminal proceedings under way against Luis Muñoz Pasquel and Girard Vernaza Arroyo.*

Case No. 2390 (Guatemala)

43. At its November 2008 meeting the Committee made the following recommendations concerning this case [see 351st Report, paras 78–80].

The Committee observes that the two Horticultura de Salamá trade unionists whose reinstatement was ordered by the courts are currently abroad. The Committee requests the complainant organization to inform these trade unionists of the court decision concerning their reinstatement so that they can act on it as they see fit.

As to the allegations concerning dismissals and anti-union acts by the NB Guatemala company, the Committee notes the decision of the Human Rights Procurator in which he considers that no violation of freedom of association has taken place. The Committee invites the complainant organization to provide its comments in that regard if it so wishes.

Lastly, the Committee regrets that the Government has not sent the information requested on the allegations concerning INTECAP (acts of interference, pressure and threats against workers to force them to leave the trade union). Therefore, the Committee reiterates its earlier recommendation, and again requests the Government to take the necessary measures to ensure that an independent inquiry is carried out into the alleged facts and to keep it informed in that regard, as well as of the result of the tripartite committee's attempts at conciliation.

44. The Committee noted the Government's information that it had submitted the pending issues to the Tripartite Committee on International Labour Affairs in order to find a solution, that several meetings had already been held and that information would be provided on the agreements reached by the parties. The Committee requested the Government to keep it informed of developments, pointed out that the pending issues dated back to 2004 and therefore expected that they would soon be resolved.
45. In its communications of 13 November 2009 and 26 March 2010, the Government says that the two Horticultura de Salamá trade unionists (María Gilberto Garrido and María García Garrido) have withdrawn their legal request for reinstatement, and that the workers' union of INTECAP has abandoned the complaint filed alleging interference, pressure and threats intended to force the workers to leave the trade union, as the change of management of INTECAP on 1 April 2009 has resulted in the total elimination of the causes that gave rise to the allegations.

46. *The Committee notes this information. The Committee further observes that, despite having been invited to do so, the complainant organization has not commented on the decision of the Human Rights Procurator stating that no violation of freedom of association has taken place, and therefore considers that it should not pursue its examination of this matter.*

Case No. 2006 (Pakistan)

47. The Committee last examined this case, which concerns a ban on trade union rights and activities at the Karachi Electric Company Ltd Supply Corporation (KESC), at its March 2009 meeting [see 353rd Report, paras 161–164]. On that occasion, it urged the Government, which is also one of the KESC shareholders, to ensure that a referendum for determining the collective bargaining agent (CBA) can take place in the KESC without further delay and to keep it informed in this respect.
48. In a communication of 4 March 2010, the Government indicates that the referendum for selecting the CBA had been held, in accordance with the directive of the Sindh High Court, and that the KESC Labour Union was declared the collective bargaining agent.
49. *The Committee notes the information respecting the selection of the KESC Labour Union as collective bargaining agent and invites the complainant organizations to submit, if they so wish, their comments thereon.*

Case No. 2096 (Pakistan)

50. The Committee last examined this case at its November 2009 meeting [see 355th Report, paras 103–105]. On that occasion the Committee, while noting with interest the Government's statement concerning the amendment of the Banking Companies Act, regretted that the Government had failed to submit its comments with respect to the other outstanding issues. It once again requested the Government to provide a copy of the report of the inquiry which revealed that none of the ex-employees of the United Bank Limited (UBL) had been dismissed for anti-union motives, as well as to specify the members of the inquiry and indicate whether the UBL employees' trade union, whose members had been dismissed, was appropriately consulted.
51. In a communication dated 11 November 2009, the UBL Employees Union states that the Government has not taken steps to resolve the present case: no measures have been taken in respect of the dismissed trade union leaders in UBL or the reform of the Banking Companies Act.
52. In a communication of 4 March 2010, the Government repeats its previous indication that a bill to repeal section 27-B of the Banking Companies Act had been moved to the Senate. In a communication of 8 April 2010, the Government attaches a copy of the draft Banking Companies (Amendment) Bill.
53. *The Committee notes the information provided by the UBL Employees Union concerning the lack of progress in resolving the present case. In this regard, the Committee regrets to note that the Government provides no information with respect to its previous recommendations, apart from repeating its previous indication that the draft Banking Companies (Amendment) Bill, which repeals section 27-B of the Banking Companies Act, had been moved to the Senate. The Committee urges the Government to give effect without delay to its longstanding recommendations with respect to the repeal of section 27-B of the Banking Companies Act and expects that the Banking Companies (Amendment) Bill will be adopted without delay. It also once again urges the Government to provide a copy of the report of the inquiry which revealed that none of the ex-employees of the UBL had been*

dismissed for anti-union motives, as well as to specify the members of the inquiry and indicate whether the UBL employees' trade union, whose members had been dismissed, was appropriately consulted.

Case No. 2169 (Pakistan)

54. The Committee last examined this case, which concerns allegations of illegal detention of trade union leaders, violations of the right to collective bargaining and acts of intimidation, harassment and anti-union dismissals in the Pearl Continental Hotels, at its meeting in March 2009 [see 353rd Report, paras 170–175]. On that occasion, the Committee requested the Government to keep it informed of the progress of all judicial proceedings and to transmit the judgements on the status of collective bargaining agents (CBAs) as soon as they were handed down. The Committee further requested the Government to report on the outcome of an independent inquiry into the alleged beatings of Messrs Aurangzeg and Hidayatullah on 6 July 2002 at the police station. In this respect, the Committee requested the Government to ensure that appropriate measures, including compensation for damages suffered, sanctioning those responsible and appropriate instructions to the police forces, are taken to guarantee that no detainee is subjected to such treatment in the future. The Committee further requested the Government to report on the outcome of the investigation of the anti-union dismissals at the hotel and, if it had been found that there has been anti-union discrimination, to ensure that the workers concerned are reinstated in their posts, without loss of pay and, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.
55. In a communication dated 7 April 2009, the complainant, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), recalls that this case was first examined by the Committee on Freedom of Association in June 2003 and that one of the key elements of the alleged acts of illegal detention, intimidation, harassment and anti-union dismissals was the arrest and detention of trade union officers following an electrical fire at the hotel on 6 January 2002. Although the hotel's original police complaint of 6 January 2002 was issued against "unknown persons", 11 union officers and members were immediately arrested and illegally detained. When no evidence could be found linking them to the fire, a group of trade unionists remained in indefinite custody while police attempted to link them with other ongoing criminal cases involving burglary and murder. When this failed, three office bearers (Ghulam Mehboob, Basheer Hussain and Aurangzeb) were specifically charged with criminal involvement in the fire. They were dismissed from the hotel due to alleged absenteeism while in custody, and only released on bail on 21 March. Following their illegal detention and dismissal, these trade union officers still had to face prosecution for their alleged acts. After seven years of vilification and false accusations, the accused union officers have been definitively acquitted of involvement in the fire. On 9 February 2009, the District Judge of the South VI District Court issued a written verdict, following an earlier announcement in court, declaring himself "of the considered view that the prosecution has miserably failed to prove its case" against the two men, observing that "doubt prevails at every nook and corner of the case".
56. The complainant recalls that the Pearl Continental Hotel Workers' Union (PCHWU), a member of the Pearl Continental Hotel Workers' Federation, was established in 1970 and continuously enjoyed the recognized CBA status until the hotel management unilaterally terminated this status following the fire in January 2002. Another union existed at the hotel, the Pearl Continental Hotel Employees Union, but never challenged the CBA status of the PCHWU before December 2002. On 10 October 2003, the Labour Court upheld the CBA status of the PCHWU. On 18 May 2006, the Labour Court dismissed the case challenging the union's registration. An appeal of this decision was made by the management before the Sindh High Court, which upheld the Labour Court decision. The

complainant indicates that the CBA status of the PCHWU was also confirmed by the Sindh Director of Labour, but nothing was done to implement this decision – another lapse on the part of the Government with respect to the ILO Convention to which it is a signatory. The IUF further alleges that, in 2004, the management succeeded in registering a dubious, management-dominated organization, the Star Labour Union (SLU), whose registration was challenged in the Sindh High Court. The case is still pending. The SLU has negligible support and membership and has no collective bargaining agreement.

- 57.** Concerning the Government's claim that the management is providing every facility to all its workers' organizations without discrimination and that the hotel fulfils all international obligations, the complainant alleges that the management has consistently used calculated delay tactics in the courts to prolong all legal cases in order to eliminate the PCHWU from the establishment; that the hotel employees have been without a collective bargaining agreement since 2001; that the members and office bearers of the PCHWU are prohibited from using the noticeboard while the SLU is allowed full use of this facility and many other facilities; and that two officers of the PCHWU, President Muhammad Nasir and Social Secretary Muhammad Nawaz have been on forced leave since 2002 and are prohibited from entering the hotel and thus maintaining contact with the members at the workplace. The IUF contends that far from fulfilling its international obligations, the hotel, with the support of the Government, is pursuing a policy of systematic discrimination against the PCHWU and its members.
- 58.** Furthermore, according to the complainant, there has been no independent inquiry into the alleged beating of the union officers by the police on 6 July 2002, nor has there been an official investigation into the anti-union dismissals at the hotel, as called for by the Committee in 2003. Despite the fact that the union has submitted detailed reports to the Labour Directorate of Sindh, these submissions remain without effect. There have been no reinstatements and no compensation for illegal dismissals.
- 59.** With regard to the Government's claim that it is not possible for any authority to intervene in the cases currently pending before courts, the complainant alleges that this misrepresents both the actual state of affairs and the Government's mandate and obligations. According to the complainant, nothing at present prevents reinstatement with full compensation of all illegally dismissed workers, recognition of the PCHWU and the signing of a collective bargaining agreement. It is the responsibility of the Labour Department, particularly in light of the Committee's 2003 recommendations, to actively facilitate a negotiated resolution to this dispute.
- 60.** In the light of the court decision acquitting the union officers, the IUF requests that the Committee requests the Government, as a matter of urgency, to swiftly implement the June 2003 recommendations.
- 61.** *The Committee notes the information provided by the complainant organization in a communication dated 7 April 2009 in which it contends that no measures have been taken by the Government to implement the recommendations of the Committee since the first examination of this case in June 2003. The Committee deeply regrets that no observations have been received from the Government in reply to this communication. The Committee notes with concern that, since the first examination of this case in June 2003, the Government provided no information on the concrete measures taken to implement any of the Committee's recommendations.*
- 62.** *The Committee notes from the IUF's communication that two union officers, Bashir Ussain and Ghulam Mehboob, who were charged with criminal involvement in the fire in January 2002, were acquitted on 9 February 2009. The Committee recalls from its first examination of this case that the trade union leaders were dismissed from the hotel while*

they were in custody on the pretext of their being absent from work. On that occasion, it concluded that the acts of the management, in particular the dismissal of trade union leaders, constituted anti-union discrimination. Welcoming the acquittal of the two trade union leaders, the Committee strongly urges the Government to take the necessary measures to ensure that the trade union leaders in question are reinstated in their jobs without loss of pay. If reinstatement is not possible, the Committee requests the Government to ensure that the workers concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals. The Committee urges the Government to instruct the competent labour authorities to undertake without delay an in-depth investigation into the dismissals of nine other trade unionists in January 2002 and, if it is found that there has been anti-union discrimination, to ensure that the workers concerned are reinstated in their posts without loss of pay. The Committee requests the Government to keep it informed in this respect.

63. With regard to the alleged beatings of Messrs Aurangzeg and Hidayatullah on 6 July 2002 at the police station, the Committee notes that, according to the complainant no independent inquiry has been established by the Government concerning these allegations. The Committee must once again express its deep regret concerning the failure of the Government to conduct independent inquiries in this respect and urges the Government to do so without further delay and to keep it informed of the outcome of this investigation.
64. The Committee notes the information provided by the complainant regarding the actions taken in courts by the hotel management to repeal the CBA status of the PCHWU. In this regard, the Committee notes that the Sindh High Court upheld the judgement of the Labour Court of 18 May 2006, which dismissed the case challenging the union's registration and that on 27 October 2008, the Sindh Director of Labour confirmed the CBA status of the PCHWU. The Committee further notes with concern the complainant's indication that for nine years, hotel employees have been without a collective agreement. The Committee draws the Government's attention to Article 4 of Convention No. 98 according to which measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organisations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee urges the Government to take the necessary measures in order to promote and facilitate collective bargaining at the Pearl Continental Hotel and to keep it informed in this respect. Furthermore, the Committee recalls that employers should recognize, for collective bargaining purposes, the organizations representative of the workers employed by them. The recognition by an employer of the main unions represented in the undertaking, or the most representative of these unions, is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking [see *Digest of decisions and principles of the Freedom of Association Committee*, fourth edition, 1996, paras 952–953]. The Committee urges the Government to take the necessary measures to ensure that the PCHWU is fully recognized as a collective bargaining agent by the management and to keep it informed in this respect.
65. The Committee notes that the complainant organization alleges that the management discriminates the PCHWU and favours the allegedly yellow trade union, the SLU. In particular, according to the IUF, the management gave preferential access to the noticeboard to the SLU and refused entry to the hotel to two officers of the PCHWU. In this regard, the Committee considers that such practices are harmful to the development of normal and healthy labour relations. The respect for the principles of freedom of association requires that employers exercise great restraint in relation to intervention in the internal affairs of trade unions. They should not, for example, do anything which might seem to favour one trade union at the expense of another. Furthermore, the Committee recalls that for the right to organize to be meaningful, the relevant workers' organizations

*should be able to further and defend the interests of their members, by enjoying facilities as may be necessary for the proper exercise of their functions as workers' representatives, including access to the workplace of trade union members [see **Digest**, op. cit., para. 1106]. The Committee requests the Government to inform it of the measures taken in order to ensure that these principles are respected at the Karachi Pearl Continental Hotel.*

- 66.** *More generally, the Committee expresses its concern at the apparent lack of will of the administrative and judicial authorities to ensure that the allegations of violations of fundamental trade union rights are examined promptly and that the decisions taken by the relevant authorities are effectively enforced. The Committee recalls that justice delayed is justice denied and further recalls that it has always attached great importance to the principle of prompt trial in all cases, including in which trade unionists are charged with criminal offences. It further recalls that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest**, op. cit., para. 820]. The Committee requests the Government to take the necessary measures in order to ensure that all allegations of violations of trade union rights are examined in the framework of national procedures which shall be prompt and that administrative and judicial decisions once rendered are implemented without delay. The Committee reminds the Government that it may avail itself of the technical assistance of the Office if it so wishes.*

Follow-up Case No. 2229 (Pakistan)

- 67.** The Committee last examined this case at its June 2009 meeting. On that occasion, the Committee made the following recommendations on the matters still pending [see 354th Report, paras 178–179]:
- (a) The Committee expects that the labour legislation as finally amended will retain the amendments in the IRA 2008 insofar as they reflect the changes previously requested by the Committee in relation to the IRO 2002, and that the Government will otherwise take measures to fully comply with the Committee's other previous requests, so as to ensure that its labour legislation is brought into full conformity with freedom of association principles. The Committee further expects that such measures will be taken in full and frank consultation with the social partners on any questions or proposed legislation affecting trade union rights and to the satisfaction of all parties concerned. The Committee 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 developments in this regard.
 - (b) Regarding the alleged acts of anti-union discrimination against trade union officers of the EOBI Employees' Federation of Pakistan, which date back to August 2003, the Committee deeply regrets that once again the Government has failed to provide its observations thereon as well as on the measures taken to conduct an independent investigation in this respect. The Committee once again recalls 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 [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, para. 817]. The Committee therefore urges the Government to institute an independent inquiry to investigate the allegations of anti-union discrimination at the EOBI, and if the allegations are proven to be true to take the necessary measures to fully redress the acts of anti-union discrimination. The Committee requests the Government to keep it informed of the outcome of this investigation.
- 68.** *The Committee notes the information concerning legislative amendments provided by the Government in its communication dated 4 March 2010, and notes that the Government reiterates the observations it had already transmitted to the Committee in 2009. The*

Committee recalls that the Committee on Freedom of Association had referred the legislative issues to the Committee of Experts on the Application of Conventions and Recommendations, which has dealt with them at its November–December 2009 Session.

- 69.** *On the other hand, the Committee once again expresses its deep regret at the failure of the Government to provide its observations regarding the alleged acts of anti-union discrimination against trade union officers of the EOBI Employees' Federation of Pakistan and to conduct an independent investigation in this respect. The Committee strongly urges the Government to institute an independent inquiry to investigate these allegations, and if the allegations are proven to be true to take the necessary measures to fully redress the acts of anti-union discrimination. The Committee requests to be kept informed of the outcome of this investigation.*

Case No. 2399 (Pakistan)

- 70.** The Committee last examined this case at its March 2009 meeting. The case concerns dismissals, harassment and violence against members of the Liaquat National Hospital Workers' Union (LNHWU). On that occasion, the Committee made the following recommendation on the matters still pending [see 353rd Report, para. 184]:

The Committee reiterates its expectation that the necessary measures have been taken to investigate all allegations of: (1) torture and harassment against trade union members ordered by the management of the Liaquat National Hospital; (2) the abduction, beating and threats carried out against the LNHWU General Secretary, Mr Shahid Iqbal Ahmed, by the police; and (3) the dismissals and suspensions at the hospital. The Committee urges the Government to report on the investigation's outcome and, if the allegations of ill-treatment are confirmed, to prosecute and punish the guilty parties and take all necessary measures in order to prevent the repetition of similar acts. In respect of the dismissals and suspensions, moreover, if it is found that the workers were dismissed for the exercise of their trade union activities, the Committee requests the Government to ensure that they are reinstated in their posts with back pay and, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests the Government to be kept informed of developments in this regard.

- 71.** In its communication dated 4 March 2010, the Government indicates that, according to the report of the inquiry officer, the judicial magistrate had acquitted the concerned office-bearers of the union. The management of Liaquat National Hospital filed an appeal before the High Court, Sindh, against these acquittals, and the acquitted workers also filed suits for damages before the High Court. Both cases were currently sub judice.
- 72.** *The Committee underlines the lack of clarity in the Government's response, which refers, without further elaboration, to a case presently before the High Court on appeal leading to the acquittal of the union officials and an appeal lodged by the management against their acquittal, whereas, according to the pending complainant's allegations, the trade union officials had been dismissed, harassed and tortured.*
- 73.** *Furthermore, the Committee deplores that the Government merely reiterates the observations it had already transmitted to the Committee in 2008, which highlights the Government's failure to take measures to implement the Committee's previous recommendations. Recalling with concern that the present case involves serious allegations of torture, harassment and dismissal of trade unionists, the Committee cannot but reiterate the recommendations it had made earlier. It therefore expects that the necessary measures will be taken to investigate without delay the allegations of: (1) torture and harassment against trade union members ordered by the management of the Liaquat National Hospital; (2) the abduction, beating and threats carried out against the LNHWU General Secretary, Mr Shahid Iqbal Ahmed, by the police; and (3) the dismissals and*

suspensions at the hospital. The Committee urges the Government once again to report on the progress and outcome of such investigation and, if the allegations of ill-treatment are confirmed, to prosecute and punish the guilty parties and take all necessary measures in order to prevent the repetition of similar acts. In respect of the dismissals and suspensions, moreover, if it is found that the workers were dismissed for the exercise of their trade union activities, the Committee again requests the Government to ensure that they are reinstated in their posts with back pay and, if reinstatement is not possible for objective and compelling reasons, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee urges the Government to keep it informed of developments in this regard.

Case No. 2677 (Panama)

74. The Committee last examined this case at its June 2009 meeting [see 354th Report, paras 1019–1036]. On that occasion, on examining allegations regarding the refusal to recognize the legal personality of the National Union of Workers of the University of Panama (SINTUP) it made the following recommendations:
- (a) The Committee expects that the Government will send it the ruling issued by the Supreme Court of Justice with respect to the authorities' refusal to recognize that the complainant trade union has legal personality and expects that the Court will issue its ruling in this regard in the near future.
 - (b) The Committee requests the complainant organization to indicate the reasons why it chose not to establish itself in accordance with the regulations governing the right to organize in the public sector.
75. In its communication dated 27 January 2010, SINTUP refers to the Government's reply concerning the case and specifically to the claims that the union's request was not accepted on the grounds that it was "against the Political Constitution of the Republic and against the law" and that the "documentation submitted in support of the application contains flaws that need to be rectified". SINTUP states that the flaws are not in the documentation submitted, but in outdated regulations contained in the Constitution and the Labour Code, which serve only to deprive public service workers of fundamental human rights, the same rights that both legal instruments clearly recognize for private sector workers, including workers at private universities. According to the complainant organization, this represents a clear violation of the Constitution on the grounds of non-compliance with article 19 which establishes that "there shall be no exemptions or privileges, nor discrimination on the basis of race, birth, disability, social class, sex, religion or political ideas". The regulations cited to deny the legal existence of SINTUP point to the tendentious refusal to recognize as workers all those who work for the State, placing them in a category called "public servants" (Title XI of the Political Constitution) and to the biased and narrow interpretation of what an enterprise is and what it represents. However, the much cited Title XI blatantly contradicts the Constitution itself, where none of the 16 articles of Title III, Chapter 3, referring to work, make reference to so-called public servants, but instead to "any worker in the service of the State or of a public enterprise" (article 65).
76. SINTUP adds the following in respect of the Committee's recommendations: as regards recommendation (a) the Supreme Court of Justice of Panama responded to the *amparo* (protection of constitutional rights) request for constitutional guarantees lodged by the trade union on 2 October 2008 with a statement by the full court bench dated 9 March 2009. In its judgement, as can be seen, it resorts to a technicality, finding a "flaw" in the *amparo* action and questioning a note and a signature. It is clear to SINTUP that there was no intention of considering the substance of the matter.

77. With regard to the Committee's recommendation (b), SINTUP states that it is entirely wrong to conclude that the union should be refused legal recognition as a union because it requests legal personality under the Labour Code and not under provisions contained in the Administrative Career Act. There is no provision in either the single text of the Administrative Career Act of 29 August 2008, nor in Act No. 43 of 30 July 2009 that amends it, that governs "the trade union rights of public servants in autonomous institutions, such as the University of Panama", let alone for all other so-called public servants. Likewise, none of this legislation makes provision for an administrative authority where public service workers can request the registration of a trade union. Consequently, it is impossible to seek to legalize a trade union in Panamanian public institutions through administrative career regulations. The Administrative Career Act grants the right of association, but completely denies the right of public sector workers to establish trade unions. Furthermore, associations of public servants that can be established, can only do so with serious and unfair limitations, including the following: (i) not all workers can belong to them; only permanently appointed public servants, who make up a tiny portion of the government labour force; (ii) the associations' officials are not entitled to immunity from dismissal. This was eliminated in the amendments introduced in Act No. 43 of 30 July 2009; (iii) the number of so-called permanently appointed public servants necessary to form an association was raised from 40 to 50 or more, a figure significantly higher than that required under the Labour Code to establish a trade union; (iv) although the right to strike is established, it is subject to a regulation that has not been established; (v) the right to the collective negotiation of conflicts exists, but not of working conditions. Since the entry into force of Act No. 9 of 20 June 1994 no state institution has negotiated a collective agreement; and (vi) the stability of public servants is extremely precarious and is undermined with every change of Government. Thus, article 21 of Act No. 43 of 30 July 2009 "set aside all the acts of incorporation of permanently appointed public servants issued as from the implementation of Act No. 24 of 2007". This turned several thousand workers who thought they were achieving permanent status in their positions into casual workers.
78. In its communication of 3 March 2010, the Government states that the Supreme Court of Justice ruled on the refusal to grant the complainant trade union legal personality in a decision dated 9 March 2009 in which the *amparo* appeal for protection of constitutional rights lodged by Mr Eliecer Chacón Arias was declared not receivable, on the grounds of procedural irregularity of the appeal. The Government indicates that in this regard the national Government has no direct responsibility for the decision because any request by a workers' social organization must comply with the requirements of the Political Constitution; consequently, public servants are governed by the principle of legality whereby they can only do what they are permitted to do by law. Evidence of this is the fact that in private universities, trade union organizations have been allowed with no qualms as they are private entities, but the same is not true in the public service universities, as is the case of the University of Panama. Lastly, the Government states that it has recently received a copy of a communication dated 27 January 2010 from SINTUP containing additional information in respect of the follow-up to the Committee's recommendations concerning the complaint, and that it will send its observations in due course.
79. *The Committee notes this information. In particular, the Committee notes the complainant organization's explanations as to why it chose not to establish itself in accordance with the regulations governing the right to organize in the public sector. In this respect, while it recalls that workers in public or private universities shall have the right to establish organizations of their own choosing and to join them, and the right to collective bargaining, the Committee requests the Government to communicate its observations with regard to the complainant's allegations and, in particular, with regard to the difficulties and restrictions that are damaging associations of public servants. The Committee emphasizes that whatever the legislation covering the right of association of workers in*

public universities may be, it must fully recognize the rights enshrined in Conventions Nos 87 and 98, and it requests the Government to specify in its reply whether the legislation guarantees those rights, including protection against anti-union discrimination and the right to collective bargaining of workers' organizations in public universities.

Case No. 2642 (Russian Federation)

80. The Committee last examined this case at its November 2009 meeting [see 355th Report, paras 1129–1179] and made the following recommendations:

- (a) The Committee regrets that the Government provided only partial information on the allegations made in this case and urges the Government to be more cooperative in the future.
- (b) The Committee requests the Government to take the necessary measures in order to encourage the enterprise management and the RPD primary trade union to strive reaching an agreement on access to the workplaces, during and outside working hours, without impairing the efficient functioning of the enterprise. It further requests the Government to take the necessary measures in order to ensure that the trade union's occupational health and safety inspectors are granted access to the enterprise in order to exercise their rights to oversee the observance of labour, health and safety legislation, conferred on them by the Law on Trade Unions. The Committee requests the Government to keep it informed in this respect.
- (c) The Committee requests the Government to take the necessary measures in order to ensure that the principle according to which authorities and employers should refrain from any undue interference in trade union internal affairs, including the right to freely elect its representatives, is respected by bodies responsible for granting access to the workplaces to trade union representatives. The Committee requests the Government to keep it informed in this respect.
- (d) The Committee requests the Government to take the necessary measures in order to ensure that the MMTP management provides the RPD primary trade union with all information on social and labour issues affecting its members, pursuant to the national legislation in force. The Committee requests the Government to keep it informed in this respect.
- (e) The Committee requests the Government to take the necessary measures to facilitate finding a mutually acceptable solution on the question of premises to be granted to the RPD primary trade union pursuant to the legislative provisions in force and the principles embodied in the Workers' Representative Recommendation (No. 143). It requests the Government to keep it informed in this respect.
- (f) The Committee requests the Government to ensure respect for the principle of inviolability of trade union premises.
- (g) Noting that due to withdrawal of the check-off facility, the RPD primary trade union has been facing serious financial difficulties, further noting that the case filed in 2006 before the district court is apparently still pending, and recalling that a considerable delay in the administration of justice is tantamount in practice to a denial of justice, the Committee requests the Government to take the necessary measures in order to ensure that the check-off system is restored without delay, pursuant to section 377 of the Labour Code and section 28 of the Law on Trade Unions. The Committee requests the Government to keep it informed in this respect.
- (h) The Committee expects that the Government will take the necessary measures, including through the issuance of relevant instructions to the enterprise management, in order to ensure that the RPD primary trade union can organize its administration and activities for the furtherance and defence of its members without interference by the employer. The Committee requests the Government to keep it informed of the measures taken in this respect.

81. In its communications dated 1 February and 1 March 2010, the Government indicates that on the instructions of the Ministry of Health and Social Development, the Federal Labour and Employment Service and the Murmansk Regional State Labour Inspectorate carried out a supplementary inspection at the enterprise relating to the allegations made in this case.
82. The Government explains that the enterprise is located in the territory of the Murmansk Commercial Sea Port, which is subject to strict security measures. This enterprise operates within a specific legal framework of measures to prevent terrorism and violations of customs legislation. Therefore, the port access is conditional upon obtaining a permit. On 4 July 2006, the issue of refusals to grant permits to the representatives of the trade union was examined by the Leninsky District Court of Murmansk. According to the ruling, in order to prevent unauthorized persons from accessing the port area, the administration of the port is entitled to require organizations to confirm the authority of their representatives who wish to receive permanent permits. The inspection carried out established that to date, the representative of the Russian Trade Union of Dockers (RPD) primary organization did not provide the necessary documentation for the port permits to be issued.
83. With regard to the issue of trade union premises, the Government indicates that in accordance with the 10 July 2006 ruling of the Leninsky District Court of Murmansk and the requirements of current legislation, premises were provided by the employer for the primary union's activities but the Chairperson of the RPD primary organization rejected the offer of premises offered at the Moryak Hotel building, room 919.
84. With regard to the membership dues, the Government indicates that under section 28 of the Law on Trade Unions and section 377 of the Labour Code, if written declarations are submitted by workers who are members of a trade union, employers must withdraw union dues from workers' wages and transfer them to the trade union on a monthly basis free of charge. The procedure for these transfers is set out in collective agreements. Employers cannot withhold transfer of such payments. The Murmansk Regional Arbitration Court examined the action brought by the RPD primary organization against the enterprise concerning the transfer of outstanding trade union dues. It was established that the employer did not deduct trade union dues from the wages of union members during the period in question. Thus, the organization had no right to request the membership dues which were not deducted. The court underlined the fact that the provisions requiring the defendant to fulfil the obligations established in law as a means of defence were not referred to by the plaintiff pursuant to section 12 of the Civil Code. The plaintiff did not file a claim for restoration of circumstances prevailing before the occurrence of the violation. The Murmansk Regional Arbitration Court therefore rejected the claim brought by the RPD primary organization.
85. *The Committee notes the information provided by the Government. With regard to the access to the workplaces by the representatives of the RPD primary trade union (recommendation (b)), the Committee regrets that the Government merely reiterates its observations, which the Committee has previously examined, and fails to provide information on the measure it has taken in order to encourage the enterprise management and the RPD primary trade union to strive to reach an agreement on access to the workplaces, during and outside working hours, without impairing the efficient functioning of the enterprise. The Committee therefore once again requests the Government to indicate the measures it has taken to bring the parties together and encourage them to reach a mutually acceptable solution on the issue of access to the workplaces by the RPD representatives, taking into account the security needs of the port. Furthermore, the Committee once again requests the Government to indicate the measures it has taken to ensure that trade union's occupational health and safety inspectors are granted access to*

the enterprise in order to exercise their rights to oversee the observance of labour, health and safety legislation, conferred to them by the Law on Trade Unions.

86. *On the issue of premises (recommendation (e)), the Committee notes the Government's indication that the employer granted premises situated in a hotel but that the trade union representatives refused to accept it. In this respect, the Committee recalls that it had previously noted the complainant's explanation that the union had turned the offer down because the legislation on fire safety forbids setting up offices and operations in hotel buildings and rooms and because these premises were situated in a distant and not easily accessible area of the city. The Committee once again requests the Government to indicate the measures it has taken in order to facilitate finding a mutually acceptable solution on the question of premises to be granted to the RPD primary trade union.*
87. *With regard to the withdrawal of the check-off facility by the employer (recommendation (g)), the Committee notes that the Government reiterates the information it has previously provided on the 18 July 2006 decision of the Murmansk Regional Arbitration Court. The Committee had previously noted that in August 2006 the complainant filed a lawsuit with the district court requesting it to oblige the enterprise to withdraw and transfer trade union dues. The Committee regrets that no information has been provided by the Government on the outcome of this lawsuit. Recalling that the national legislation requires employers to provide for check-off facilities at their enterprises, the Committee requests the Government to indicate whether the check-off facility was restored at the port and to provide information concerning the case filed in 2006 by the RPD before the district court regarding the withdrawal of the check-off facility.*
88. *The Committee notes with regret that the Government provides no information as to the measures it has taken to ensure that the MMTP management provides the RDP primary trade union with all information on social and labour issues affecting its members and requests the Government to keep it informed in this respect.*

Case No. 2249 (Bolivarian Republic of Venezuela)

89. At its June 2009 meeting, the Committee regretted that, despite the seriousness of the case, the Government had not sent information relating to the recommendations it had made since its March 2007 meeting. It therefore reiterated the recommendations and requested the Government to send the information requested as a matter of urgency. Those recommendations are set out below [see 354th Report, paras 188–195]:
- bearing in mind the importance of due process of law being respected, the Committee trusts that the trade union leader, Carlos Ortega, will be released without delay and requests the Government to send it the decision handed down by the authority hearing the appeal. The Committee also requests the Government to send it a copy of the sentence handed down by the court of first instance (with all the reasons and conclusions therefor) in respect of the trade union leader Carlos Ortega (the Venezuelan Workers' Confederation (CTV) has only sent a copy of the record of the public hearing at which the decision of the court and the sentence were made public);
 - the Committee requests the Government to recognize FEDEUNEP and to take steps to ensure that it is not the object of discrimination in social dialogue and in collective bargaining, particularly in the light of the fact that it is affiliated to the CTV – another organization that has encountered problems of recognition which the Committee has already examined in the context of this case. The Committee requests the Government to keep it informed of any invitation it sends to FEDEUNEP in the context of social dialogue. The Committee recalls the principle that both the government authorities and employers should refrain from any discrimination between trade union organizations, especially as regards recognition of their leaders who seek to perform legitimate trade

union activities [see *Digest of decisions and principles of the Freedom of Association Committee*, fourth edition, 1996, para. 307];

- with regard to the dismissal of over 23,000 workers from the PDVSA and its subsidiaries in 2003 for having taken part in a strike during the national civic work stoppage, the Committee notes the Government’s statements, and specifically that only 10 per cent of the appeals lodged with the labour inspectorate and other judicial authority have not yet been ruled upon. The Committee deeply regrets that the Government has disregarded its recommendation that it enter into negotiations with the most representative workers’ federations in order to find a solution to the dismissals at the PDVSA and its subsidiaries as a result of the organization of or participation in a strike during the national civic work stoppage. The Committee reiterates this recommendation;
- the Committee calls on the Government to take steps to vacate the detention orders against the officials and members of the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL), Horacio Medina, Edgar Quijano, Iván Fernández, Mireya Repanti, Gonzalo Feijoo, Juan Luis Santana and Lino Castillo, and to keep it informed in this respect;
- the Committee considers that the founders and members of UNAPETROL should be reinstated in their jobs since, in addition to the fact that they were participating in a civic work stoppage, they were dismissed while they were undergoing training;
- with regard to the alleged acts of violence, arrests and torture by the military on 17 January 2003 against a group of workers from the PDVSA enterprise – leaders of the Beverage Industry Union of the State of Carabobo – who were protesting against the raiding of the enterprise and the confiscation of its assets, which was a threat to their source of work, the Committee notes that the complaints submitted by José Gallardo, Jhonathan Rivas, Juan Carlos Zavala and Ramón Díaz are currently under investigation and stresses that the allegations refer to the detention and torture of these workers, as well as of Faustino Villamediana. While regretting that the proceedings currently pending at the Office of the Attorney-General with respect to four workers have not been concluded despite the fact that the events go back to December 2002 or January 2003, the Committee firmly hopes that the authorities will rapidly conclude the investigations and requests the Government to keep it informed of any decision that is taken;
- the Committee requests the Government to send it the decision adopted by the labour inspectorate regarding the reassessment of the dismissal of trade unionist Gustavo Silva and draws attention to the delays in the conduct of these proceedings;
- with regard to the dismissal of FEDEUNEP trade unionist Cecilia Palma, the Committee requests the Government to inform it whether she has appealed against the ruling of 1 September 2003 and, if so, to keep it informed of the outcome of her appeal; and
- in general, the Committee deeply regrets the excessive delay in the administration of justice with regard to several aspects of this case and emphasizes that justice delayed is justice denied and that this situation prevents the trade unions and their members from exercising their rights effectively.

90. In addition, the Committee trusted that the Government would cooperate fully with the procedure and would respond in detail to the questions that had been asked [see 354th Report, para. 194] and invited the complainant organizations to communicate any relevant information on the matters that were pending [see 354th Report, para. 195].

91. Lastly, the Committee requested the Government to respond specifically to the allegations by UNAPETROL, which were submitted in its communications of 2 March and 27 September 2007.

92. The complainant organization, UNAPETROL, had indicated that the auditing body of the PDVSA had summoned around 200 dismissed workers – including union officials – who had participated in the 2002–03 work stoppage in the petroleum sector as part of investigations into the losses of millions of dollars incurred during the stoppage. According

to UNAPETROL, these were undefined and vague accusations, which lacked proof, and were another example of anti-union persecution.

- 93.** UNAPETROL added that the public summons issued by the enterprise put forward conclusions relating to the national civic work stoppage which were not within its remit, when stating that “an analysis of the information contained in the written and audiovisual mass media showed that the prerequisites for workers to initiate strike procedures were not met ...”.
- 94.** The complainant organization noted furthermore that there was a substantial amount of proof, which was duly presented to the Attorney-General’s Office – as well as records of public statements made by UNAPETROL spokespersons and public hearings in which they participated – relating to inappropriate operational procedures, acts of negligence, incompetence and the use of physical violence at various operational sites of the enterprise just after the dismissals had taken place and once members of the national armed forces had taken control of the facilities, and that this proof attests to the absolute innocence of all the dismissed workers. The evidence has been completely overlooked and ignored by the Tax Auditor’s Office, the PDVSA Operational Audit Unit and even the Attorney-General’s Office. In this connection, UNAPETROL had enclosed the following:
- copies of the document presented by a group of lawyers and representatives of these workers to the Attorney-General’s Office in April 2003, containing certificates of safe transfer for installations that were later found to be damaged, once officials of the regime had taken control of operations; and
 - documents presented to the Tax Auditor’s Office and the PDVSA Operational Audit Unit by Víctor Ramos and Horacio Medina, the Internal Control Secretary and the President of UNAPETROL, who were summoned to meetings on 16 and 22 December 2006, respectively. According to UNAPETROL, the documents demonstrate how these workers were subjected to an act of persecution and retaliation while they were totally defenceless. Furthermore, union officials Edgar Quijano and Rodolfo Moreno, the Labour Assistance Secretary and the Vice-President of the disciplinary tribunal of UNAPETROL, were publicly summoned to meetings on 12 April and 28 June 2007; Horacio Medina, President of UNAPETROL, was also summoned.
- 95.** In its communication dated 20 October 2009, the Government states that the former President of the CTV, Mr Carlos Ortega, was convicted of the offences of civil rebellion, incitement to break the law and fraudulent use of a public document, for having deliberately urged the population to subvert public order, refrain from paying taxes or social security contributions, and engage in civil disobedience and rebellion, obstructing traffic in the streets and the exercise of the right to health and education, among others, all with the aim of damaging the constitutional fabric, creating a chaotic situation conducive to those aims. He was therefore sentenced on 13 December 2005 to 15 years and 11 months for civil rebellion, incitement to commit an offence and possession of false documents. Mr Carlos Ortega was serving his sentence in Ramo Verde military prison in Los Teques, where, despite the fact that he was serving a sentence for ordinary crimes, he also had opportunities to engage in leisure, entertainment and cultural activities, which are all permitted in this penitentiary establishment. However, on 13 August 2006, Mr Carlos Ortega escaped from prison and is currently a fugitive from Venezuelan justice.
- 96.** Mr Ortega is now living in Peru, having been granted asylum by that country in 2007. Based on the principles of sovereignty, independence and self-determination of peoples, the Venezuelan Government expressed its respect for that decision by the Peruvian Government. *The Committee recalls that it has already examined these statements by the*

Government and the substance of the case and considered that Mr Ortega's conviction was related to his trade union activities, in particular national strikes and protest marches, at times involving the participation of over 1.5 million people, against the Government's economic and social policy. The Committee requests the Government to ensure that this trade union officer can return to the country without fear of reprisals.

- 97.** As regards the situation of the National Single Federation of Public Employees (FEDEUNEP), the Government states that the Federation last held elections to its executive committee on 25 October 2001, as attested by the certification of validity of the elections issued by the National Electoral Council (CNE) on 25 July 2002 and published in *Electoral Gazette* No. 169 of 22 January 2003. According to FEDEUNEP's by-laws, its executive committee is elected for a term of five years, and has therefore been in a situation of electoral default since 25 October 2006.
- 98.** Subsequently, on 21 February 2007, a draft framework collective agreement was submitted to the Directorate of the National Inspectorate for the Public Sector by the union's representative. On 30 July of the same year, the National Inspectorate made its comments on the draft so that any omissions or deficiencies could be rectified within 15 working days of its notification, as prescribed by law. The main observation was the fact that the members of the Federation's executive committee had allowed their term of office to expire, having been elected until 25 October 2006, and were thus in a situation described in our country as "electoral default" and could only carry out simple administrative and operational activities so as to ensure that members' rights were protected, but were barred from engaging in or representing the members in collective bargaining or disputes. Section 128 of the Regulations under the Organic Labour Act provides that members of trade union executive committees whose term of office has expired may not engage in, conduct or represent the organization in acts that go beyond simple administration.
- 99.** For the above reasons, the Government states that the executive committee of FEDEUNEP is not authorized to negotiate the draft framework agreement submitted, since the term of office of its members has expired and they have provided no proof of having held another election to remedy the situation. Once the situation has been remedied, negotiations will begin on the draft collective agreement, in accordance with the legislation in force and in full conformity with ILO Convention No. 98.
- 100.** *The Committee recalls that on numerous occasions it has objected to the role of the CNE, which is not a judicial body, in the elections of trade union executive committees, as constituting interference by the authorities. The present report, in the cases concerning the Bolivarian Republic of Venezuela, sets forth in detail the criticism levelled by all of the supervisory bodies against the interference in elections by the CNE, as well as the legislation which results in barring trade unions whose executive committees are not recognized by that body from collective bargaining. The Committee reiterates its conclusions and recommendations relating to those cases and urges the Government to take the necessary steps to ensure that the CNE does not interfere in trade union elections.*
- 101.** As regards the allegations of government discrimination, the Government believes that previous replies have demonstrated to the ILO all the actions taken attesting to the Government's interest in, unequivocal practice of and willingness to promote collective bargaining, freedom of association and broad and inclusive social dialogue, without excluding or discriminating against any organization or trade union. Moreover, the Government has maintained and continues to maintain dialogue and negotiations with the small and medium-sized enterprise sectors, which had historically been excluded from political, economic and social decision-making, formerly the preserve of a group of employers or organizations, within a highly monopolistic and oligopolic structure

subordinate to transnational interests, in which the people's interests were relegated to the sidelines.

- 102.** *The Committee notes that, by not submitting its trade union elections to control by the CNE, FEDEUNEP is prevented by the legislation from engaging in collective bargaining. The Committee requests the Government not to discriminate against FEDEUNEP under the pretext that it does not submit to regulation by the CNE and to guarantee its right to bargain collectively.*
- 103.** As regards the strike by the PDVSA and dismissals of workers, the Government reiterates that in 2002, PDVSA senior and middle managers, some political parties and dissenting elements in the national armed forces had called an indefinite nationwide work stoppage with the aim of overthrowing the democratically elected president and destabilizing the Republic socially and economically. This illegal and unconstitutional work stoppage was essentially sustained by a total paralysis of the oil industry called by the former PDVSA employees through various media. The stoppage was nothing but an act of sabotage of the national economy and an illegal paralysis of the oil industry; it was not motivated by workers' demands, whether legal or contractual; it was a stoppage which had major serious repercussions on the country's social, political and economic situation.
- 104.** Far from being a legal civic work stoppage, as the complainants would have us believe and are still claiming, this stoppage called by former PDVSA senior and middle managers and members of organizations such as FEDECAMARAS and the CTV led to closures of businesses and enterprises and paralysed basic services, reducing the capacity of society to meet the needs of the Venezuelan population with respect to health care, education and food, among others, and prompting a crisis of considerable magnitude and repercussions, with the aim of bringing our main industry to its knees, destabilizing the country economically, politically and socially, and overthrowing the President of the Republic democratically elected by the people.
- 105.** Accordingly, justified dismissal proceedings were instituted on various grounds set forth in section 102 of the Organic Labour Act against certain workers and managers of the PDVSA for having committed acts which are contrary to the due integrity they are bound to maintain as workers of this State enterprise, having participated in the unconstitutional and illegal paralysis of the enterprise's activities in December 2002 and January, February and March 2003. These actions by former workers were not based on the Constitution or on the national or international legislation in force, neither were they motivated by labour demands or rights; on the contrary, they involved the public and general interest and seriously damaged the nation and the population, affecting society and the State, with repercussions on the normal development of the economic and social life of the Republic. The Venezuelan State did not take any retaliatory action against these workers, or against anyone else who participated in the work stoppage of the national enterprise, whose economic activity makes a vital contribution in terms of earnings to the public objectives of the State. Instead, the state authorities fully discharged their duty to dispense justice in an impartial, appropriate, transparent, independent, responsible and fair manner, in the cases in which acts were found to have been committed which were contrary to the fundamental obligations inherent in the employment relationship, as well as serious and wilful misconduct, not only with regard to the enterprise but with regard to the nation and hence the Venezuelan people.
- 106.** The Government indicates that its foregoing statements concerning the procedure followed with regard to the former PDVSA employees, in compliance with all the requirements of the law and due process, also constitute a reply to the allegations on the summonses issued by the auditing body of the enterprise and the alleged evidence presented by

UNAPETROL concerning the illegal and unconstitutional work stoppage in the oil industry.

107. *The Committee recalls that it has already examined the substance of this allegation; it considered that the right to strike should be recognized in the petroleum sector and regrets that the Government has disregarded its previous recommendation that it enter into negotiations with the most representative workers' federations in order to find a solution to the dismissals at the PDVSA and its subsidiaries. The Committee recalls that the dismissals were due to a strike and that they affected over 23,000 workers. The Committee reiterates its previous recommendations.*
108. As regards the request to vacate the detention orders against Horacio Medina, Edgar Quijano, Iván Fernández, Mireya Repanti, Gonzalo Feijoo, Juan Luis Santana and Lino Castillo, the Government reports that on 21 December 2004, the Office of the 73rd Prosecutor of the Office of the Public Prosecutor (the national body with competence to handle cases involving corruption, banks, insurance and capital markets), under the responsibility of lawyer Daniel Medina, submitted an indictment against Juan Antonio Fernández Gómez, Horacio Francisco Medina Herrera and Mireya Ripanti de Amaya for committing the offences of civil rebellion, incitement to commit an offence, incitement to break the law and advocating criminal conduct, unlawful interruption of the gas supply, criminal conspiracy and computer espionage, and requested preventive judicial detention. On 22 December of the same year, a warrant was requested for the arrest of Gonzalo Feijoo Martínez, Edgar Quijano Luengo, Juan Luis Santana López, Edgar Paredes Villegas and Juan Lino Carrillo Urdaneta; the application was granted on the same day, along with the request for preventive judicial detention. Accordingly, as is clear from the above, the competent Office of the Public Prosecutor issued these orders for enforcement by the police; however, the persons concerned are now fugitives from justice.
109. *Once again, the Committee recalls that the right to strike in the petroleum sector should be recognized, and considers that it is for the Government to prove in each individual case that an offence has been committed involving the overstepping of trade union rights by the union members concerned. The Committee considers that as this has not been done so far, the union officers and members concerned should be able to return to the country with government assurances that they will not be subject to reprisals. The Committee notes with concern the allegation by UNAPETROL relating to the fabrication of evidence against its officers and requests the Government to send its observations in this regard.*
110. As regards the situation of members of the UNAPETROL trade union, the Government indicates that these former PDVSA employees, who set up UNAPETROL and were senior and middle managers of the oil company, were the same individuals who were involved in the coup d'état in 2002, rejecting the PDVSA board of directors, which had been legally appointed in accordance with the Petroleum Act (*Official Gazette* No. 37323 of 13 November 2001), and who instigated the illegal and unconstitutional paralysis of the oil industry. Thus, as already stated, the lawful procedures prescribed by law for such cases were instituted against these workers, who participated in illegal activities incompatible with their functions and duties under the employment relationship, and who therefore could hardly be reinstated in the PDVSA today in posts which they are not lawfully entitled to occupy.
111. *The Committee reiterates its recommendation above on the legitimacy of the strike in the oil industry and considers that, until the Government has proved in each individual case that offences were committed, the union members should be reinstated in their posts.*
112. As regards the situation of PANAMCO de Venezuela SA, the Government states that this enterprise was in fact legally raided by the National Guard, in accordance with the

Consumer and User Protection Act and on the basis of a court order, because it had been hoarding foodstuffs, which it had also done during the illegal and unconstitutional work stoppage held in December 2002. During the procedure carried out in the enterprise, it was found to be illegally hoarding basic staple foods which had been withdrawn from the market at the time on account of the hoarding practices of certain enterprises. The competent authorities did not use violence or exceed their powers when they carried out this measure; on the contrary, the National Guard peacefully abided by the legal requirements, despite hostile and aggressive acts by groups from outside the enterprise, who took it upon themselves to violently assault National Guard officers performing their duty to protect the interests of the population. As a result, the National Guard officers had to protect the integrity of the officials who were enforcing the court order and safeguarding the public order. This is not intended to justify the use of force or coercion by state bodies, but merely to explain that their powers and duties include ensuring security and the public order and protecting citizens against acts of violence.

- 113.** The Government adds that according to information provided by the Office of the Attorney-General of the Republic, on 30 May 2006 the 20th Prosecutor of the Office of the Public Prosecutor, the national body with full competence at the time, applied to the Third Court of First Instance, acting as overseeing court for the Criminal Judicial Circuit of the state of Carabobo, requesting a dismissal of proceedings under section 318(2) of the Code of Penal Procedure, read in conjunction with section 1 of the Penal Code, which was ordered on 3 July 2006. Under section 319 of the Code of Penal Procedure, dismissal of proceedings “terminates the proceedings and has the authority of *res judicata*, thus preventing any further prosecution of the defendant or accused against whom proceedings have been dismissed, except where otherwise provided in section 20 of this Code, and all the measures of restraint ordered shall be lifted”. *The Committee concludes that penal proceedings have been dismissed and can only regret the measures taken against the enterprise and some of its employees.*
- 114.** Concerning the alleged reassessment of the dismissal of Gustavo Silva, the Government states that the archives of the Directorate of the National Inspectorate for the Public Sector do not contain any record of proceedings for misconduct against Gustavo Silva; accordingly, no decision has been adopted in this regard. The Government thus requires further information in order to address this request by the Committee on Freedom of Association.
- 115.** *The Committee requests the complainant to provide its observations on this matter.*
- 116.** As regards the case of Cecilia Palma, the Government states that the applicable disciplinary proceedings prescribed by law were instituted against this person, culminating in an administrative decision on 6 November 2002 issued by the competent authority, duly motivated with sufficient grounds. The official concerned was dismissed from her post as lawyer with the National Nutrition Institute on legal grounds of “lack of integrity, acts of violence, insult, insubordination, immoral conduct at work or act detrimental to the reputation or interests of the institution of the Republic concerned”. The judicial authority rejected the remedy of annulment filed by Ms Cecilia Palma against the decision by the administrative authority, considering that she had displayed extremely serious lack of integrity unrelated to the exercise of trade union rights. There is no record of Ms Palma having filed any other appeals.
- 117.** *The Committee requests the Government to send the text of the administrative and judicial decisions in this matter.*

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- 118.** Finally, the Committee requests the governments 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	–
1914 (Philippines)	June 1998	March 2010
1991 (Japan)	November 2000	March 2009
2086 (Paraguay)	June 2002	–
2192 (Togo)	March 2003	March 2007
2222 (Cambodia)	June 2004	March 2010
2227 (United States)	November 2003	March 2010
2257 (Canada)	November 2004	November 2009
2267 (Nigeria)	June 2004	November 2006
2268 (Myanmar)	November 2008	March 2010
2291 (Poland)	March 2004	March 2010
2292 (United States)	November 2006	November 2008
2295 (Guatemala)	November 2008	November 2009
2301 (Malaysia)	March 2004	March 2010
2302 (Argentina)	November 2005	March 2009
2304 (Japan)	November 2004	November 2008
2317 (Republic of Moldova)	June 2008	March 2010
2355 (Colombia)	November 2009	–
2362 (Colombia)	March 2010	–
2371 (Bangladesh)	June 2005	March 2010
2383 (United Kingdom)	March 2005	March 2008
2395 (Poland)	June 2005	March 2010
2400 (Peru)	November 2007	March 2010
2423 (El Salvador)	March 2007	March 2010
2430 (Canada)	November 2006	March 2010
2433 (Bahrain)	March 2006	March 2010
2459 (Argentina)	June 2007	–
2460 (United States)	March 2007	March 2010
2470 (Brazil)	March 2009	March 2010
2474 (Poland)	March 2007	March 2010
2478 (Mexico)	March 2010	–
2480 (Colombia)	June 2007	March 2010
2488 (Philippines)	June 2007	March 2010
2490 (Costa Rica)	November 2008	November 2009
2500 (Botswana)	June 2007	November 2009
2506 (Greece)	June 2007	November 2009
2512 (India)	November 2007	June 2009
2518 (Costa Rica)	March 2010	–
2520 (Pakistan)	November 2007	November 2009

Case	Last examination on the merits	Last follow-up examination
2524 (United States)	March 2008	March 2010
2538 (Ecuador)	November 2009	–
2546 (Philippines)	March 2008	March 2010
2547 (United States)	June 2008	March 2010
2552 (Bahrain)	March 2008	March 2010
2553 (Peru)	March 2009	November 2009
2554 (Colombia)	June 2008	November 2009
2557 (El Salvador)	March 2010	–
2559 (Peru)	March 2008	November 2008
2565 (Colombia)	March 2010	–
2568 (Guatemala)	November 2008	November 2009
2575 (Mauritius)	March 2008	March 2010
2583 (Colombia)	June 2008	March 2010
2590 (Nicaragua)	March 2008	March 2010
2591 (Myanmar)	March 2008	March 2010
2595 (Colombia)	June 2009	March 2010
2596 (Peru)	November 2009	–
2597 (Peru)	March 2009	November 2009
2600 (Colombia)	November 2009	–
2601 (Nicaragua)	March 2010	–
2603 (Argentina)	November 2008	–
2604 (Costa Rica)	November 2008	November 2009
2611 (Romania)	November 2008	March 2010
2612 (Colombia)	March 2010	–
2614 (Argentina)	March 2010	–
2624 (Peru)	March 2009	–
2626 (Chile)	March 2010	–
2627 (Peru)	March 2009	November 2009
2634 (Thailand)	March 2009	March 2010
2637 (Malaysia)	March 2009	March 2010
2643 (Colombia)	November 2009	–
2651 (Argentina)	November 2009	–
2652 (Philippines)	March 2010	–
2654 (Canada)	March 2010	–
2658 (Colombia)	November 2009	–
2662 (Colombia)	November 2009	–
2663 (Georgia)	March 2010	–
2667 (Peru)	March 2010	–
2668 (Colombia)	June 2009	–
2669 (Philippines)	March 2010	–
2672 (Tunisia)	March 2010	–

Case	Last examination on the merits	Last follow-up examination
2680 (India)	November 2009	–
2681 (Paraguay)	March 2010	–
2686 (Democratic Republic of the Congo)	November 2009	–
2692 (Chile)	March 2010	–
2693 (Paraguay)	March 2010	–
2695 (Peru)	March 2010	–
2699 (Uruguay)	March 2010	–
2700 (Guatemala)	March 2010	–
2705 (Ecuador)	November 2009	–
2718 (Argentina)	March 2010	–

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

120. In addition, the Committee has just received information concerning the follow-up of Cases Nos 2153 (Algeria), 2160 (Bolivarian Republic of Venezuela), 2428 (Bolivarian Republic of Venezuela), 2527 (Peru), 2592 (Tunisia), 2605 (Ukraine), 2616 (Mauritius), 2630 (El Salvador), 2656 (Brazil), 2665 (Mexico) and 2685 (Mauritius), which it will examine at its next meeting.

CASE NO. 2701

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

**Complaint against the Government of Algeria
presented by
the National Union of Vocational Training Workers (SNTFP)**

*Allegations: The complainant organization
alleges refusal by the authorities to register a
union since 2002*

121. The complaint is contained in a communication from the National Union of Vocational Training Workers (SNTFP) dated 24 February 2009.

122. The Government sent its observations in a communication dated 4 March 2010.

123. Algeria 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), as well as the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

124. In a communication dated 24 February 2009, the SNTFP complains of the refusal of the authorities to register the organization since 2002, when the first application was made. The complainant considers that the Government is thereby contravening the provisions of Convention No. 87.

- 125.** The complainant organization states that it held a constituent meeting on 11 April 2002 in the presence of representatives of ten of the country's *wilayas* (prefectures), at which the union adopted its by-laws and elected its national bureau. The union's constitution was publicized, as the law requires, in a national daily news sheet. An application to register the union as duly constituted was filed with the Ministry of Labour and Social Security on 25 August 2002. In a reply dated 18 September 2002, the Labour Relations Directorate made a number of observations concerning the union's by-laws and requested the files concerning three elected members of the national bureau, together with certification concerning the function of each of the founder members. According to the complainant organization, the required formalities were dealt with on 11 June 2003, in close collaboration with the relevant government department. Nevertheless, as there was no reply from the authorities, the SNTFP referred the matter to the Minister of Labour and Social Security on 13 September 2003. A reply was received on 2 December 2003, with a request for the complete files of all the union's founder members, which was inconsistent with the Ministry's original request for the files of only three members of the national bureau.
- 126.** The complainant organization states that it complied with the Ministry's unexpected request and deposited the complete files of the 33 founder members of the union in June 2004. However, the complainant states that, as no reply was received from the authorities, it resent the files on 24 November 2004 and again on 15 January 2005 only to be told verbally that it would have to amend the by-laws once more. The complainant organization states that it collaborated fully with the department concerned in amending its by-laws, but maintains that, despite regular contacts with the Ministry of Labour and Social Security and open letters to the Head of Government between 2006 and 2008, there has been no word from the authorities.
- 127.** The complainant organization states that, following the ILO's intervention with the Government in October 2008, it was contacted by the Ministry of Labour and Social Security during the same month and told that it would have to conclude a civil liability insurance policy, for which there is no legal requirement. The complainant organization nevertheless once again complied with the request and deposited the relevant insurance documents with the Social Dialogue Department on 22 October 2008.
- 128.** The SNTFP considers that the Ministry of Labour and Social Security does not want to register the union, and the Government is thus violating Convention No. 87.

B. The Government's reply

- 129.** In a communication dated 4 March 2010, the Government offers explanations for the delay in dealing with the registration dossier and reports on the outcome of investigations conducted by members of the complainant organization's national bureau.
- 130.** The Government indicates that the delays in dealing with the dossier are due to the number of observations made on the dossier and the time taken by the union to comply with them.
- 131.** The Government also states that investigations were conducted on the members of the SNTFP national bureau. These investigations revealed that seven of the 11 founder members of the national bureau had judicial records. For example, according to the Government, Mr Oukil Djilali, President of the SNTFP, was fined by the El Harrach court for contravening the law concerning organization, security and road traffic. Other founder members (Nader Omar, Tolba Boudjemâa) have also been fined for assault and verbal abuse. The Government also states that a number of the founder members also belong to a different union, which casts doubt on their loyalty to the members of the SNTFP.

132. According to the Government, the judicial records of most of the founding members cast doubt on their credibility and good faith in exercising trade union office. Furthermore, the Government states that the individuals concerned attempted to conceal their records, which was a flagrant lack of transparency.

C. The Committee's conclusions

133. *The Committee notes that, in this case, the allegations made by the complainant organization concern the refusal of the Ministry of Labour and Social Security to register the SNTFP, established in April 2002, following an application for registration filed in August 2002.*
134. *The Committee notes that according to the information supplied by the complainant organization, the SNTFP held a constituent meeting on 11 April 2002, when it adopted its by-laws and elected a national bureau. In accordance with the law, the union's constitution was publicized in a national daily news sheet. The Committee notes that the union filed its first application for registration with the Ministry of Labour and Social Security on 25 August 2002, that this gave rise to a reply from the Labour Relations Directorate in September 2002 with a request for amendments to the union by-laws and for the files of three of the national bureau's elected members including formal documentary certification of their union functions. According to the complainant organization, the necessary formalities were dealt with on 11 June 2003 in close collaboration with the department concerned. However, the lack of any response yet again from the administration prompted the SNTFP to try to restart the proceedings in September 2003, which led to a reply dated 2 December 2003 requesting the union to provide complete files of all the union's founder members, a request which, in the view of the complainant organization, was inconsistent with the Ministry's original request for the files of only three members of the national bureau. The Committee notes that, despite all this, the complainant organization states that it once again complied with the new request and deposited the complete files of the 33 founder members in June 2004. The Committee notes that, following the attempt by the union to restart proceedings, it was told verbally that the by-laws had to be changed again and cooperated fully with the Ministry to that end. The Committee notes that the union complains of the absence of any response from the administration, despite regular contacts with the Ministry of Labour and Social Security and open letters to the Head of Government between 2006 and 2008.*
135. *The Committee notes the statements to the effect that, following an intervention with the Government by the ILO in October 2008, the Ministry of Labour and Social Security contacted the complainant organization to inform it of the need to conclude a civil liability insurance policy which, according to the SNTFP is not a legal requirement. The complainant organization states that it complied once again with the request and deposited the relevant insurance documents with the Social Dialogue Department on 22 October 2008 (the complainant organization has supplied a copy of all the correspondence with the administration). Lastly, the Committee notes that, according to the SNTFP, there is no real wish on the part of the Ministry of Labour and Social Security to give the approval required, in contravention of the provisions of Convention No. 87.*
136. *The Committee notes that the Government in its reply confines itself to explaining the delay noted in processing the registration dossier by referring to the number of observations and remarks concerning the dossier as deposited by the complainant organization and to the time taken by the latter to comply with them.*
137. *To begin with, the Committee notes with deep concern that more than seven years have passed since the initiative by the SNTFP founders to file an application for registration with the Ministry of Labour and Social Security, to no avail. The Committee recalls in this*

regard that the right to official recognition through legal registration is an essential facet of the right to organize since that is the first step that workers or employers' organizations must take in order to be able to function efficiently and represent their members adequately. The principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization. Such authorization could concern the formation of the trade union organization itself, the need to obtain discretionary approval of the constitution or rules of the organization, or, again, authorization for taking steps prior to the establishment of the organization. This does not mean that the founders of an organization are freed from the duty of observing formalities concerning publicity or other similar formalities which may be prescribed by law. However, such requirements must not be such as to be equivalent in practice to previous authorization, or as to constitute such an obstacle to the establishment of an organization that they amount in practice to outright prohibition. Even in cases where registration is optional but where such registration confers on the organization the basic rights enabling it to "further and defend the interests of its members", the fact that the authority competent to effect registration has discretionary power to refuse this formality is not very different from cases in which previous authorization is required. The Committee also recalls that the formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations, and any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No. 87. A complicated and lengthy registration procedure, in the view of the Committee, creates a serious obstacle for the establishment of a trade union and is tantamount to lead to a denial of the right to organize without previous authorization [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 295, 272, 279 and 307].

138. The Committee notes that the Government in its reply also states that it conducted investigations into the members of the SNTFP national bureau and that the latter noted that, of the 11 founder members in the national bureau, seven had judicial records. The Government notes, for example, that Mr Oukil Djilali, President of the SNTFP, had been fined by the El Harrach court for infringing the law on organization, security and road traffic. Other founder members were also fined for assault and verbal abuse (Nader Omar and Tolba Boudjemâa). The Committee notes the Government's statements to the effect that the judicial records of most of the founder members, and their concealment of those records, reveal a lack of transparency on their part and undermine their credibility with regard to the exercise of their trade union office at the national level. Furthermore, the Committee notes that, according to the Government, a number of the founder members are also members of another union which, in its view, casts doubt on their loyalty towards the SNTFP members.
139. The Committee takes note of the Government's information, and notes that it refers by name to only three founder members. The Committee recalls that, as regards the judicial records and the ethics of the complainant organization's founding members, it has had occasion to recall in previous cases that a legal requirement that candidates for trade union office be subjected to a background investigation conducted by the Ministry of the Interior and the Department of Justice amounts to prior approval by the authorities of candidates, which is incompatible with Convention No. 87. Similarly, it has stated that conviction on account of offences, the nature of which is not such as to call into question the integrity of the person concerned and is not such as to be prejudicial to the exercise of trade union functions, should not constitute grounds for disqualification from holding trade union office, and any legislation providing for disqualification on the basis of any offence is incompatible with the principles of freedom of association [see **Digest**, *op. cit.*, paras 419 and 422].

140. *Furthermore, the Committee, referring to section 6 of Law No. 90-14 of 2 June 1990 as amended, concerning the means of exercising trade union rights, notes that none of the criteria put forward by the Government, in particular judicial records, membership of another union, or considerations concerning credibility or loyalty, appears among the criteria considered to disqualify anyone from founding a union. In addition, the Committee notes that union officials may, through the exercise of their legitimate activity, find themselves faced with accusations of the type of offence referred to by the Government (infringement of the law relating to organization, security and road traffic) and such charges should not constitute grounds for denying an individual the right to found a union. Consequently the Committee is bound to express its deep concern at the criteria cited by the Government as grounds for its refusal to register the SNTFP. The Committee is especially concerned by the fact that the Government's reasons were apparently never explained to the SNTFP, and the registration procedure has dragged on for a number of years during which various demands have been made of the complainant organization, which has duly cooperated in order to obtain registration, including by concluding an insurance policy.*
141. *In view of the provisions of Law No. 90-14 concerning the procedure for establishing a trade union organization, the information supplied by the complainant organization and the Government's reply, the Committee concludes that the Ministry of Labour and Social Security has failed to follow up the application to register the SNTFP made a number of years ago, without any valid reason. Consequently, the Committee urges the Government to register the SNTFP without delay, and notes with deep regret that the time that has passed since the initial application to register (August 2002) may have prevented the union from organizing its activities in an appropriate way. It requests the Government to keep it informed in this respect. The Committee expects that the Government will ensure the strict application of national law and of the principles recalled above concerning the right to establish trade union organizations, and ensure that the actions of the administration in this regard, in particular as they entail contravention of Convention No. 87, will not recur in the future.*

The Committee's recommendation

142. *In the light of its foregoing conclusions, the Committee requests the Government Body to approve the following recommendation:*

The Committee urges the Government to register the National Union of Vocational Training Workers (SNTFP) without delay, and notes with deep regret that the time that has passed since the initial application to register (August 2002) may have prevented the union from organizing its activities in an appropriate way. It requests the Government to keep it informed in this respect. The Committee expects that the Government will ensure the strict application of national law and of the principles recalled above concerning the right to form trade unions, and ensure that the actions of the administration, in particular as they entail violation of Convention No. 87, will not recur in the future.

CASE NO. 2702

INTERIM REPORT

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

Allegations: The complainant organization alleges acts of anti-union persecution and dismissal of a union officer

143. The complaint is contained in a communication from the Congress of Argentine Workers (CTA) of February 2009.
144. The Government sent its observations in a communication dated 10 March 2010.
145. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

146. In its communication of February 2009, the CTA alleges that Supermercados Toledo SA violates freedom of association and the rights of workers' organizations and representatives guaranteed in Conventions Nos 87, 98 and 135 and Recommendation No. 143, having committed acts of discrimination and dismissed union officers, representatives and activists. The CTA states that the case referred to in the present complaint is only one of many in which the rights of workers and organizations have been flouted. The CTA is concerned at the systematic repetition of acts infringing freedom of association; this complaint is accordingly presented against the Government of the Argentine State for failing to guarantee the exercise of trade union rights of members, officers and representatives of trade unions that are merely registered and those which have applied for registration – in both cases, for not belonging to trade union organizations that do not have trade union status (“personería gremial”).
147. The complainant alleges that the company has committed acts of discrimination and engaged in anti-union conduct to the detriment of the union representative and the Congress of Argentine Workers. Supermercados Toledo SA is a supermarket enterprise engaged in retail sale of food, toiletries and cleaning items, etc. in the Mar del Plata area, which is part of Buenos Aires province. The complainant alleges the dismissal of Mr Rubén Óscar Godoy, a worker who has been with the company for many years and who, in addition to his natural leadership and continuous trade union activity, is a member of the Executive Committee of the Trade Union of Poultry Slaughtering and Processing Plant and Allied Workers. The latter union's application for trade union registration is currently being processed in the Ministry of Labour, Employment and Social Security under file No. 1262756. The CTA states further that the poultry slaughtering plant owned by the company is located in Batán Industrial Park. Its workers slaughter and process 45,000 chickens a day, most of which are exported to the European Union, South Africa, China, Côte d'Ivoire and the Russian Federation, generating considerable profits for the enterprise.
148. The CTA states that despite the above, not only do the workers not share in the substantial economic benefits derived from their labour by the enterprise, but they are subjected to

precarious working conditions and receive a meagre income in return for their efforts. To that end, the enterprise has used a ploy that is common in Argentina: it has chosen, at its own discretion, the collective agreement that is applicable based on the amount of the wages, not on the occupation of the workers to whom it is to be applied. In this case, the enterprise decided to pay the wages determined in the collective agreement for the commercial sector, which the workers firmly contested on the grounds that a collective agreement that did not correspond to their occupation was being applied to them, with the clear aim of denying them an even greater portion of their wages.

- 149.** According to the CTA, the precarious economic situation of the workers is further exacerbated by the fact that part of their paltry earnings for such highly lucrative work is paid in the form of vouchers with which they can purchase goods only in the supermarkets belonging to the enterprise. In addition, and in violation of the principle of trade union autonomy and its obligation not to interfere, the enterprise has managed to impose a union representation other than that elected by the workers, thus violating the collective rights granted to workers in international human rights treaties with constitutional rank, including ILO Convention No. 87.
- 150.** The CTA points out that it was in this context of extremely poor working conditions and constant violation of rights by the company, which are condoned by omission by the public authorities responsible for supervising and enforcing compliance with labour standards, that the workforce decided to apply to the competent authority for registration of their trade union organization that was operating *de facto* in the enterprise. Having met the legal requirements, the trade union began the formalities of application to the Ministry of Labour, Employment and Social Security for recognition of trade union registration.
- 151.** As soon as it found out that the administrative procedure had been launched, the company began persecuting and harassing the unionized workers, singling out those it considered union leaders for especially harsh treatment. When its efforts to discourage the workers from organizing and implementing their action programmes did not succeed, the enterprise violently stepped up its illegal pressure, to the point where it selectively dismissed the leaders and activists of the new trade union.
- 152.** The CTA alleges that such is the power arbitrarily exerted by the enterprise over its dependent employees, as well as its influence over the local community, that it overtly carries out its discriminatory manoeuvres and violations of freedom of association. This explains why the company formally acknowledged its conduct in its telegrams to the dismissed workers even as they were in the process of claiming reinstatement on grounds of nullity of their dismissal as an act of anti-union discrimination prohibited by the highest ranking legal provisions: those of the National Constitution.
- 153.** The complainant indicates that the enterprise thus couched the dismissal in the following terms: "... in view of the fact that you not only refused to perform your duties and failed to return to work despite clear orders to that effect, but also incited your fellow workers to take the same illegal stance, causing considerable damage and failing to meet your most basic obligations, your services are no longer required". According to the CTA, the illegal anti-union actions of the enterprise are clear from the wording itself of the dismissal. The CTA alleges that, in its telegram, the company admits that the reason for the dismissal was "refusal to perform duties" and "inciting fellow workers to take the same illegal stance, causing considerable damage ...". According to the CTA, it is clear that the strike was being held by the dismissed worker and his fellow employees, evidently under his leadership.
- 154.** The complainant points out that the dismissal took place after the executive committee of the Trade Union of Poultry Slaughtering and Processing Plant and Allied Workers had

called a strike after repeated labour demands had gone unheeded by the enterprise. The employer's clear and obvious intention to penalize Mr Godoy's trade union activities is further evidenced by the fact that the enterprise only dismissed him, together with the most representative workers, and not the other strikers, who, incidentally, made up the entire workforce. The complainant organization considers that it is obvious that the reason for the dismissal was not only the trade union activity itself, and especially the strike action – already serious in itself – but was also an attempt at an abusive display of power by the employer with the clear aim of punishing and preventing the exercise of collective rights, targeted at all the workers.

- 155.** The CTA alleges further that the company exerted pressure – which was illegal, being anti-union and discriminatory in nature – through dismissal and suspension of workers' representatives, including both members and non-members of the Trade Union of Poultry Slaughtering and Processing Plant and Allied Workers. On 18 April 2008, the day of the strike, when the workers were mobilizing and picketing, the enterprise used all the resources and considerable influence at its command and managed to enlist the complicity of the State, which brought its repressive force to bear against the workers, so that the strike was violently repressed. As reported in the newspaper, "yesterday in Mar del Plata, infantry troops repressed members of the new Trade Union of Poultry Slaughtering and Processing Plant and Allied Workers, who after demanding a wage increase from the company began to receive telegrams announcing their dismissal. The CTA alleges that police action left seven injured, one of whom, José Lagos, was still in hospital with a guarded prognosis. The union's lawyers filed complaints with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province, for 'illegal deprivation of liberty, serious injury and dereliction of duty by a public official'. When the complaint was filed, staff of the Public Prosecutor's Office stated that the repressive action had not been ordered by their office. Some days earlier, the trade union had launched industrial action including partial strikes and protests against delays in paying wages and unsafe workplaces. The enterprise retaliated by dismissing 15 workers 'for disobeying orders'. Faced with this situation, the workers decided to hold a strike with pickets at the entrance of the Industrial Park, which were dispersed yesterday by infantry troops."
- 156.** The CTA adds that the company, in its exaggerated display of force against the trade union, went to unusual lengths in arrogating the right to declare the strike illegal, contrary to the provisions of Convention No. 87 and the reiterated case law of the Committee on Freedom of Association.

B. The Government's reply

- 157.** In its communication of 10 March 2010, the Government states that it is providing a partial reply and that the Ministry of Labour of Buenos Aires Province points out that, firstly, the complaint does not specify which acts committed by the provincial Government constitute violations of freedom of association. It affirms categorically that the provincial administrative authority intervened within the limits of its own powers of conciliation and restoration of social peace. It states further that, starting with its intervention in the dispute after a complaint was filed by the workers and the CTA, it offered the parties a conciliation procedure, summoning them to a hearing and even calling in the law enforcement bodies when the employer failed to appear when summoned, and constantly sought a peaceful settlement to the dispute. An administrative procedure was thus provided as an opportunity for dialogue within the framework established by law, and the provincial Ministry's intervention was lawful and appropriate. It should be pointed out that it was the complainant that requested its intervention.
- 158.** The provincial Government adds that, once the conciliation was over, the provincial Ministry of Labour decided to cease its intervention, considering that the dispute lay

outside its competence, as the complaint referred to unfair practices, questions of applicability and violations of trade union rights – issues which should be resolved by the national Ministry of Labour, Employment and Social Security, which is the authority responsible for applying Act No. 23551 on trade unions and/or the judiciary. Another reason for ceasing its intervention was the employer's refusal to accept the administrative procedure invoking the fact that the dispute involved issues outside the provincial authority's remit, such as those mentioned above. The provincial Ministry of Labour confined itself to holding the hearings and attempting to bring the parties to a peaceful settlement. The provincial administrative authority thus considers that there are no grounds for alleging violation of freedom of association, which is lawfully protected and guaranteed by the legislative framework in force, articles 14bis, 16 and 75(22) of the National Constitution; and Act No. 23551 on trade unions, which expressly stipulates in section 1 that "freedom of association shall be guaranteed by all regulations relating to the organization and activity of trade unions" and that workers have the right, inter alia, to establish trade unions freely and without prior authorization (section 4).

- 159.** The complainant had an opportunity to apply for judicial review of the dismissals ordered by the employer and for enforcement of the applicable statutory penalties, and therefore the complaint presented to the ILO is rejected as unfounded and inappropriate, leading to an unnecessary waste of international jurisdictional resources. Lastly, the Government states that it will send an additional reply by the enterprise, as well as information on any judicial and administrative proceedings under way concerning the dismissals.

C. The Committee's conclusions

- 160.** *The Committee observes that in this case the complainant states that as soon as it found out that the administrative procedure for trade union registration of the Trade Union of Poultry Slaughtering and Processing Plant and Allied Workers had been launched, Supermercados Toledo SA began persecuting and harassing union officers and members, and alleges that after the workers held a strike to uphold its many unheeded demands, the enterprise, in the context of anti-union climate and interference, dismissed union officer Mr Rubén Óscar Godoy and other union members (a total of 15). The Committee also observes that the complainant alleges that on 18 April 2008, the day of the strike, the police repressed the strikers, leaving seven workers injured (one of them, Mr José Lagos, seriously), and that the union's lawyers filed complaints against these acts with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province. The Committee understands that the union ultimately obtained trade union registration, but that the dismissals remain in force.*
- 161.** *The Committee notes that the Government sent a partial reply indicating that, according to the Ministry of Labour of Buenos Aires Province: (1) the provincial administrative authority intervened in the dispute in response to the CTA's complaint, within the limits of its powers of conciliation and restoration of social peace; (2) the provincial administrative authority offered the parties a conciliation procedure, summoning them to a conciliation hearing, and even called in the law enforcement bodies to get the employer to appear; (3) once the conciliation was over, the provincial Ministry of Labour decided to cease its intervention, considering that (a) the dispute lay outside its competence, as the complaint referred to unfair practices, questions of applicability and violations of trade union rights – issues which should be resolved by the national Ministry of Labour, Employment and Social Security, which is the authority responsible for applying Act No. 23551 on trade unions and/or the judiciary; and (b) the employer refused to accept the administrative procedure; and (4) the complainant had the opportunity to apply for judicial review of the dismissals ordered by the employer and for enforcement of the applicable statutory penalties. Lastly, the Committee notes that the Government states that it will send*

additional information from the enterprise, as well as information on any judicial and administrative proceedings under way concerning the dismissals.

- 162.** *As regards the allegation concerning dismissal of a trade union officer, Mr Rubén Óscar Godoy, and other members (a total of 15) after holding a strike, the Committee observes that neither the national Government nor the provincial administrative authority deny that the dismissals took place, and that it appears from the statements by the provincial Ministry of Labour that the employer refused to attend a conciliation hearing. The Committee recalls that “the use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paragraph 666]. In these circumstances, in view of the seriousness of the allegations concerning discrimination and interference by the enterprise and the failure of the attempted conciliation procedure, the Committee requests the Government to carry out an investigation without delay into all the acts of discrimination and interference mentioned in the complaint, and to determine the reasons for the dismissals, and, should they be found to be based on anti-union motives, to take steps to bring the parties together with a view to reinstating the dismissed workers. In addition, the Committee requests the Government to inform it whether those adversely affected have taken legal action.*
- 163.** *As regards the allegation to the effect that on 18 April 2008, the day of the strike, the police repressed the strikers, leaving seven injured (one of them, Mr José Lagos, seriously), and that the union’s lawyers filed complaints with the Public Prosecutor’s Office of Mar del Plata, Buenos Aires Province, in connection with these acts, the Committee regrets that the Government has not sent its observations. In these circumstances, the Committee recalls that it has emphasized on numerous occasions that in cases in which the dispersal of public meetings by the police has involved serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities. Under these circumstances, the Committee requests the Government to take the necessary steps to ensure that an investigation is carried out in this respect by an authority independent from those involved, and to inform it of the outcome. The Committee also requests the Government to inform it of the outcome of the complaints filed against those acts by the trade union with the Public Prosecutor’s Office of Mar del Plata, Buenos Aires Province.*

The Committee’s recommendations

- 164.** *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 carry out an investigation without delay into all the acts of discrimination and interference mentioned in the complaint, and to determine the reasons for the dismissal of trade union officer Mr Rubén Óscar Godoy and other union members (a total of 15) of the Supermercados Toledo SA enterprise after holding a strike, and, should they be found to be based on anti-union motives, to take steps to bring the parties together with a view to reinstating the dismissed workers. In addition, the Committee requests the Government to inform it whether those adversely affected have taken legal action.*

- (b) *As regards the allegation to the effect that on 18 April 2008, the day of the strike, the police repressed the strikers, leaving seven injured (one of them, Mr José Lagos, seriously), the Committee requests the Government to take the necessary steps to ensure that an investigation is carried out in this respect by an authority independent from those involved, and to inform it of the outcome. The Committee also requests the Government to inform it of the outcome of the complaints filed against those acts by the trade union with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province.*

CASE NO. 2698

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

**Complaint against the Government of Australia
presented by
the Communications, Electrical, Electronic, Energy, Information,
Postal, Plumbing and Allied Services Union of Australia (CEPU)**

Allegations: The complainant alleges that labour legislation introduced in 2008 contains numerous contraventions of freedom of association principles, including restrictions on the right to organize, the right to bargain collectively and the right to strike

- 165.** The complaint is set out in a communication of 20 February 2009 from the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The complainant submitted additional information in support of its complaint in communications of 16 and 28 April 2009.
- 166.** The Government submitted its observations in a communication of 15 January 2010.
- 167.** 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).

A. The complainant's allegations

- 168.** In its communications of 20 February and 28 April 2009, the complainant states that, in November 2008, the Fair Work Bill 2008 was introduced into Parliament, subsequently debated upon, and passed with amendments by both houses of Parliament. The Bill – now the Fair Work Act (FWA), 2009, received Royal Assent.
- 169.** The complainant states that, since 1999, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) had, in its comments, identified several provisions of the previous legislation – the Workplace Relations Act (WRA) of 1996, since repealed – that were not in conformity with Conventions Nos 87 and 98. The FWA replicates many of the contraventions contained in the WRA and introduces two potential new breaches of freedom of association principles. In particular, the FWA remains in

violation of freedom of association by: (1) giving primacy to enterprise-level agreements and restricting the level at which bargaining can occur; (2) limiting the content of agreements; (3) providing insufficient protection to unionized workers who take industrial action in support of their rights under the Conventions; (4) limiting the right to organize; (5) restricting the right to strike beyond the limits permitted by the Conventions and lifting the protection of several types of industrial action, including sympathy strikes and those in support of multiple business agreements, “pattern bargaining”, matters that are not “permitted”, and strike pay; (6) prohibiting industrial action in situations of “economic harm” and danger to the economy, including through the introduction of compulsory arbitration at the initiative of the Minister; and (7) imposing penalties for engaging in “unprotected” industrial action and introducing secret ballot provisions. The complainant further maintains that the Bill’s structure requires employers to bypass unions and make and reach agreements directly with employees, even where a union exists at the workplace.

Enterprise agreements

- 170.** With regards to enterprise agreements, the complainant states that the FWA raises three particular concerns. First, agreements are no longer made with employee organizations, that is, unions. Whereas the WRA envisaged agreements being made between employers and unions – agreements which would then be subsequently voted on by employees – the FWA envisages no such arrangements. Instead, single enterprise agreements are made when the employer puts them out to a vote by employees and the employees approve the agreement (section 182(1)). This intention is confirmed by section 183 of the FWA. The involvement of the workers’ organization is not necessary to the concluding of a successful agreement, nor is it required before an agreement is put out to a vote of employees. According to the complainant, this conception of the role of workers’ organizations is directly contrary to the letter and spirit of Article 4 of Convention No. 98, which clearly envisages encouraging unions making and concluding agreements, while discouraging employers from negotiating directly with employees collectively when a union is present. Additionally, the Bill removes worker organizations as parties to any agreement reached, another radical departure from industrial history and from legislation prior to the previous Government.
- 171.** The complainant states that the impermissible downgrading of the role of workers’ organizations was reflected in the objects of the WRA. However, whereas prior to the previous Government the WRA had as one of its objects “to encourage the organization of representative bodies of employers and employees and their registration under this Act”, the FWA makes no mention of organizations in its new objects. Thus, whereas the WRA impermissibly enshrined union and non-union agreements as being of equal status, the FWA enshrines no role at all for organizations in the making and approving of agreements. In order to comply with Convention No. 98, significant amendments are required to reflect the fact that agreements are, and ought to be, struck between representative organizations and employers, and that organizations have a legitimate role in the framework of the agreement-making structure of the FWA.
- 172.** The complainant indicates that the FWA’s new bargaining provisions (Part 2-4, Divisions 3 and 8), whilst welcome, do not, in fact, require agreement with the union, where there is one, but rather will permit the employer to negotiate non-union agreements even where a trade union exists in a workplace.
- 173.** Additionally, “take it or leave it” individual arrangements are not precluded by the legislation. The FWA envisages individual arrangements whereby an employer can negotiate directly with an employee, or prospective employee, for conditions which vary from the relevant award (section 144) or enterprise agreement (section 202). The complainant adds that it is indeed compulsory to include a term in each enterprise

agreement allowing for individual variation (section 202). The FWA, moreover, does not prohibit such individual arrangements being offered before employment starts, but does prohibit third party (i.e. union) agreement before entering into any such arrangement (sections 144(5) and 203(5)). Section 203(4) of the FWA imposes a “better off overall” test for any such agreement, but this test is not assessed by any third party before the agreement is entered into, nor is there any requirement to submit any such executed agreement to a third party for checking. Further, the “better off overall” test by definition involves the trading off of the benefit of some clauses (e.g. penalty rates) for a different benefit (e.g. a higher hourly rate), meaning that each individual term of an award ceases to be a firm legislative floor, but instead something that can be traded off.

- 174.** The complainant states that, especially in environments not regulated by union agreements, an employer could, therefore, continue to use its disproportionate bargaining power to strike individual arrangements with employees that differ from the legislated minimum standard; further, there is no prohibition on these “flexibility arrangements” being offered as a condition of employment. Although Australian Workplace Agreements (AWAs) are no longer available, the FWA provides employers with a range of measures to offer prospective employees “take it or leave it” individual contracts that differ from the legislated minimum. Even if any such arrangement is contrary to the award or agreement because it fails the “better off overall” test, given the private nature of the transaction, there is no guarantee that such breach will ever be discovered; unless the “take it or leave it” approach is prohibited, collective bargaining will not be encouraged, contrary to Convention No. 98, and minimum wages will be able to be traded off.

Provisions which give primacy to enterprise-level agreements and restrict the level at which bargaining can occur

- 175.** The complainant indicates that one of the objects of the FWA, as laid down in section 3(f), is the achievement of “productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action”. Section 171 similarly privileges collective bargaining at the enterprise level; the FWA thus establishes a clear preference for enterprise-level bargaining over negotiations at other levels, in contravention of Convention No. 98. The privileging of enterprise-level bargaining is also reflected in the fact that, under section 413 of the FWA, industrial action in support of multi-enterprise agreements is not protected. Additionally, since section 413 does not protect industrial action in support of multi-enterprise agreements, the approval of multi-enterprise agreements may potentially be refused under section 186(2)(b), which provides that Fair Work Australia, the agency mandated with the administering of the FWA, may refuse to approve agreements unless it is fully satisfied that no person coerced, or threatened to coerce, any of the employers to make the agreement. The complainant indicates that, under section 229 of the FWA, applications for bargaining orders from Fair Work Australia are prohibited in respect of multi-employer agreements unless a low-paid authorization is in operation in relation to the agreement.
- 176.** As regards pattern bargaining, the complainant indicates that sections 408 and 409 of the FWA exclude industrial action in support of pattern bargaining from the sphere of protected action; furthermore, under section 422 of the FWA, injunctions against action in support of pattern bargaining may be sought from either the Federal Court or Federal Magistrates Court.

Provisions which limit the content of agreements

- 177.** The complainant indicates that the FWA imposes restrictions on the content of collective agreements, in violation of Convention No. 98. Section 172 provides that collective agreements may include “permitted matters”, and adopts a “matters pertaining to the relationship between the employer or employers, and the employee organization or employee organizations” test as the cornerstone for determining whether a matter is permissible. The complainant maintains that such a test will not render permissible “non-union matters” over which workers may legitimately wish to bargain, and will most likely exclude the following: terms concerning an employer’s environmental practices; programmes that regulate the composition of a workforce so as to increase the number of women; clauses prescribing a minimum number of apprentices, or that a certain number of apprentices should be drawn from among indigenous Australians; and restrictions on the proportion of contractors used at an enterprise.
- 178.** The complainant indicates that section 194 lays down several terms of an agreement deemed “unlawful”, and which constitute grounds for denying approval of an agreement by Fair Work Australia under section 186. Section 194 further prohibits terms concerning bargaining fees from collective agreements, while section 470 prohibits the matter of strike pay as a subject for negotiation; these provisions additionally prohibit the negotiation of “better than legislative minimum” standards in the following areas: (1) right of entry; (2) industrial action; and (3) unfair dismissal – in so far as probationary periods are concerned. The complainant adds that bargaining over non-permitted matters is not protected by law, is subject to orders from Fair Work Australia, and ultimately orders and penalties from courts, and that the FWA’s anti-discrimination provisions do not extend to someone who is dismissed or otherwise prejudiced for taking industrial action in support of non-permitted matters.

Provisions imposing limits on unions’ right to access workplaces

- 179.** According to the complainant, sections 512 and 513 of the FWA restrict trade union representatives’ right of access to workplaces through the imposition of a permit system administered by Fair Work Australia, under which permits are issued on the basis of a “fit and proper person” test. Under section 513, furthermore, trade union representatives face the prospect of lifetime bans from workplaces for breaches of industrial laws.

Provisions restricting the right to strike

- 180.** The complainant maintains that the right to strike is restricted in several ways under the FWA. Industrial action in support of multiple-employer agreements and pattern bargaining is unprotected, as are secondary boycotts and sympathy strikes generally. Also, industrial action in support of negotiations concerning content deemed prohibited under the FWA is itself prohibited.
- 181.** According to the complainant, sections 424 and 426 of the FWA empowers Fair Work Australia to suspend or terminate protected industrial action in support of a proposed enterprise agreement if it is satisfied that the said action has threatened, is threatening, or would threaten, significant damage to the economy or an important part of it, or significant harm to a third party, respectively. Furthermore, under section 423, Fair Work Australia may suspend or terminate protected industrial action taken in support of a proposed collective agreement, where there is a threat of significant economic harm to the employer or any of the employees who will be covered by the agreement. The complainant contends that section 423, as drafted, appears likely to render all successful industrial action

unlawful – in contravention of freedom of association principles. Additionally, section 431 permits the Minister to issue a declaration to terminate industrial action if the Minister is satisfied that it is threatening, or may potentially threaten, significant damage to the national economy, or an important part of it.

- 182.** The complainant further indicates that Part 3-3, Division 8, of the FWA, contains provisions governing the secret ballot procedures for the calling of a strike. The provisions contained in Part 3-3 provide for the removal of protected action status in the absence of a secret ballot (section 445), require “numerous stages” before a ballot can be taken (subdivisions B–C), and requires a majority, not of the actual votes cast, but of those eligible to vote in order for protected industrial action to be authorized; these provisions, the complainant contends, are unduly burdensome and complicated and contravene freedom of association principles. Finally, the complainant states that section 470 of the FWA restricts industrial action in support of strike pay.
- 183.** Finally, the complainant states that Part 4-1 of the FWA concerning remedies establishes heavy sanctions for taking unprotected industrial action and exercising rights permitted under the relevant ILO Conventions. Workers and their unions remain exposed to: (1) orders from Fair Work Australia and penalties and sanctions for breach thereof; (2) court orders and the enforcement thereof; and (3) substantial monetary penalties. The above sanctions, the complainant contends, amount to undue restrictions on freedom of association rights.
- 184.** The complainant attaches a number of documents in support of its complaint, including: a statement dated 22 April 2009 by Mr Dean Mighell, National Vice-President of the complainant’s Electrical Division, on the effects on unions of the provisions of the Fair Work Bill 2008 and of past court and tribunal decisions; documents setting out the proposed amendments to the Fair Work Bill, 2008, prior to its adoption as the FWA; a copy of the Fair Work Bill, 2009; and a summary of several relevant decisions of courts and tribunals in Australia interpreting provisions of the WRA of 1996 that are reproduced in the FWA.

B. The Government’s reply

- 185.** In its communication of 15 January 2010, the Government states that the FWA commenced on 1 July 2009 and became fully operational on 1 January 2010, when the provisions relating to the new statutory minimum standards (called the National Employment Standards) and modern awards commenced. The Government maintains that it takes seriously its commitments under international labour standards and strongly supports the ILO in its objective of promoting decent work for all and raising labour and social standards. In doing so, it has sought to give effect to the firm belief that decent, fair protection for employees can, and indeed should, be a feature of modern economies based on the principles of competition and prosperity. The FWA is an expression of this commitment and, therefore, due consideration was given to Australia’s international obligations during the drafting of the new legislation. The Government is confident that the legislation gives effect to Australia’s commitments under ratified ILO Conventions.
- 186.** The Government rejects the complainant’s assertion that the FWA is inconsistent with Australia’s obligations under ILO Conventions Nos 87 and 98, and that the FWA is not consistent with ILO advisory opinions. It states that the new workplace relations system established under the FWA represents a deliberate and substantive move away from the fundamental elements of the previous Government’s Work Choices regime that were the subject of criticism by the CEACR in recent years. The FWA has introduced significant workplace reforms which place collective bargaining at the enterprise level at the heart of

the workplace relations system and does not restrict the choice of multiple employers to voluntarily bargain together for a multi-enterprise agreement.

- 187.** According to the Government, the FWA expands the range of content that can be included in enterprise agreements and, consequently, the range of matters over which protected industrial action can be taken. Employees will continue to have the right to take industrial action to support or advance claims during collective bargaining. This right is balanced with clear rules around taking industrial action, including the requirement for a secret ballot to authorize protected industrial action that is free from threat of legal sanctions. Finally, the right of entry provisions in the FWA strike a balance between the right of employees to be represented by their union with the right of employers to run their businesses with minimum disruption.
- 188.** The Government states that it adopted an extensive programme of consultation at every stage of the development and implementation of the new legislation, ensuring that employers, unions, state and territory governments and the community had the opportunity for their concerns to be raised and addressed before the Bill was debated in Parliament and adopted in amended form. This was the most comprehensive consultation on workplace relations ever undertaken in Australia. The principal object of the new laws is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.
- 189.** The Government indicates that the FWA also establishes two new independent statutory institutions to investigate and enforce the new laws: (1) Fair Work Australia is an independent tribunal headed by a judicial officer with the power to carry out a range of functions in relation to modern awards, minimum wages, collective agreements, unfair dismissal claims, good faith bargaining and industrial action, and to help employees and employers resolve disputes at the workplace; and (2) the Office of the Fair Work Ombudsman is an independent statutory office. Its functions include promoting harmonious, productive and cooperative workplace relations and ensuring compliance with Commonwealth workplace laws, for example through inspections.
- 190.** The Government considers that much of the complainant's concerns are of a technical nature and do not relate to substantive policy. The complainant, in identifying select provisions of the draft legislation, fails to acknowledge the content, intent and impact of the new legislation as a whole and the historic reform it represents in Australia. It is also important to note that the FWA is in the early stages of being implemented, and that the Government will closely monitor its implementation to ensure that it is in accordance with the policy intentions outlined in this report.
- 191.** The Government states that the complainant's contention that the FWA permits "take it or leave it" individual agreements to be made and that unions no longer have a role in the collective bargaining process, misrepresent the legislation. Under transitional legislation which came into effect in March 2008, no new Australian Workplace Awards could be made under federal workplace relations law. In limited circumstances, Individual Transitional Employment Agreements (ITEAs) could be made if they passed a "no disadvantage" test against the relevant award or collective agreement that would have applied. In other words, ITEAs cannot be used as a device to undermine collective bargaining and, in any event, could only be made up until 31 December 2009. Additionally, the general protections part of the FWA prohibits an employer from taking "adverse action" against an employee in relation to the making or termination of an individual flexibility arrangement. The FWA contains penalties for employers who coerce or use undue influence in having an employee enter into an individual flexibility arrangement (sections 343 and 344). Similarly, an employee can bring an action for

compensation and penalties for breach of an enterprise agreement or award if an individual flexibility arrangement disadvantages an employee.

- 192.** According to the Government, the FWA does not provide for individual statutory agreements of any form. Indeed, the objects of the FWA include: “ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind, given that such agreements can never be part of a fair workplace relations system”. The FWA also places collective bargaining at the enterprise level at the heart of its new workplace relations system and recognizes the legitimate rights of employees to be represented in the workplace and to negotiate collectively, including through new good faith bargaining requirements. Moreover, the FWA permits individual employers and employees to negotiate an arrangement that best suits them and their workplace (such as family-friendly arrangements) through individual flexibility arrangements, but these are substantially different to the previous Government’s individual statutory agreements (or AWAs). In particular, they cannot be made a condition of employment, are limited to certain matters, can be terminated with 28 days notice by either party and, importantly, cannot undermine industrial award safety net conditions or the provisions of a collective agreement, as an employee must be “better off overall” under the arrangement. Additionally, the FWA does not restrict the ability of unions to be involved in the collective bargaining process. In fact, it allows unions to be automatically recognized as bargaining representatives for those of its members in the workplace; to be covered by collective agreements in workplaces where they have members; and to seek redress if employers refuse to bargain with them in good faith.
- 193.** The Government states that although the FWA removes the distinction between union and non-union agreements, it in no way restricts the ability of unions to be involved in the collective bargaining process. To the contrary, the FWA reinforces the fundamental right of employees to be represented in negotiations by a union. Employers must notify employees that they have this right when bargaining commences, and bargaining representatives (including employers) are required to meet the good faith bargaining requirements (section 228), including a requirement to recognize and bargain with other bargaining representatives. Fair Work Australia has the power to make bargaining orders if the good faith bargaining requirements are not being met.
- 194.** As regards the complainant’s allegation that the FWA establishes a preference for enterprise-level bargaining over multi-employer agreements by not allowing the parties to choose the level at which to bargain, not providing for protected industrial action in support of multi-employer agreements or “pattern bargaining” and by not protecting employees involved in negotiating multi-employer agreements, the Government states that the FWA places collective bargaining at the enterprise level at the heart of the workplace relations system and also specifically provides for multiple employers to voluntarily bargain together for a multi-enterprise agreement. The FWA removes the requirement under the previous laws, which required employers to seek prior authorization in order to bargain together. Furthermore, single employers and single-interest employers, such as employers that are related bodies corporate, or engaged in a joint venture, for example, franchises, are now also able to bargain together for a single-enterprise agreement with their employees. Protected industrial action is available in this case. The FWA also includes provisions to assist low-paid employees and their employers to access the benefits of collective bargaining through facilitated multi-employer bargaining; this special stream of facilitated multi-employer bargaining for low-paid employees is intended to help workers who have not been able to access the benefits of bargaining in the past.
- 195.** To ensure that multi-employer bargaining remains voluntary, however, the Government indicates that protected industrial action is not available in support of claims for a multi-

enterprise agreement; also, action taken in support of “pattern bargaining” is not protected industrial action (i.e. immune from legal action such as claims in tort or contract) under the FWA. However, the making of common claims across multiple workplaces is not regarded as pattern bargaining, provided that the bargaining representative is genuinely trying to reach agreement and is willing to negotiate those claims at each enterprise (section 412(2)).

- 196.** As regards the allegations concerning restrictions on the content of collective agreements, the Government maintains that the FWA expands the range of matters that can be included in collective agreements, compared to the previous Government’s workplace relations laws. For example, it allows provisions in enterprise agreements on paid leave to attend union meetings or training, requirements for an employer to consult with unions about major change in the workplace and the ability for unions to be involved in dispute settlement procedures; such provisions were not permitted under the previous legislation. The FWA provides that collective agreements can deal with such subjects as “matters pertaining to the employment relationship”, including: matters pertaining to the relationship between the employer and their employees; matters pertaining to the relationship between the employer and the employee organization or organizations to be covered by the agreement; deductions of wages for any purpose authorized by an employee; and how the agreement will operate. The Government states that this is an appropriate parameter, ensuring that agreements deal with issues that properly relate to work performed and the entitlements of employees in the workplace.
- 197.** As concerns the allegations relating to restrictions on negotiations over strike pay, the Government states that, consistent with the general common law rule that employees are not entitled to receive payment for employment services they do not perform, it is unlawful for an employer to pay, or an employee to demand or request, strike pay. However, the FWA provides fairer and more proportionate options for employers to respond to employee industrial action than previous legislation. The new workplace relations system distinguishes between payments withheld during periods of unprotected and protected industrial action and includes special rules for protected partial work bans. When protected industrial action is taken, there will no longer be a minimum mandatory deduction of four hours’ pay (this was known as the “four hour rule” under the previous workplace relations system). The employer must only deduct pay for the actual period of industrial action taken by the employee. The “four hour rule” continues to apply to unprotected industrial action, in acknowledgement of the fact that snap strikes and bans can have severe and damaging effects on businesses. For unprotected industrial action that is of less than four hours’ duration, employers are required to withhold four hours’ pay. For more than four hours of unprotected industrial action, pay is withheld for the duration of the action. A mandatory minimum deduction of pay acts as a disincentive to taking unprotected industrial action.
- 198.** The FWA also introduced additional options to provide for greater proportionality and fairness in managing and responding to protected industrial action taken in the form of partial work bans. After giving notice, employers may deduct wages proportionate to duties not being performed. Fair Work Australia is able to settle any disputes about the amount of wages an employer proposes to deduct. Previously, any payment of wages where any form of work ban (no matter how minor) was in place was considered illegal strike pay. The Government believes that the provisions governing strike pay in the FWA are reasonable and appropriate for Australian conditions and do not impose undue restrictions on freedom of association. The Government will carefully monitor the application of the provisions to ensure that they work as intended.
- 199.** As concerns the allegations of restrictions on the right of entry to workplaces, the Government states that the FWA permits unions to enter workplaces to investigate suspected breaches of the law, an award, agreement or State occupational health and safety

laws and to hold discussions with those members (or those employees who are eligible to be members) of the union. In the case of right of entry for the purpose of holding discussions, there is no longer a requirement that employees are covered by an award or agreement that binds the union; it is no longer necessary for the union to be actually covered by an employment instrument operating in the enterprise. Also, there are no restrictions on the subject matter of discussions. Moreover, while the employer can determine the location on the premises for holding discussions, the FWA now provides guidance on what would be an unreasonable location.

- 200.** According to the Government, the provisions of the FWA ensure that only “fit and proper persons” are able to hold a right of entry permit. The factors to be considered in making this determination are listed in section 513 and include whether the official has any previous convictions under industrial law or for certain criminal offences. Importantly, in recognition of the vulnerable nature of the industry, the FWA also includes new right of entry provisions that have been tailored specifically to apply to outworkers in the Textile, Clothing and Footwear (TCF) industry. Under the provisions, a permit holder can enter premises to inspect documents relevant to an alleged breach involving TCF outworkers, even if the TCF outworkers do not work at the premises where the documents are held. In addition, advance notice of entry is not required when permit holders enter any premises to investigate suspected breaches relating to TCF outworkers. The Government indicates that it considers that the new system properly recognizes the rights of employees to meet with their union in their workplace, while also preventing unreasonable behaviour.
- 201.** With regard to the allegations concerning restrictions on secondary boycotts and sympathy strikes, the Government states that the complainant’s reference to the restriction set out in section 438 appears to concern the former WRA, which provided that industrial action was not protected if taken “in concert” with persons who are not “protected persons”. This provision is not in the FWA: instead, the FWA now provides that industrial action is protected if organized or engaged in by a bargaining representative of an employee covered by the agreement, or by the employees specified, in the protected action ballot order.
- 202.** Secondary boycotts continue to be regulated by the Trade Practices Act. Those arrangements prohibit a person engaging in conduct with a second person which hinders or prevents a third person (who is not an employer of the first or second person) supplying or receiving goods and services from a fourth person (who is also not an employer of the first or second person) and which has the effect of causing a substantial loss or damage to the business of the fourth person (section 45D), or has the effect of causing a substantial lessening of competition in any market (section 45DA) and also prohibits a person engaging in conduct with a second person which prevents, or substantially hinders, a third person (who is not an employer of the first person) from engaging in trade and commerce (section 45DB). However, section 45DD of the Trade Practices Act provides that a person does not contravene sections 45D–45DB if the dominant purpose for which the conduct was engaged is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or another employee also employed by the employer of that person.
- 203.** As concerns restrictions on the right to strike during the life of an agreement, the Government indicates that it is not appropriate for protected industrial action to be available during the life of an agreement on the basis that once parties have entered into an enterprise agreement, they should abide by the terms of that agreement. The Government believes that this is a reasonable requirement, noting that the new agreement and bargaining framework under the FWA facilitates the making of enterprise agreements that are fair and reasonable. This is achieved, for example, by enabling employees to be represented in bargaining and requiring the parties to bargain in good faith. Further, Fair

Work Australia will only approve an agreement if satisfied that it has been genuinely agreed to and passes the “better off overall” test against the new safety net. Also, enterprise agreements must include a term in the agreement that requires employers to consult employees about major workplace changes and allows for the representation of employees.

- 204.** As concerns prohibitions on industrial action on grounds of economic harm, the Government states that the thresholds for suspending and/or terminating protected industrial action are sufficiently high and strike an appropriate balance between the rights of employees to take protected action with the need to protect the public interest by ensuring economic stability. Protected industrial action threatening trade or commerce is not prohibited under the FWA. Only in very limited circumstances does the FWA provide for protected industrial action to be suspended or terminated. It is only where Fair Work Australia is satisfied that protected industrial action is causing, or is threatening to cause, significant damage to the Australian economy, or an important part of it, or endangers the life, personal safety or health or the welfare of the population, or part of it, that it must suspend or terminate the protected industrial action.
- 205.** Subject to certain qualifications, Fair Work Australia must suspend protected industrial action for a period of time if it is satisfied that industrial action is adversely affecting the bargaining participants and is threatening to cause significant harm to a third party. Fair Work Australia must also be satisfied that the suspension of the industrial action is appropriate, taking into account whether the suspension would be contrary to the public interest as well as any other relevant matters. The harm to the third parties must be significant, that is, a more serious nature than merely suffering a loss, inconvenience or delay. This may occur, for example, where industrial action in one sector is significantly affecting another enterprise to the point where the other enterprise is at risk of insolvency. Fair Work Australia also has the discretion to suspend or terminate protected industrial action where significant economic harm is being caused to the parties themselves. Again, Fair Work Australia is required to consider such matters as the source, nature and degree of harm suffered, or likely to be suffered, the likelihood the harm will continue to be caused, or will be caused, and the capacity of the person to bear that harm. If the action is threatening to cause significant economic harm, Fair Work Australia must be satisfied the harm is imminent.
- 206.** The Government indicates that, in circumstances where Fair Work Australia believes that a “cooling off period” is appropriate and will help resolve the issues in dispute, it must also suspend protected industrial action. Fair Work Australia is required to take into account a range of matters including whether the suspension would be beneficial to the bargaining representatives for the agreement; the duration of the protected industrial action; and whether the suspension would be contrary to the public interest or inconsistent with the objects of the Act.
- 207.** Moreover, where industrial action is terminated because the action was causing, or threatening to cause, significant economic harm to the employer and employees, or the action was endangering the life, personal safety or health, or the welfare, of the population, or part of it, or was causing significant damage to the Australian economy, or an important part of it, then Fair Work Australia must, after a 21-day negotiating period, make a workplace determination (that is, arbitrate an outcome to the matters that are still in dispute at the end of the negotiating period). Fair Work Australia must extend the negotiating period to 42 days if all of the bargaining representatives jointly apply for the extension. Fair Work Australia may continue to use its powers to assist bargaining representatives to reach an agreement during the negotiating period. The Government strongly believes that the thresholds for suspending or terminating protected industrial action on each of these grounds under the FWA are sufficiently high to balance the rights of employees to take industrial action in pursuit of an agreement with the Government’s responsibilities for

protecting the national economy, the safety, health or welfare of the population and the legitimate interests of other affected parties.

- 208.** As regards restrictions on the right to strike through the imposition of compulsory arbitration by the Minister, the Government states that the thresholds for the Minister making such a declaration are sufficiently high when balanced with the rights of employees to take protected action under the FWA. Importantly, under these provisions, the harm to the economy must be considered as significant and of a more serious nature than a mere loss, inconvenience or delay. The Minister for Employment and Workplace Relations has recently stated that she would intervene in industrial disputes only as a last resort, noting also that the outcome of ministerial intervention would be arbitration by Fair Work Australia. The power of the Minister to make such a declaration was also present in the WRA and, to date, has never been exercised.
- 209.** As regards the allegations concerning the FWA's secret ballot strike provisions, the Government indicates that they are designed to be fair and have been simplified compared to the previous workplace relations laws. They are not intended to frustrate or delay the taking of industrial action. Protected action ballots ensure that eligible employees are free to make their own choice about whether or not to authorize industrial action. They are a simple mechanism for ensuring a democratic process for determining the views of employees about taking protected industrial action and are being carefully monitored by the Government. The FWA also provides for employees to take protected action in response to industrial action taken by employers without the need for a secret ballot.
- 210.** The Government states that, at this early stage, the protected action ballot provisions in the FWA are generally operating as intended. Based on data from the first six months of the FWA's operation, of the 615 protected action ballot applications lodged, Fair Work Australia has made 529 protected action ballot orders; that is, 86 per cent of the applications were successful. The remaining applications comprise those that are rejected for reasons such as non-compliance with the requirements for a protected action ballot or technical errors, and those withdrawn for reasons such as bargaining representatives reaching agreement. At this stage, the Government's view is that the parties are testing the parameters of the new laws and that, with time, the percentage of protected action ballots being granted should increase as Fair Work Australia decisions establish a body of case law in relation to the concept of genuinely trying to reach agreement, a key requirement for the granting of a protected action ballot order.
- 211.** The Government states that unnecessary delays in the ballot process have been minimized, as determinations for protected ballot applications, as far as practicable, are being made within two days of the application. Analysis of the 105 protected ballot applications lodged in September 2009, and scheduled for hearing by Fair Work Australia, indicates that 84 applications were heard within two days, 17 within three days, two within four days, one within five days and one within six days. The Government adds that it will continue to monitor carefully the application of the provisions to ensure that the secret ballot provisions work as intended.
- 212.** Finally, as concerns the complainant's allegations on severe sanctions for engaging in unprotected industrial action, the Government states that it is necessary to provide appropriate deterrents, including the imposition of pecuniary penalties, against persons taking unprotected industrial action in the workplace. The Federal Court retains the discretion to determine what the appropriate level of penalty is, having regard to the circumstances of the case.

C. The Committee's conclusions

213. *The Committee notes that the present case concerns allegations of contraventions of freedom of association contained in the FWA, particularly restrictions on the right to engage in collective bargaining and the right to strike.*
214. *The Committee notes, firstly, the complainant's allegations to the effect that the FWA undermines collective bargaining by permitting an employer to negotiate directly with an employee, or prospective employee, for conditions which vary from the relevant enterprise agreement. The Committee further notes the Government's indication that the FWA does not provide for individual statutory agreements of any form, but rather takes as one of its objects "ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind, given that such agreements can never be part of a fair workplace relations system". Moreover, according to the Government, individual flexibility arrangements cannot undermine industrial award safety net conditions or the provisions of a collective agreement, as an employee must be "better off overall" under the arrangement. The Committee further notes that section 202(3) provides that an individual flexibility arrangement under a flexibility term in an enterprise agreement does not change the effect the agreement has in relation to the employer, and any other employee, and does not have any effect other than as a term of the agreement. Observing that the provisions concerning individual flexibility arrangements have been carefully drafted and, according to the Government, do not undermine collective agreements, given that their impact is largely dependent on their application by Fair Work Australia, the Committee requests the Government to keep it informed of the application of the individual flexibility arrangement provisions in practice.*
215. *As regards the complainant's allegation that the FWA permits employers to enter into agreements directly with employees, even where a union exists, the Committee notes the Government's indication that the FWA reinforces the fundamental right of employees to be represented in negotiations by a union: employers must notify employees that they have this right when bargaining commences and, under section 228, bargaining representatives, including employers, are required to meet the good faith bargaining requirements. In respect of this issue, the Committee additionally notes that section 172 provides that in the case of greenfield agreements – agreements relating to a "genuine new enterprise" – employers are to conclude agreements with one or more employees' organizations; moreover, section 173 stipulates that an employer that will be covered by a proposed enterprise agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who will be covered by the agreement.*
216. *The Committee also notes, however, that section 172 could place employees, and organizations of employees, on an equal footing with respect to the conclusion of agreements that are not greenfield agreements – irrespective of whether or not an employees' organization exists. Recalling that the Collective Agreements Recommendation, 1951 (No. 91), stresses the role of workers' organizations as one of the parties in collective bargaining, and that direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist, might, in certain cases, be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 945], the Committee requests the Government to ensure respect for this principle and to provide detailed information on the application of section 172 of the FWA in practice, so as to allow it to determine the impact of this provision on the promotion of negotiations between employers and workers' organizations.*

- 217.** *The Committee notes the complainant’s allegation that, by its stated objects and several of its provisions, the FWA establishes a preference for enterprise-level bargaining over bargaining at other levels – particularly multi-employer or “pattern bargaining”. In this respect, the Committee notes that one of the FWA’s stated objects, as set out in section 3(f), is “achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action”. Similarly, one of the stated objects of Part 2-4 of the FWA, which concerns enterprise agreements, is “to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits” (section 171(a)). Additionally, the Committee notes that section 186(2)(ii) of the FWA requires, with respect to a multi-enterprise agreement, that Fair Work Australia be satisfied that the employer or employers concerned were not “coerced” into making the agreement, and that section 229(2) prohibits applications for bargaining orders made in relation to proposed multi-enterprise agreements – unless a “low-paid authorization” is in operation in relation to the agreement concerned.*
- 218.** *The Committee observes, moreover, that industrial action taken in furtherance of multi-enterprise or “pattern bargaining” is excluded from the definition of protected industrial action under sections 408–413 of the FWA: section 409(4) provides that for an employee claim action undertaken by a bargaining representative to qualify as protected industrial action, the bargaining representative must not be engaged in pattern bargaining in relation to the proposed agreement unless, as stipulated under section 412(2), the bargaining representative is “genuinely trying to reach an agreement with the employer”; and section 413, which sets out the common requirements that apply for industrial action to be protected industrial action, stipulates that the industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement (subsection 2). The Committee further notes that section 409(1)(b), by limiting protected employee claim actions to those “against an employer to be covered by the agreement”, would appear to exclude sympathy strikes and general secondary boycotts from the scope of protected industrial action.*
- 219.** *The Committee takes note of the Government’s indications regarding multi-enterprise bargaining, in particular that the FWA places collective bargaining at the enterprise level at the heart of the workplace relations system, and that multi-enterprise bargaining is facilitated by: (1) removing the requirement under previous legislation that employers seek prior authorization before bargaining together; and (2) facilitating multi-employer bargaining in low-paid industries. The Government also confirms, nevertheless, that to ensure the voluntary nature of multi-employer bargaining, protected industrial action is not available in support of claims for a multi-enterprise agreement, or for “pattern bargaining” – although under section 412(2) the making of common claims across multiple workplaces is not regarded as. “pattern bargaining”, provided that the bargaining representative is genuinely trying to reach agreement and is willing to negotiate those claims at each enterprise.*
- 220.** *In respect of these matters, the Committee recalls that, according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority. Furthermore, workers and their organizations should be able to call for industrial action (strikes) in support of multi-employer contracts (collective agreements) [see *Digest*, op. cit., paras 988 and 540]. The Committee further recalls that in a previous case concerning Australia, and with reference to the Building and Construction Industry Improvement Act of 2005, it had already reached conclusions noting that a general*

prohibition on sympathy strikes could lead to abuse and workers should be able to take such action, provided the initial strike they are supporting is, itself, lawful [see Case No. 2326, 320th Report, para. 445]. In view of the above, the Committee considers that subsections (1)(b) and (4) of section 409 and section 413(2), by excluding sympathy strikes, secondary boycotts and industrial action in support of multiple-enterprise agreements from the scope of protected industrial action, could adversely affect the right of organizations to seek and negotiate multi-employer agreements, as well as unduly restrict the right to strike. Taking into account its conclusions on such matters reached in previous cases concerning Australia, it requests the Government to review these sections, in full consultation with the social partners concerned.

- 221.** *The Committee notes that section 409 also contains other restrictions on the right to strike. Section 409(1)(a) provides that industrial action is protected only to the extent that it is “organized or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters”. (Permitted matters are defined under section 172(1) as matters pertaining to: (1) the relationship between the employer or employers, and the employees, employee organization or employee organizations, that will be covered by the agreement; (2) deductions from wages for any purpose authorized by an employee who will be covered by the agreement; and (3) how the agreement will operate.) Furthermore, section 409(3) excludes from the scope of protected industrial action actions in support of the inclusion of “unlawful” terms, including terms relating to: the extension of unfair dismissal benefits to workers not yet employed for the statutory period; the provision of strike pay; the payment of bargaining fees to a trade union; and the creation of a union’s right to entry for compliance purposes that are different or superior to those contained within the Act.*
- 222.** *Moreover, the Committee notes that other provisions of the FWA provide for the suspension or termination of protected industrial action if: (1) it is causing, or may cause, significant economic harm (section 423); and (2) it has threatened, is threatening, or would threaten, significant damage to the economy or an important part of it (section 424(1)(d)). Section 431 further empowers the Minister to terminate protected industrial action in support of a proposed agreement in case of significant damage to the economy or a part of it, and section 426 provides that Fair Work Australia must suspend, or terminate, industrial actions threatening to cause significant harm to a third party. The Committee notes, finally, that section 417 prohibits industrial actions undertaken before the nominal expiry date of an agreement.*
- 223.** *In respect of these provisions, the Committee notes that according to the Government: (1) the thresholds for suspending and/or terminating protected industrial action are sufficiently high and strike an appropriate balance between the rights of employees to take protected action with the need to protect the public interest by ensuring economic stability; (2) only in very limited circumstances does the FWA provide for protected industrial action to be suspended or terminated; and (3) harm to the economy must be considered as significant and of a more serious nature than a mere loss, inconvenience or delay – the power of the Minister to make such a declaration has, to date, never been exercised. The Government adds that it strongly believes that the thresholds for suspending or terminating protected industrial action on each of these grounds under the FWA are sufficiently high to balance the rights of employees to take industrial action in pursuit of an agreement with the Government’s responsibilities for protecting the national economy, the safety, health or welfare of the population and the legitimate interests of other affected parties.*
- 224.** *These indications notwithstanding, as regards the right to strike, the Committee must recall that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective*

*claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. Furthermore, the right to strike may only 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) [see **Digest**, op. cit., paras 526 and 576]. In the light of the above-noted principles, the Committee requests the Government to provide detailed information on the application of these provisions and to review them, in consultation with the social partners, with a view to their revision, where appropriate.*

- 225.** *As regards the complainant's allegation that the provisions in Part 3-3, Division 8, of the FWA governing the secret ballot procedures for the calling of a strike are unduly burdensome and complicated, the Committee notes that according to the Government, the said procedures are designed to be fair, have been simplified compared to the previous workplace relations laws, and are not intended to frustrate or delay the taking of industrial action. In respect of this matter, the Committee recalls that the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organizations. Furthermore, the requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises [see **Digest**, op. cit., paras 547 and 556]. The Committee requests the Government to ensure respect for these principles in practice, as well as to provide detailed information on the practical application of the secret ballot procedure provisions.*
- 226.** *The Committee notes that the FWA contains several provisions concerning the content of collective agreements. As noted above, section 172 provides that an agreement may be made on matters pertaining to the employment relationship, deductions from wages, and the operation of the agreement. Section 186(4) further requires that an agreement contain no "unlawful terms", which, as defined under section 194, includes terms relating to: the extension of unfair dismissal benefits to workers not yet employed for the statutory period; the provision of strike pay; the payment of bargaining fees to a trade union; and the creation of a union right to entry for compliance purposes that are different or superior to those contained within the Act. Additionally, section 470 bans the provision of strike pay; the Government further confirms in this connection that negotiations concerning strike pay are also prohibited.*
- 227.** *The Committee notes that, according to the Government, "matters pertaining to the employment relationship" include such matters as the deduction of wages for any purpose authorized by an employee, and how an agreement will operate. In spite of this clarification, the Committee observes that the exact scope of the term "matters pertaining to the employment relationship" remains elusive. Further recalling that measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98, and that tripartite discussions for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties [see **Digest**, op. cit., para. 912], the Committee requests the Government to provide further clarification on the application of sections 172 and 194 of the FWA and review these sections, in full consultation with the social partners, in line with the principle cited above.*
- 228.** *The Committee notes that under sections 512 and 513 of the FWA, union officials require a permit issued by Fair Work Australia in order to access the workplace, and that the said permits are issued on the fulfilment of a "fit and proper person" test, under which the factors to be considered include: whether the official has ever been convicted of an offence*

*involving entry on to premises, or intentional use of violence against another person, or intentional damage or destruction of property; as well as whether the official, or any other person, has ever been ordered to pay a penalty under this Act, or any other industrial law, in relation to action taken by the official". In respect of this matter, the Committee recalls that workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including access to workplaces and, moreover, that workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation function [see *Digest*, *op. cit.*, paras 1102 and 1104]. Bearing in mind the aforementioned principles, the Committee requests the Government to provide information on the practical application of section 513, including any statistics relating thereto, in order to allow it to assess the impact of that section on the right of workers' representatives to access the workplace.*

The Committee's recommendations

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

- (a) The Committee wishes at the outset to recognize the efforts that were made by the Government when drafting the Fair Work Act to consult the social partners with the aim of concluding a carefully drafted Act intended to balance a variety of important interests in the field of industrial relations. It encourages the Government, in its review of the application of the FWA, to proceed in the same way of full consultation.*
- (b) The Committee requests the Government to keep it informed of the application of the provisions of the FWA concerning individual flexibility arrangements in practice.*
- (c) Recalling that the Collective Agreements Recommendation, 1951 (No. 91), stresses the role of workers' organizations as one of the parties in collective bargaining, and that direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist, might, in certain cases, be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted, the Committee requests the Government to ensure respect for this principle and to provide detailed information on the application of section 172 of the FWA in practice, so as to allow it to determine the impact of this provision on the promotion of negotiations between employers and workers' organizations.*
- (d) Taking into account its conclusions on such matters reached in previous cases concerning Australia, the Committee requests the Government to review sections 409(1)(b), 409(4) and 413(2) of the FWA, in full consultation with the social partners concerned.*
- (e) The Committee requests the Government to provide detailed information on the application of sections 409(1)(a), 409(3), 423, 424, 426 and 431 of the FWA and to review these provisions, in consultation with the social partners, with a view to their revision, where appropriate.*

- (f) *The Committee requests the Government to provide detailed information on the practical application of the provisions of Part 3-3, Division 8, of the FWA concerning protected action ballots.*
- (g) *The Committee requests the Government to provide further clarification on the application of sections 172 and 194 of the FWA concerning the subject matter for collective bargaining and to review these sections, in full consultation with the social partners, in line with the principles cited in its conclusions.*
- (h) *The Committee requests the Government to provide information on the practical application of section 513 of the FWA, including any statistics relating thereto, in order to allow it to assess the impact of that section on the right of workers' representatives to access the workplace.*
- (i) *The Committee draws the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.*

CASE NO. 2722

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

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

- **Education International (EI) and**
- **the Botswana Teachers' Union (BTU)**

supported by

the International Trade Union Confederation (ITUC)

Allegations: The complainant organizations allege that the Department of Teaching Service Management (TSM) forced the President of the Botswana Teachers' Union (BTU), Mr Japhta Radibe, to retire from his post in order to prevent him from heading the BTU, and other harassment and dismissals

- 230.** The complaint is contained in a communication from Education International (EI) and the Botswana Teachers' Union (BTU) dated 24 June 2009. The ITUC supported the complaint in a communication dated 30 June 2009.
- 231.** The Government forwarded its response to the allegations in a communication dated 17 November 2009.
- 232.** Botswana 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), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

- 233.** In a communication dated 24 June 2009, the complainant organizations, EI and the BTU, raise the following alleged shortcomings in respect of Convention No. 87.
- 234.** The complainants deplore that the Government interfered in the internal organization of the BTU and discriminated against one of its trade union leaders by making the President of the BTU, Mr Japhtha Radibe, retire in order to prevent him from heading the teachers' union, in breach of Articles 3 and 4 of Convention No. 87.
- 235.** On two occasions, in 2006 and 2007, the Director of Teaching Service Management (TSM), Mr Opelo Makhandlela, forced Mr Japhtha Radibe to retire by means of a letter. The reasons advanced were that Mr Radibe was spending too much time on his union work, which compromised his duties as headmaster.
- 236.** Mr Radibe was first made to retire, at age 49, on 24 October 2006. He was reinstated in his school on 3 November 2006. The President of the BTU was again forced into early retirement by a letter from the Department of TSM dated 7 March 2007. The BTU President was given three months' notice to depart from his position as the headmaster of Sedibelo Junior Secondary School in Mochudi, located in the Kgatleng District. This time, Mr Radibe was not reinstated.
- 237.** EI and the BTU consider this forced retirement a clear violation of the workers' rights of Mr Radibe and a victimization and intimidation of his leadership as a trade unionist.
- 238.** On 29 March 2007, an international trade union delegation composed of representatives from EI, the Southern African Teacher Organisation (SATO) and the Southern African Trade Union Co-ordinating Council (SATUCC) met with officials from the Department of Labour as well as the Education Minister, Mr Jacob Nkate, to convince him to reconsider his decision.
- 239.** Following the early retirement of its President, the BTU convened a Special Congress in April 2007 to amend the constitution of the union to allow Mr Radibe to keep his position at the leadership of the BTU until the end of his term in 2009. Otherwise, not being active in teaching, Mr Radibe would have had to resign from BTU leadership. In March 2007, Mr Radibe was elected President of the Botswana Federation of Trade Unions (BFTU) because of his firmness at the BTU.
- 240.** In addition to the personal case of the BTU President, the complainants point to information received by the teachers' union according to which the Director of TSM has identified 14 heads of secondary schools who have been intimidated because of their involvement in trade union activities. Two have been dismissed in 2008: Mr Ruda and Mr Habangana.
- 241.** The complainants add that the President of the BTU was forced into early retirement for speaking publicly against government education policies such as privatization, the double-shift system and the reintroduction of school fees and his denunciation of teachers' poor working conditions. Mr Radibe also made public comments deploring corruption and maladministration at the Ministry of Education.
- 242.** When he was made to retire, the President of the BTU was denied leave benefits proportionate to his career. He received no benefits and is currently surviving with an early retirement pension allocation which he was able to access only once he turned 50.

243. In March/April 2007, the BTU took up, on behalf of Mr Radibe, the issue of the unfair early retirement to the High Court of Botswana. Mr Radibe requests to be reinstated in his teaching duties and to be given compensation for the lost years in his teaching position.
244. The complainants highlight that it took over six months for the judicial system to declare itself competent, so the court case really started in early 2008, and by June 2008 there had been no hearing. BTU leadership and Mr Radibe are concerned by the postponement of the court case without justification. The delay may actually prevent Mr Radibe from applying for another term at the helm of the BTU.
245. In addition, attempts have been made by the Director of TSM to develop informal contacts with the BTU lawyer. This is perceived to be putting the lawyer under pressure.
246. Mr Radibe is a hard worker and not afraid to take employers head-on over the needs of workers in Botswana. His union activism is well known in the country. Mr Radibe is the President of the SATO and was an executive member of EI's African Regional Committee.
247. The complainants further condemn the Government's interference in the internal organization of the BTU through its prevention of the union's President from attending major international trade union meetings, such as the EI regional conference in Cairo in January 2007, for which Mr Radibe was denied a visa.
248. Lastly, the complainant organizations indicate that they are lodging this complaint to remind the Government of Botswana of its responsibility to uphold international labour standards and fulfil its obligations to respect and ensure freedom of association.

B. The Government's reply

249. In a communication dated 17 November 2009, the Government denies having at any time interfered in the affairs of the BTU. This is evidenced by the promptness with which the Government granted recognition to the BTU as soon as it was a registered trade union. The Government has always allowed for the secondment of officers to the BTU.
250. The Government states that the Director of TSM as the employer of teachers has the responsibility to ensure that there is compliance in the service and that non-performers are called to account for their misconduct, regardless of their union affiliation. The Government rejects the allegation that the 14 school heads were retired for their involvement in trade union matters. These persons were school heads of poor performing schools, the performance of which was a result of poor leadership, and their employer is not even aware that they were members of any trade union.
251. The Government refers to two of the 14 cases. One case involved a teacher, Mr Ruda, who left the service after attaining forced retirement at the age of 65 years. Another case involved a teacher, Mr Habangana, who was retired after displaying behaviour unfit for his professional obligations, in that, in the process of punishing three girl students, he ordered them to undress in front of him, which was viewed as a gross misconduct.
252. The Government asserts that Mr Radibe was never discriminated against for his trade union involvement. All employed teachers are expected to attend to their official duties. Mr Radibe had completely abdicated responsibility and was busy with social events that had nothing to do with the cause of teachers. He was more of an absentee school head and had been warned without success in this regard.

253. The Government concludes that Mr Radibe was retired solely for neglect of duty. The decision as to whether the retirement or benefits of Mr Radibe were proper or improper is yet to be determined in the court, but meanwhile he remains retired.
254. With regard to the BTU legal case, the Government indicates that the judicial system regulates its own procedures and the Director of TSM cannot interfere with them. It considers the allegation that the Director attempted to befriend the lawyer of the BTU as a misrepresentation of facts.
255. In relation to his union representation activities, Mr Radibe was requested to prioritise his activities and meetings in view of the fact that he was also an employee and had work to do. The allegation that Mr Radibe was denied a visa by the Government is refuted by the fact that the Government of Botswana does not issue visas for its citizens to visit foreign countries. The process of issuing visas is the responsibility of the embassies of foreign countries.

C. The Committee's conclusions

256. *The Committee notes the complainants' allegation that the Government forced Mr Japhta Radibe, President of the BTU, into early retirement from his position as the headmaster of Sedibelo Junior Secondary School in Mochudi, Kgatleng District, in order to prevent him from heading the teachers' union. On two occasions, the Director of TSM allegedly made Mr Radibe retire at age 49 by means of a letter: (i) on 24 October 2006, he was forced to retire but was reinstated in his post on 3 November 2006; and (ii) on 7 March 2007, he was again forced into early retirement with three months' notice. The complainants add that an international trade union delegation composed of representatives from EI, the SATO and the SATUCC met on 29 March 2007 with officials from the Department of Labour as well as the Minister of Education and tried to make the Minister reconsider the decision. The Committee notes that Mr Radibe was not reinstated, was denied leave benefits proportionate to his career and is currently receiving an early retirement pension allocation which he was only able to receive at the age of 50. The Committee further notes that, according to the complainants, in April 2007, the BTU convened a meeting to amend its constitution so as to allow Mr Radibe who had also been elected President of the BFTU in March 2007, to keep his position as BTU leader until the end of his term in 2009, although not active in teaching.*
257. *The Committee notes the Government's reply that it has never interfered in the affairs of the BTU, which, it states, is evidenced by the promptness with which the Government granted recognition as soon as the BTU was a registered trade union, and that it has always allowed for the secondment of officers to the BTU. The Committee further notes that, according to the Government, Mr Radibe was retired solely for neglect of duty and was never discriminated against for his trade union involvement. Instead of attending official duties, Mr Radibe had completely abdicated responsibility being busy with social events not related to the cause of teachers and had been warned without success in relation to his absences. The Government adds that the decision on the appropriateness of the retirement or benefits of Mr Radibe is yet to be determined in the court, but that meanwhile he remains retired.*
258. *The Committee observes that there is a contradiction between the information provided by the complainant and that of the Government, and that in neither case was any documentary evidence or relevant decisions or court judgements (such as the decision to reinstate after the first forced retirement) provided. While the reason advanced by the Government for his early retirement was that Mr Radibe was spending too much time on social events unrelated to the cause of teachers, which compromised his duties as headmaster, the complainant organizations allege that he was forced into early retirement*

for speaking publicly against government education policies (e.g. privatization, double-shift system and reintroduction of school fees), poor working conditions of teachers, as well as corruption and maladministration at the Ministry of Education.

259. The Committee however, remains deeply concerned by the allegations that the Government forced Mr Radibe, President of the BTU, President of the SATO and former executive member of EI's African Regional Committee, at age 49 into early retirement from his position as a school headmaster. The Committee points out 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. The Committee wishes to recall that not only dismissal, but also compulsory retirement, when imposed as a result of legitimate trade union activities, would be contrary to the principle that no person should be prejudiced in his or her employment by reason of trade union membership or activities [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 793 and 799].
260. In this regard, the Committee notes the allegation of the complainant organizations that the court case of Mr Radibe concerning unfair early retirement is being delayed without justification. In March/April 2007, the BTU took up the case, on behalf of Mr Radibe, before the High Court of Botswana and requested Mr Radibe's reinstatement in his teaching duties and compensation for the lost years in his position. The complainants denounce that it took the judicial authority over six months to declare itself competent, and by June 2008 there had been no hearing. In addition, attempts have allegedly been made by the Director of TSM to develop informal contacts with the BTU lawyer, which is perceived as putting the latter under pressure. The complainants add that the delay might actually prevent Mr Radibe from applying for another term at the helm of the BTU. The Committee also notes the Government's indication that the Director of TSM cannot interfere with the judiciary, since the judicial system regulates its own procedures, and that it is a misrepresentation of facts to allege that the Director of TSM attempted to befriend the lawyer of the BTU.
261. The Committee deeply regrets the delay in the processing of the case of Mr Radibe before the High Court of Botswana. It 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. The Committee considers that the longer it takes for such a procedure to be completed, the more difficult it becomes for the competent body to issue a fair and proper relief, since the situation complained of has often been changed irreversibly, people may have been transferred, etc, to a point where it becomes impossible to order adequate redress or to come back to the status quo ante. The Committee draws the Government's attention to the fact that, in a case in which proceedings concerning dismissals had already taken 14 months, the Committee requested the judicial authorities, in order to avoid a denial of justice, to pronounce on the dismissals without delay and emphasized that any further undue delay in the proceedings could in itself justify the reinstatement of these persons in their posts [see **Digest**, op. cit., paras 821, 826 and 827].

- 262.** *In view of the fact that three years have elapsed since the lodging of the case by the BTU before the High Court of Botswana, the Committee requests the Government to take all measures within its power to ensure that the ongoing judicial proceedings regarding the allegedly unfair early retirement of Mr Radibe are swiftly concluded and a decision handed down without any further delay. Should it be found that Mr Radibe was forced to retire due to his exercise of legitimate trade union activities, the Committee urges the Government to take the necessary steps to ensure that he is fully reinstated in his position as a headmaster without loss of pay. In the event that the reinstatement of Mr Radibe would be impossible for objective and compelling reasons, the Committee requests the Government to ensure that he receives adequate compensation so as to constitute a sufficiently dissuasive sanction against anti-union discrimination. The Committee requests to be kept informed of the final outcome of the judicial proceedings and of all measures of redress taken.*
- 263.** *As regards the alleged interference in union representation activities by preventing the BTU President from attending major international trade union meetings, such as the EI regional conference in Cairo in January 2007, for which Mr Radibe claims he was denied a visa, the Committee notes the Government's response that Mr Radibe was only requested to prioritize his activities and meetings in view of his duties as an employee. The Government refutes having prevented Mr Radibe from attending the EI regional conference in Cairo, since the Government of Botswana does not have the discretion to issue visas for its citizens to visit foreign countries. The Committee recalls that leaders of organizations of workers and employers should enjoy appropriate facilities for carrying out their functions, including the right to leave the country when their activities on behalf of the persons they represent so require (moreover, the free movement of those representatives should be ensured by the authorities), and that participation by trade unionists in international trade union meetings is a fundamental trade union right and governments should therefore abstain from any measure, such as withholding travel documents, that would prevent representatives of workers' organizations from exercising their mandate in full freedom and independence [see **Digest**, *op. cit.*, paras 749 and 153]. The Committee requests, in view of the above, the complainant organizations to provide additional substantive information in relation to this allegation. In the absence of any such information, the Committee will not pursue the examination of this aspect of the case.*
- 264.** *Finally, the Committee notes the allegation that 14 heads of secondary schools have been intimidated by the Director of TSM because of their involvement in trade union activities, of which two (Mr Ruda and Mr Habangana) have been dismissed in 2008. The Committee also notes the Government's indication that the Director of TSM, as the employer of teachers, has the responsibility to ensure that there is compliance with service duties and that non-performers are called to account for their misconduct, regardless of their union affiliation. The Government rejects the allegation that the 14 school heads were retired for their involvement in trade union matters affirming that the employer is not even aware that they were union members, and that the relevant schools were performing poorly as a result of poor leadership. The Committee further notes that, according to the Government, Mr Ruda left service after attaining forced retirement age (65 years), and Mr Habangana was retired following gross misconduct, whereby in the process of punishing three girl students, he ordered them to undress in front of him. In these circumstances, and unless the complainant organizations provide additional substantive information in relation to this allegation, the Committee will not pursue the examination of this aspect of the case.*

The Committee's recommendations

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

- (a) *In view of the fact that three years have elapsed since the lodging of the case by the BTU before the High Court of Botswana, the Committee requests the Government to take all measures within its power to ensure that the ongoing judicial proceedings regarding the allegedly unfair early retirement of Mr Radibe are swiftly concluded and a decision handed down without any further delay. Should it be found that Mr Radibe was forced to retire due to his exercise of legitimate trade union activities, the Committee urges the Government to take the necessary steps to ensure that Mr Radibe is fully reinstated in his position as a headmaster without loss of pay. In the event that the reinstatement of Mr Radibe would be impossible for objective and compelling reasons, the Committee requests the Government to ensure that he receives adequate compensation so as to constitute a sufficiently dissuasive sanction against anti-union discrimination. The Committee requests to be kept informed of the final outcome of the judicial proceedings and of all measures of redress taken.*
- (b) *The Committee requests the complainant to provide additional substantive information in relation to the allegation that the Government impeded Mr Radibe's attendance at international trade union meetings.*

CASE NO. 2522

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

Complaints against the Government of Colombia presented by

- **the National Union of State Employees of Colombia (UTRADEC, formerly UNETE)**
- **the Joint Union of Workers in Decentralized Institutions of the Municipality of Buenaventura (SINTEDMUNICIPIO)**
- **the Union of Workers of the Municipality of Buenaventura**
- **the General Confederation of Labour (CGT)**
- **the Union of Labour Inspectors and Public Employees of the Ministry of Social Protection (SINFUMIPROS) and**
- **the Association of Public Servants of the Ministry of Defence and the Health Service Institutions of the Armed Forces and the National Police (ASEMIL)**

Allegations: Non-compliance with a collective agreement, refusal to register a trade union organization, and refusal to engage in collective bargaining with public employees

266. The Committee last examined this case at its meeting in November 2009 and on that occasion presented an interim report to the Governing Body [see 355th Report, paras 433–464, approved by the Governing Body at its 306th Session].

267. The Government sent its observations in a communication dated 19 February 2010.

268. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

269. In its previous examination of the case in November 2009, the Committee made the following recommendation [see 355th Report, para. 464]:

- (a) ...;
- (b) With regard to clause (b) of the recommendations regarding the allegations presented by the CGT and the SINFUMIPROS, the Committee requests the Government, taking into account the recent case law of the Constitutional Court (rulings Nos 465/08 and 695/08), to take the necessary measures to ensure the immediate registration of the SINFUMIPROS. The Committee requests the Government to keep it informed in this regard.
- (c) As to clause (c) of the recommendations regarding the transfer of Mauricio Lobo Rodríguez and Gustavo Vargas Burbano, members of the Executive Board of SINTRAOFICAJANAL, the suspension of the check-off of union dues and the offering of benefits to workers to give up union membership, the Committee requests the Government to keep it informed as to whether administrative inquiries have been launched regarding the enterprise.
- (d) With regard to the new allegations presented by UTRADEC (formerly UNETE) regarding non-compliance with the collective agreement and accords signed by CAJANAL EICE, including the failure to pay overtime and the refusal to grant other contractual benefits referred to in the collective agreement, the seizure and removal of the trade union archive and the computer of the president of the trade union organization, along with pressuring the president to take leave in order to separate her from her members, the Committee requests the Government to send its observations without delay.
- (e) As to clause (d) of the recommendations regarding the allegations presented by ASEMIL on the refusal to bargain collectively with public employees, noting the recent adoption of Decree No. 535 of 24 February 2009 governing section 416 of the Substantive Labour Code (in light of Acts Nos 411 and 524 approving Conventions Nos 151 and 154 at national level) and establishment of the bodies within which negotiation between trade union organizations of public employees and public sector bodies will be advanced, the Committee requests the Government to keep it informed of developments and as to whether ASEMIL has been able to participate in the negotiation processes.

B. The Government's reply

270. In its communication of 19 February 2010, the Government sent the following observations.

271. With regard to recommendation (c) concerning the alleged transfer of Mauricio Lobo Rodríguez and Gustavo Vargas Burbano, members of the Executive Board of SINTRAOFICAJANAL, the suspension of the check-off of trade union dues, the offer of benefits to workers to give up union membership, the Committee had requested the Government to keep it informed as to whether administrative inquiries had been launched regarding the enterprise. The Government reports in this regard that the Regional Director of Cundinamarca has confirmed that no such administrative investigations were under way.

272. As regards recommendation (d) concerning allegations presented by UTRADEC regarding non-compliance with the collective agreement and accords signed by CAJANAL EICE, including the failure to pay overtime and the refusal to grant contractual benefits referred to in the collective agreement, the seizure and removal of the trade union archive and the computer of the president of the trade union organization SINTRAOFICANAL, along with attempts to put pressure on the president to take leave in order to separate her from her members, the Government states that, with the reform of social security under Act No. 100 of 1993, CAJANAL EICE was given responsibility for providing essential services in the area of health and pensions. In 2003, that body faced a serious economic crisis as a result of which it split up, CAJANAL retaining exclusive responsibility for negotiations on public service pensions. In 2008, the body announced that it was insolvent, and is currently being wound up.
273. As regards the alleged refusal to pay overtime, in contravention of the collective agreement, the Government indicates (a fact corroborated by information from CAJANAL EICE) that in June 2009, an instruction was given to grant overtime payments to Mr Reyes Durán and Mr Ávila. As regards the alleged refusal to grant other contractual benefits, the Government states that a meeting between the institution and the trade union was held on 25 March 2009 under the auspices of the Welfare and Training Committee, but SINTRAOFICANAL refused to sign the agreement on the grounds that a request for sports uniform allowance had been refused because there was no provision for it in the budget, the collective agreement, or the Committee's own statutes. On the other hand, according to the Government, some 158 requests for allowances and subsidies under the collective agreement have been accepted since January 2009.
274. As regards the unwarranted seizure and removal of the trade union archive, the Government indicates that, according to the information provided by CAJANAL EICE, the trade union which had premises and furnishings made available to it by the institution, unilaterally and without any consultation appropriated additional furniture from the institution for the purpose of storing its union documents. The filing cabinets, desk and computer were among the items that belonged to CAJANAL EICE and were not assigned to the union president. Furthermore, the furniture in question contained documents of importance for CAJANAL EICE. The Government adds that, owing to the existing dispute and in order to safeguard the contents of the archives, which included information of importance for the union and for CAJANAL EICE, on 11 May 2009 an inspection was conducted inside the institution's premises and seals were placed on the files by mutual agreement of the two parties. The Government indicates that there was no improper seizure of files because both parties decided to keep them in the CAJANAL EICE premises.
275. As regards the allegations regarding pressure on the president of SINTRAOFICANAL to take leave in order to separate her from her union, the Government indicates that in accordance with article 187 of the Substantive Labour Code, holidays must be granted informally or at the worker's request within the following year and it is not possible to accumulate more than three periods of leave. For this reason, the management of CAJANAL EICE stated publicly through circular No. 006 of 21 April 2009 that it would grant leave to employees who accumulated more than two periods of leave from the first working day in May 2009. As the President had not taken leave for more than two years, the measure was applied to her as well.
276. Lastly, the Government adds that the body has made the agreed payments and union check-offs and will continue to ensure that the collective agreement is applied.

C. The Committee's conclusions

277. *The Committee takes note of the Government's observations.*

- 278.** *As regards recommendation (c) concerning the alleged transfer of Mauricio Lobo Rodríguez and Gustavo Vargas Burbano, members of the Executive Board of SINTRAOFICAJANAL, the suspension of the check-off of trade union dues, and the offer of benefits to workers to give up union membership, the Committee had requested the Government to keep it informed as to whether administrative action had been launched by the members concerned regarding the company. The Committee notes the Government's information that the Regional Director of Cundinamarca confirmed that no such action was under way. Under these circumstances, the Committee will not pursue its examination of these allegations.*
- 279.** *As regards recommendation (d) concerning the allegations presented by UTRADEC regarding non-compliance with the existing collective agreement and accords signed by CAJANAL EICE, including failure to pay overtime and refusal to grant other contractual benefits, the seizure and removal of the union archive and of the computer of the president of the trade union organization SINTRAOFICANAL, and pressure on the president to take leave in order to separate her from the union, the Committee notes that: (1) the Government denies the failure to comply with the collective agreement, and indicates that overtime payments were made in June 2009 to Mr Reyes Durán and Mr Ávila; (2) as regards the refusal to grant other contractual benefits and allowances, the Government states that a meeting was held on 25 March 2009 between CAJANAL EICE and the trade union organization under the auspices of the Welfare and Training Committee but SINTRAOFICANAL refused to sign the agreement because its request for a sportswear allowance was not granted since there was no provision for it in the budget, the collective agreement or the Committee's regulations, but that, on the other hand, the employer had granted 158 other applications for allowances and contractual benefits since January 2009; (3) as regards the unwarranted seizure of the union archive, the Committee notes the Government's statement to the effect that in accordance with the information provided by CAJANAL EICE, the trade union organization to which it had granted union premises and provided furniture, appropriated other furniture unilaterally and without consultation for the purpose of storing its union papers. The Committee notes that, according to the information provided, the furniture in question contained papers of importance to CAJANAL EICE and for that reason, on 11 May 2009, the parties (the trade union organization and the public institution) decided by mutual agreement, in order to safeguard the content of the archives which included information of value to both the union and CAJANAL EICE, to place seals on the file cabinets in order to ensure their security, and there was no unwarranted seizure of the archives since both parties decided to keep the archives at CAJANAL EICE installations; and (4) as regards the allegations concerning pressure on the president of SINTRAOFICANAL to take leave in order to separate her from her union, the Committee notes that according to the Government, taking into account that under current legislation, leave must be taken informally or at the request of the worker within the following year, and that it is not possible to accumulate more than three periods of leave, the management of CAJANAL EICE announced publicly, through circular No. 006 of 21 April 2009, that it would grant leave for employees who had accumulated more than two periods of leave from the first working day of May 2009. The Committee notes that, as the president of SINTRAOFICAJANAL had not taken leave for more than two years, the measure was applicable to her as well. In this regard, noting that a number of the issues raised in these allegations are in the process of being resolved, and noting the Government's statement to the effect that it will continue to guarantee compliance with the collective agreement by CAJANAL EICE, the Committee firmly expects that the parties will be able to settle their differences through the existing negotiating machinery in the course of relations between the public institution and the trade union organization. The Committee requests the Government to keep it informed in this respect.*

- 280.** *As regards recommendation (b), the Committee had requested the Government to take the necessary measures for the immediate registration of the Union of Labour Inspectors and Public Employees employed by the Ministry of Social Protection (SINFUMIPROS), in accordance with the recent jurisprudence of the Constitutional Court (rulings 465/08 and 695/08), and to keep it informed in that regard. Noting that the Government has sent no information on this matter, the Committee reiterates its request with urgency.*
- 281.** *As regards recommendation (e), regarding the allegations presented by ASEMIL on the refusal to bargain collectively with public employees, the Committee had noted the adoption of Decree No. 535 of 24 February 2009 governing section 416 of the Substantive Labour Code (in light of Acts Nos 411 and 524, approving Conventions Nos 151 and 154 at national level) and establishment of the bodies within which negotiation between trade union organizations of public employees and public sector bodies will be advanced, and requested the Government to keep it informed of developments and as to whether ASEMIL had been able to participate in the negotiation process. Noting that the Government has sent no information in this regard, the Committee reiterates its request with urgency.*

The Committee's recommendations

- 282.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *As regards the allegations presented by UTRADEC on the non-compliance with the collective agreement and the accords concluded by CAJANAL EICE, including failure to pay overtime and refusal to provide the contractual benefits provided therein, the seizure of the union archive and the computer of the president of SINTRAOFICANAL and pressure on the president to take leave in order to separate her from her union, noting that a number of the questions raised in these allegations are in the process of being resolved, and noting the Government's statement to the effect that it will continue to ensure compliance with the collective agreement by CAJANAL EICE, the Committee firmly expects that the parties will be able to resolve their differences through the existing negotiating machinery as part of the normal relations between the institution and the trade union organization. The Committee requests the Government to keep it informed in this respect.*
- (b) *The Committee once again urges the Government to keep it informed as to whether it has registered the SINFUMIPROS, in accordance with recent jurisprudence of the Constitutional Court (rulings 465/08 and 695/08).*
- (c) *As regards the allegations presented by ASEMIL on the refusal to bargain collectively with public employees, taking into account the adoption of Decree No. 535 of 24 February 2009 governing section 416 of the Substantive Labour Code (in light of Acts Nos 411 and 524 approving Conventions Nos 151 and 154 at national level) and the establishment of the bodies within which negotiation between trade union organizations of public employees and public sector bodies will be advanced, the Committee urges the Government to keep it informed of developments and as to whether ASEMIL has been able to participate in the negotiation process.*

CASE NO. 2676

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

**Complaint against the Government of Colombia
presented by
the Colombian Trade Union Association of Road
Transport Workers (ASCOTRACOL)**

Allegations: The Colombian Trade Union Association of Road Transport Workers (ASCOTRACOL) alleges the refusal of the administrative authority to enter the said trade union organization in the trade union register and the subsequent dismissal of the executive committee and of 40 workers, protected by immunity for founders

- 283.** The complaint is contained in communications from the Colombian Trade Union Association of Road Transport Workers (ASCOTRACOL) dated 1 July and 21 October 2008. The trade union organization sent additional information on 19 January 2009.
- 284.** The Government sent its observations in communications dated 8 January and 8 February 2010.
- 285.** Columbia 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

- 286.** In its communications dated 1 July and 21 October 2008 and 19 January 2009, the Colombian Trade Union Association of Road Transport Workers (ASCOTRACOL) explains that it is a trade union organization which was established on 2 April 2006. The establishment of ASCOTRACOL was notified to transport companies, including Coolitorial Ltda, and to the Ministry of Social Welfare, which sent a communication dated 3 April 2006 notifying the legal representative of the company concerned of the establishment of ASCOTRACOL. The admission of new members was also notified by means of communications dated 7, 20, 24 and 27 April 2006.
- 287.** The complainant organization alleges that by means of a decision of 24 April 2006, the Ministry of Social Welfare refused to register the trade union's founding charter. The relevant appeals lodged were also rejected by Decision No. 523 of 30 May 2006. The complainant organization adds that on 1 June 2006, all the workers who had been involved in the establishment of the union or who had joined the union were dismissed by the company (the executive committee plus 40 workers).
- 288.** The complainant organization filed actions for protection of constitutional rights (*tutela*) against these decisions but they were rejected. It then filed actions before the labour courts of Barranquilla. It adds that although one of the courts ruled in its favour (see enclosed

copy of ruling), ordering the company to reinstate the workers and pay them compensation, this ruling was subsequently overturned on appeal.

B. The Government's reply

289. In its communications dated 8 January and 8 February 2010, the Government points out that article 39 of the political Constitution protects freedom of association. However, this freedom is subject to respect for the law and observance of constitutional mandates and the international conventions duly ratified.

290. The right of association is also established in the Substantive Labour Code (section 38 of Act No. 50 of 1990) which guarantees both employers and workers the right to organize through trade unions or associations. Section 359 of the same Code regulates the conditions governing the creation of trade union organizations, including the minimum number of members, the obligation to draw up a founding charter, the legal framework for adopting the by-laws, the obligation to notify the employer of the establishment of the trade union and the legal personality automatically acquired. It also contains the procedure for registering the union in the trade union registry and the steps to be taken by the administrative authority in response to the union's request. The Government explains that in its most recent rulings concerning the obligation to draw up a founding charter (Ruling No. C-621 of 25 June 2008), the Constitutional Court ruled as follows:

The establishment of a trade union is thus a solemn legal act since it has to be recorded in a private document which is not required to be executed in the presence of any public official, by means of which a number of individuals required by law express their desire to create a permanent legal organization which shall acquire a personality distinct from that of the members in order to achieve certain objectives and as a result of which binding ties shall be created.

The Court finds that the mandate in question does not violate the constitutional guarantee of freedom of association since the requirement that the trade union's founding charter be provided does not represent prior authorization or constitute an obstacle to the creation of a trade union organization, but rather establishes a simple formality designed to ensure the normal functioning of the union.

In effect, the signing of the trade union's founding charter is an administrative act which describes events or circumstances arising at the time that the workers, exercising the positive right of freedom of association, decide independently and freely to establish an organization to defend their interests.

This document is of significant importance, given that it serves as the basis for the decisions taken within the organization, mainly for the purposes of entry in the trade union registry by the Ministry of Social Welfare which, as pointed out by this Court, serves the exclusive purpose of publicity since, in accordance with article 39 of the political Constitution and with section 364 of the Substantive Labour Code (SLC), any organization of workers shall enjoy legal personality purely as a result of its establishment with effect from the date of the constituent assembly.

Requiring, as is the case in the first paragraph of the regulation in question, that the founding charter contain the names of the initiators or founders, their identity documents, the activity that they carry out and that links them and the purpose of the association also seems reasonable, since these conditions firstly allow the organization to make proper use of the powers recognized by law and secondly make it possible to identify the union for the purposes inter alia of inspection and supervision by the Government in accordance with its powers in relation to this type of association in connection with the preservation of public order (see section 353 of the SLC).

Certainly, the provision of the names and the identification of the initiators makes it possible to establish whether those who participated in the establishment of the trade union are active workers within the company and whether the act was carried out with the minimum number of members required by law (see section 359 of the SLC); the obligation to indicate

the activity carried out by these individuals for its part makes it possible to determine the type of trade union that brings the workers together, i.e. whether they form part of a trade union representing a company, industry or economic activity, occupation or various occupations (see section 356 of the SLC); finally, the reference to the purpose of the organization makes it possible to confirm that the association established has the purpose of developing the activities characteristic of trade unions, namely to defend the common interests of workers and not to carry out other activities (see section 355 of the SLC).

It is therefore found that the requirements established in the first paragraph of section 361 of the SLC do not at any time represent authorization, prior control or intervention by the State in relation to the exercise of the right of association and freedom of association, since, as already outlined, the establishment of these requirements is designed to make the effective exercise of these constitutional rights viable and to ensure that the State is able to fulfil the functions of inspection and supervision conferred on it by law for the purpose of preserving public order (section 353 of the SLC).

291. The Government adds that with regard to the procedures established by law for the entry of trade unions in the trade union registry by the administrative authorities, the Constitutional Court ruled as follows in Ruling No. C-695 of 9 July 2008:

In accordance with the provisions of section 372(1) of the Substantive Labour Code, replaced by section 50 of Act No. 50 of 1990 and expressly amended by section 6 of Act No. 584 of 2000, no trade union may act as such, perform the functions established by law and by their respective by-laws or exercise the rights conferred on it, until it has registered its founding charter with the Ministry of Labour and Social Security and only during the validity of that registration.

Moreover, in accordance with article 39 of the political Constitution, section 365 of the abovementioned Code, replaced by section 45 of Act No. 50 of 1990, provides that every union of workers shall be entered in the register kept for that purpose by the Ministry of Social Welfare.

In accordance with the provisions of article 39 of the political Constitution, “workers and employers shall have the right to establish trade unions or associations without intervention from the State. Such organizations and associations shall be granted legal recognition merely as a result of the registration of their founding charter”.

In the same vein, Article 2 of ILO Convention No. 87 provides that “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation”.

In accordance with these provisions, it is clear that legally trade unions exist and are valid as a result of their establishment, without the intervention or prior authorization of the State, by means of a declaration of collective will, issued by means of the exercise of the autonomy of private will, a declaration which is constitutionally required to be made in a document which shall be entered in the relevant register.

This implies that the said declaration of collective will shall have legal effect among the parties to that declaration or among the founders of the trade union from the time that it is issued, as is generally the case in the legal field with declarations of will, in particular with regard to contracts.

On the other hand, in relation to third parties, the declaration of a desire to establish the trade union shall have legal effect and be enforceable against them only from the communication of such declaration to them individually or generally, in the latter case by means of publication.

This is the effect of the principle of publicity, which has predominantly rational grounds in so far as, generally speaking, legal acts have effect only from the point at which their addressees become aware or are presumed to have become aware of those acts, as is the case, for example, with administrative acts and laws, with legal proceedings according to the various codes of procedure and with the acts of private individuals with regard to contracts.

The legal importance of the principle of publicity explains its guarantee at the constitutional level as one of the components of due process (see article 29 of the Constitution) and as one of the principles governing the actions of the public administration (see article 209 of the Constitution).

From this perspective, the provision that reads “the trade union shall be recognized legally solely as a result of the registration of its founding charter”, contained in article 39 of the Constitution, should be interpreted in accordance with the principle of publicity in the sense that such recognition is not based on the granting of legal personality to the union or on a declaration of its valid existence by the State, but rather on enforceability and the production of the legal effects of its establishment vis-à-vis the State, which, including all its entities, is a third party in relation to the individuals party to the declaration of a collective will to establish the trade union concerned, or rather in relation to the founders of the union concerned, and in relation to all other third parties, including firstly the employer, with effect from such registration.

Based on the above, taking into account that section 372(1) of the Substantive Labour Code, replaced by section 50 of Act No. 50 of 1990 and expressly amended by section 6 of Act No. 584 of 2000, may be interpreted to mean that the registration of the trade union’s founding charter with the Ministry of Social Welfare is a requirement for the union’s existence or validity, which would be contrary to the provisions of article 39 of the political Constitution and to those in Article 2 of ILO Convention No. 87, which forms part of the constitutional provisions, this Court hereby declares the provision concerned to be enforceable subject to conditions, on the counts set forth in this judgment, on the understanding that registration is solely for the purpose of publicity and does not authorize the Ministry concerned to exercise prior control over the content of the founding charter.

- 292.** In short, the Court regarded as applicable the sections of the Substantive Labour Code relating to the registration of the trade union’s founding charter with the Ministry of Social Welfare, but pointed out that the exclusive purpose of such registration was to make the information known and that the Ministry of Social Welfare was not authorized to exercise prior control over the content of that charter. The Government points out that, for that reason, the Ministry currently files only the decision to create a trade union organization, together with its by-laws and the appointment of its executive committee. With regard to the particular case of ASCOTRACOL, the Government points out that the Ministry of Social Welfare notified the employers comprising the Cooperative of Atlantic Coast Transport Companies (Coolitoral Ltda, Coochofal and Transporte Atlántico López e Hijos SCA) of the union’s establishment on 4 April 2006.
- 293.** By means of Decision No. 000325 of 24 April 2006, the Ministry rejected the request for registration of the founding charter, by-laws and executive committee on the basis that they were contrary to the national Constitution, in accordance with section 4(4)(a) of Act No. 50 of 1990. Decision No. 00423 of 15 May 2006 ruled on an application for reconsideration filed by the trade union organization and upheld the decision which was the subject of the appeal. Decision No. 000523 of 30 May 2006 ruled on the appeal lodged by the trade union organization and upheld the decision which was the subject of the appeal, thereby exhausting the administrative channels.
- 294.** The Government indicates that the by-laws of ASCOTRACOL omitted the rules contained in section 42(7) and (8) of Act No. 50 of 1990 concerning the amount and frequency of ordinary membership fees and the method of payment and the procedure for ordering and paying extraordinary membership fees. Furthermore, it was considered that the wording of section 5 was not clear in referring to “cooperatives of Colombia” and that there was also a lack of clarity with regard to the hierarchy of the executive bodies. Section 14 concerning the members of the executive committee is also contrary to the legislation. The Government refers to various other provisions of the by-laws which are contrary to Colombian legislation.

295. The Government attaches a communication from the Cooperative of Atlantic Coast Transport Companies (COOLITORAL) referring to the various administrative bodies which examined the application for registration submitted by ASCOTRACOL and rejected it for being contrary to the Constitution and the Substantive Labour Code. The enterprise also attaches a copy of the court rulings handed down with respect to the reinstatement proceedings instituted by the dismissed workers in which reinstatement was refused on the grounds that the workers did not enjoy immunity as founders of a union because the application for registration of the union was rejected.

C. The Committee's conclusions

296. *The Committee notes that in the present case ASCOTRACOL alleges: (1) the rejection by the Ministry of Social Welfare of the request for registration in the trade union register of the trade union organization established on 2 April 2006 (a decision which became final on 30 May 2006); and (2) that as soon as the administrative authority decided to reject the request for registration of the trade union organization, Coolitoral Ltda dismissed, on 1 June 2006, the executive committee and 40 workers who had been involved in the establishment of the trade union organization or had subsequently joined the organization.*
297. *With regard to the refusal to register the trade union in the trade union register, the Committee notes that according to ASCOTRACOL, the Ministry of Social Welfare refused, by means of a decision of 24 April 2006, to register the union's founding charter and that the administrative appeals lodged against the decision and the action filed for protection of constitutional rights (tutela) were also rejected.*
298. *In this regard, the Committee notes that the Government indicates that the request for the registration of the founding charter, by-laws and executive committee was rejected under Decision No. 000325, of 24 April 2006, on the basis that they were contrary to the national Constitution, in accordance with section 4(4)(a) of Act No. 50 of 1990. This decision was confirmed by Decision Nos 00423 of 15 May 2006 and 000523 of 30 May 2006, which ruled respectively on the application for reconsideration and the appeal lodged by the trade union organization, thereby exhausting the administrative channels. The Committee notes that the Government refers in detail to the various omissions and inconsistencies on the part of the trade union organization which resulted in registration being denied. These included the omission of the rules relating to the amount and frequency of the ordinary membership fees and the method of payment and the procedure for ordering and paying extraordinary membership fees; it was considered that the wording of section 5 was not clear in referring to "the co-operatives of Colombia"; there was also a lack of clarity as regards the hierarchy of the executive bodies, etc. The Committee notes, however, that the Government indicates that currently, and in accordance with the recent rulings of the Constitutional Court (Ruling Nos C-621 of 25 June 2008 and C-695 of 9 July 2008 in which the Court considered that although the sections of the Substantive Labour Code concerning the registration of the union's founding charter with the Ministry of Social Welfare are applicable (enforceable), the purpose of these sections is to ensure that the founding charter is made public and the Ministry of Social Welfare is not authorized to exercise prior control over the content of the charter), the Government merely registers the official documents relating to the establishment of any trade union organization, together with its by-laws and the records of the election of its executive committee. Although the registration procedure very often consists in a mere formality, there are a number of countries in which the law confers on the relevant authorities more or less discretionary powers in deciding whether or not an organization meets all the conditions required for registration, thus creating a situation which is similar to that in which previous authorization is required. Similar situations can arise where a complicated and lengthy registration procedure exists, or where the competent administrative authorities may exercise their powers with great latitude; these factors are such as to create a serious*

obstacle for the establishment of a trade union and lead to a denial of the right to organize without previous authorization [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, para. 296]. Under these particular circumstances, the Committee points out that the trade union may, if it so wishes, once the omissions and inconsistencies as referred to above have been rectified, submit a new request for the registration of its founding charter, by-laws and executive committee and requests the Government in that case to register the trade union organization immediately, in conformity with the recent rulings of the Constitutional Court.

- 299.** *As regards the allegation that as soon as the administrative authority rejected the request for registration of the trade union (on 30 May 2006), the company dismissed, on 1 June 2006, the members of the executive committee and 40 workers who had been involved in the union's establishment or had joined the union, the Committee notes the information from the Government and the enterprise to the effect that the actions for protection of constitutional rights (tutela) and other legal actions filed with the courts were rejected. The Committee observes that the rulings, copies of which are attached, show that the dismissals indeed occurred on the day following the administrative authority's decision refusing registration of the trade union. However, the Committee observes that it was on account of the rejection of the request for registration that the judicial authority considered the dismissed workers not to have enjoyed trade union immunity. In this regard, noting with concern the large number of union leaders and workers dismissed shortly after they attempted to establish the union and on the day after the administrative rulings rejecting the registration of the union became final, the Committee recalls that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see *Digest*, op. cit., para. 771]. The Committee therefore requests the Government to take the necessary steps to have the dismissed workers reinstated if indeed these workers were dismissed for having established a trade union and, should reinstatement be impossible for objective and compelling reasons, the Committee requests the Government to ensure that the workers receive appropriate compensation, such as to constitute a penalty that acts as a sufficiently dissuasive and effective deterrent against anti-union dismissals. The Committee requests the Government to keep it informed in this regard.*

The Committee's recommendations

- 300.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) With regard to the refusal of the Ministry of Social Welfare to grant the request for entry in the trade union registry of the trade union organization established on 2 April 2006, the Committee points out that the trade union organization may, if it so wishes, once the omissions and inconsistencies highlighted in the decisions concerned have been rectified, submit a new request for the entry of its founding charter, by-laws and executive committee in the register and requests the Government in that case to register the trade union organization immediately.*
 - (b) With regard to the allegation that as soon as the administrative authority rejected the request for registration of the trade union, the company dismissed the members of the executive committee and 40 workers who had been involved in the union's establishment or had joined the union, a fact that was verified by the judicial authority in its rulings, the Committee requests the Government to take the necessary steps to have the dismissed*

workers reinstated if indeed they were dismissed for having established a trade union and, should reinstatement be impossible for objective and compelling reasons, the Committee requests the Government to ensure that the workers receive appropriate compensation, such as to constitute a penalty that acts as a sufficiently dissuasive and effective deterrent against anti-union dismissals. The Committee requests the Government to keep it informed in this regard.

CASE NO. 2719

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

**Complaint against the Government of Colombia
presented by
the National Union of Food Industry Workers (SINALTRAINAL)**

Allegations: The National Union of Food Industry Workers (SINALTRAINAL) alleges various acts of anti-union discrimination and interference, including, among others, anti-union dismissals and refusal to bargain collectively

- 301. The present complaint is contained in a communication dated 3 February 2009 presented by the National Union of Food Industry Workers (SINALTRAINAL).
- 302. The Government submitted its observations in communications dated 6 December 2009 and 19 February 2010.
- 303. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 304. In its communication of 3 February 2009, the SINALTRAINAL indicates that the acts of anti-union discrimination described below had taken place at Nestlé.
- 305. According to SINALTRAINAL, Nestlé Colombia, through certain employees working as process coordinators and department heads, exerts pressure on new employees to dissuade them from joining the trade union organization. SINALTRAINAL also refers to various scenarios involving measures adopted by the company with a view to undermining the trade union organization, including: the transfer (in May 2002, to the Bugalagrande plant) of four workers (Mr Corrales Trejos, Mr Montoya Ortiz, Mr Pérez Restrepo and Mr Suárez Herrera) with more than 24 years of service with the company, without their consent; the implementation of policies for outsourcing (processes for the transport, distribution and marketing of goods); the implementation of programmes designed to dissuade workers from joining a trade union organization (such as the "Nestlé vive bien" programme or its SAP-based GLOBE programme). Moreover, the company denies union leaders free access to the plants; they must be accompanied by the head of human resources, an assistant or

security guards, thus restricting the workers' right to communicate with union leaders. Lastly, the trade union organization's allegations concern the collective dismissal of workers from the Nestlé Facatativa plant on 27 July 1992 and the refusal to register a new trade union organization in 1982. The complainant organization also refers to other allegations of anti-union dismissals, in relation to which the judicial authority ordered the reinstatement of the workers.

- 306.** At the Nestlé Valledupar plant: (1) on 23 May 2006, after receiving notification that some workers had joined SINALTRAINAL, the company met with workers and threatened them against joining the trade union organization (on 22 May, it had dismissed nine workers who tried to join the organization, but the judicial authority ordered their reinstatement). Moreover, it proposed that they establish a new company trade union organization, which more than 70 workers joined, once it was set up; (2) on 29 May, the company signed a collective agreement with this new union, while refusing to negotiate SINALTRAINAL's list of demands; on 8 October 2008, SINALTRAINAL requested the labour inspectorate to order the company to enter into collective negotiations; nevertheless, the company was not sanctioned for its refusal to negotiate; (3) on 15 June 2006, Mr Walberto Quintero M., a worker at the Valledupar plant and a member of the SINALTRAINAL complaints committee, filed an out-of-court claim against the company Nestlé Dairy Partners Americas (DPA) on the grounds of the harassment perpetrated by the company since he joined the trade union organization; and (4) on 7 November 2008, the company requested the suspension of the trade union immunity of Mr Luis Eduardo Lúquez Castilla, a leader of the trade union organization, for alleged offences; the proceedings are still under way.
- 307.** At the Bugalagrande plant: (1) in November and December 2002, the company dismissed 12 unionized workers from the plant (including Mr Gustavo Salazar, Mr William Ramírez, Mr Jesús Escobar, Mr Germán Núñez, Mr Magnol Ossa, Mr Fernando Londoño, Mr Enrique Castro, Mr Dulfair Martínez and Mr Vladimir Espinosa) because of their participation in a day of protest in front of company headquarters in Bogotá. Some workers filed an application for legal protection (*tutela*), which was denied; (2) in 2006, the company dismissed Mr Héctor Marino Lasso, Mr Leonardo Gómez and Mr Luis Fernando Arbeláez without just cause, in violation of the collective agreement in force, the application for legal protection was denied and the ordinary legal proceedings are still under way; (3) in 2006, the company dismissed 90 temporary workers allegedly on grounds of their support to the trade union organization; and (4) in 2007, the Bugalagrande plant dismissed five workers (Ms Edna Lucía Fernández, Mr Diego Lozano, Mr Hebert González, Mr Ignacio Millán and Mr Rogelio Sánchez) in violation of the due process set out under the collective labour agreement in force. The legal proceedings instituted by the workers are pending.

B. The Government's reply

- 308.** In its communications of 6 December 2009 and 19 February 2010, the Government sent the observations set out below.
- 309.** The Government notes that, according to the information submitted by the company on relations between Nestlé Colombia and its trade union organizations, the company has a strong management framework guiding relations with employees. The criteria are set out in the company's corporate business principles and human resources policy and the relevant guidelines are in line with local legislation and regulations. The company notes that its corporate business principles reflect its full support of the six guiding principles on human rights and labour of the United Nations Global Compact, namely: (1) respect the protection of internationally proclaimed human rights within the sphere of influence; (2) make sure that their own companies are not complicit in human rights abuses; (3) uphold the freedom of association and the effective recognition of the right to collective bargaining; (4) the

elimination of all forms of forced and compulsory labour; (5) the effective abolition of child labour; and (6) the elimination of discrimination in respect of employment and occupation.

- 310.** Nestlé Colombia regularly maintains dialogue with all the legally established workers' organizations at various levels and provides forums for dialogue in order to strengthen its labour relations and bridge differences. Within these forums, various special agreements have been concluded for improving working conditions. In particular, the company signed a special agreement with the Dosquebradas plant union in order to improve operators' promotion prospects. At this same plant, with the same trade union organization, a long-term plan of action was signed for the improvement of working and safety conditions at operators' work stations; this plan of action covered more than 400 activities which are being implemented simultaneously and which have generated investments of more than US\$500,000. The Bugalagrande and Mosquera plants have also initiated special agreements of particular interest, all of which seek continuous improvement of the company's labour relations.
- 311.** With respect to the allegations concerning the company's implementation of policies to restrict workers' right of freedom of association, and implementation of policies for outsourcing work, to the detriment of working conditions, the Government notes the following: (1) with respect to the selection of team leaders: the trade union organization has not submitted any evidence in connection with the allegations, which remain vague, thus preventing an in-depth investigation into the matter; and (2) with respect to the company's use of psychological harassment, the trade union organization should indicate before which court it lodged the complaint against the managers in question so that the status of the respective investigation can be verified.
- 312.** With regard to the allegations on the outsourcing of the distribution processes, the Government notes that, as has been pointed out on various occasions, employers in Colombia enjoy the right to economic freedom, in accordance with article 333 of the Political Constitution of Colombia, under which employers are free to exercise their activities within the limits of the common good. Fair competition is a universal right and carries responsibilities. In exercising this right and in order to ensure efficient service delivery, the company decided to modify its distribution network by centralizing the distribution process at a single logistical hub of operations in the city of Pereira, to serve the whole country, and by outsourcing the operation of its distribution centres to an expert in the field. The Government states that, according to the company, this process was accompanied by a staff relocation programme, without compromising the right to freedom of association. This decision aimed to: (1) improve customer service; (2) reduce the high level of damage to goods during transport and storage; (3) streamline the process; and (4) improve operational efficiency.
- 313.** The Government notes that Nestlé Colombia conducts its industrial operations in five departments in Colombia. Its plant locations and operations are as follows:
- (a) Bugalagrande – Department of Valle del Cauca:
- 603 directly employed workers on open-ended contracts;
 - 114 workers on fixed-term contracts;
 - production of 45,000 tonnes/year;
 - production of food items, coffee, beverages and milk.

- (b) Dosquebradas – Department of Risaralda:
- 449 directly employed workers on open-ended contracts;
 - 28 workers on fixed-term contracts;
 - production of 24,000 tonnes/year;
 - production of chocolate goods and biscuits.
- (c) Florencia – Department of Caquetá:
- 30 directly employed workers on open-ended contracts;
 - 12 workers on fixed-term contracts;
 - production of 61,000 tonnes/year;
 - pre-condensation of fresh milk for food production.
- (d) Mosquera – Department of Cundinamarca – Nestlé Purina Petcare:
- 152 directly employed workers on open-ended contracts;
 - production of 31,000 tonnes/year;
 - food for pets, dogs and cats.
- (e) Valledupar – Department of César (DPA: joint venture between Nestlé and Fonterra):
- 183 directly employed workers on open-ended contracts;
 - one worker on a fixed-term contract;
 - production of 33,000 tonnes/year.

314. The Government notes that the Ministry of Social Protection, through its labour offices, carries out all inspection, surveillance and monitoring activities in relation to the complaints received by the Ministry. The Government adds that, in its observations, the company noted that its employees must comply with the legislation in force in each of the countries in which it carries out its activities. Nestlé assures that it applies the most stringent rules of responsible conduct throughout the company, complying responsibly with its corporate business principles, which are the basis for its business activities and relations throughout the world and in each of its business sectors. Nestlé recognizes that the process of globalization creates a need to generate ever more international recommendations. Although these recommendations are primarily addressed to governments, these inevitably also affect business practices. Nestlé endorses the relevant commitments and recommendations for its voluntary self-regulation, as issued by the competent sectorial organizations, provided that these have been drawn up with full agreement from all interested parties. These include the Business Charter for Sustainable Development drawn up by the International Chamber of Commerce (ICC). Moreover, Nestlé uses the revised Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD), approved in June 2000, as a reference point for its corporate governance principles. Nestlé Colombia's alignment with and attachment to its corporate principles are audited through internal monitoring mechanisms such as its Compliance Assessment of Human Resources, Occupational Health and Safety,

Environment and Business Integrity (CARE) audit programme, a tool for verifying that Nestlé's worldwide markets faithfully apply its corporate principles and implement national and international legislation, especially in relation to the abovementioned matters. There are different phases to this auditing process: phase one covers all the industrial operations of Nestlé's markets; phase two covers all administrative, sales and distribution areas; and phase three extends to the company's most strategic suppliers to ensure that they, with their workers, also comply with the corporate and legal guidelines. Nestlé Colombia, as for other markets in the world, must be audited once every three years to ensure its ongoing and continuously improving compliance with the relevant principles and rules. The company adds that the last audit of Nestlé Colombia revealed very satisfactory results, since its compliance rate was above 95 per cent and plans of action and follow-up mechanisms were drawn up to address the remaining 5 per cent. In the first half of 2010, Nestlé Colombia will once again undergo a CARE assessment, in phase two, for the review of its administrative, sales and distribution activities. In addition to this CARE assessment, Nestlé Colombia is also subject to international audits which point to specific operations or business processes that need to be reviewed; these are carried out by the corporate office for internal controls and audits.

- 315.** With regard to the allegations concerning the transfer of Mr Luis Eduardo Pérez Restrepo, Mr Fernando William Corrales Trejos, Mr Gilberto de Jesús Montoya Ortiz and Mr Luis Ernesto Suárez Herrera in 2002 to the Bugalagrande plant, the Government notes that the legal authority rejected the legal proceedings that had been filed for the protection of constitutional rights (*amparo*), deeming that the company had complied with domestic legislation by applying the principle of *ius variandi*, respecting the fundamental rights of workers, and had respected the provisions under the collective labour agreement.
- 316.** With regard to the implementation of the company's programmes, the Government notes that, according to the company, these programmes aim to improve the working environment. Moreover, the trade union organization does not provide information about the legal or administrative proceedings brought before the various authorities, to defend the rights they claim are being undermined by the implementation of the programmes in question.
- 317.** With regard to the allegations concerning the refusal by the company to grant workers' representatives free access to the workplace, the Government notes that SINALTRAINAL does not indicate the sites to which these allegations refer. Nevertheless, the Office of Cooperation and International Relations received the following response to its request for information on whether any administrative labour investigation had been initiated against Nestlé for anti-union harassment: according to the territorial directorate of Valle, to date, no such investigation has been opened against the company for trade union harassment; and the territorial directorate of César notes that an administrative labour investigation has been opened against the Dairy Partners Americas Manufacturing Colombia Ltd (DPA) for violation of the collective labour agreement.
- 318.** For its part, the company notes that it allows union leaders to access the factory facilities as long as this does not disrupt normal production line operations or distract the operators. The company must ensure that the time frames for entering and leaving the premises and the work shifts are respected. The trade union organization has been given due notice of these rules. The company notes that, to date, the rules drawn up in previous years for gaining access to the factory have not presented any problems to either the trade union organization or any visitors to the company. The trade union organization usually requests authorization for access to the premises, which the company has not denied to date.
- 319.** As regards the allegations concerning the collective dismissal of Nestlé Facatativa workers in 1982 and the refusal to register the trade union organization, the Government notes that

the then Ministry of Labour and Social Security, in order to authorize the collective dismissal, had exhausted relevant procedures under domestic legislation. In accordance with the provisions of section 40 of Legislative Decree No. 2351 of 1965 – subsequently replaced by section 67 of Act No. 50 of 1990 – an employer who deems it necessary to carry out a collective dismissal of workers or to terminate work in progress, either partially or fully, for reasons other than those set forth under section 5(1)(d) of the said Act and section 7 of Legislative Decree No. 2351 of 1965, must seek prior authorization from the Ministry of Labour and Social Security, setting out and, if necessary, justifying the reasons. Also, the employer must simultaneously notify the workers in writing of this request. A request for authorization must also be made in the following cases: when the employer needs to modernize work processes, equipment and systems with a view to increasing productivity or the quality of goods, or needs to eliminate work processes, equipment or systems and units of production, including in the event that these have become obsolete or inefficient, or result in systematic losses, or place the employer at a competitive disadvantage with respect to similar companies or goods on the domestic market or those with which the employer should be able to compete on foreign markets; when an employer is in default or in a financial situation where there is a risk of default, or faces technical or economic difficulties, such as a lack of raw materials, or other difficulties that can yield similar effects; and in general, other scenarios yielding similar consequences to those mentioned above. The respective request must be accompanied by due evidence – whether financial, accounting, technical, business or administrative in nature, depending on the case. Workers who were not satisfied with the decision petitioned for its annulment and for the re-establishment of rights before the body handling the case. After a review of the case, it was determined that the claims did not merit further consideration.

- 320.** As regards the alleged refusal to register a trade union organization, the Government notes that this issue has been resolved, since the organization itself mentions its registration by the then Ministry of Labour.
- 321.** With regard to the allegations on the dismissal of 12 unionized workers from the Bugalagrande plant in 2002, the Government notes that the competence for ruling on the legality of the dismissals rests with the judicial authority, not the Ministry of Social Protection. Accordingly, it would be very useful if the trade union organization could provide information on the legal proceedings instituted, so that information can be requested from the respective judicial offices on the status of each case and so that the relevant observations can be sent.
- 322.** With regard to the allegations concerning the dismissal of Ms Edna Lucía Fernández, Mr Diego Lozano, Mr Hebert González, Mr Ignacio Millán and Mr Rogelio Sánchez, the Government notes that Mr Rogelio Sánchez brought the matter before the ordinary labour court, which in the first instance handed down a decision in favour of the company, a ruling which was upheld at the appeal stage. The Government adds that, for the other cases, it would be very useful if SINALTRAINAL could indicate which courts are handling these respective claims so that it can assess the current status of cases and thus be able to send complete information to the Committee on Freedom of Association.
- 323.** As regards the allegations concerning the threats to prevent workers from joining SINALTRAINAL and the subsequent negotiations with another trade union organization, at the Valledupar plant, the Government notes that the territorial directorate of Valledupar, through Decision No. 00455 of 12 December 2008, absolved DPA of its refusal to enter into negotiations. According to the administrative decision, and as demonstrated by the evidence, on 23 May 2006, the trade union organization SINALTRAINAL presented to the company a list of demands and notified it of the composition of the complaints committee, and provided the same notification to the Ministry for Social Protection. On 23 May 2006,

DPA workers decided freely and voluntarily to establish another trade union organization – a company, primary-level one – which had a membership of 89 workers. On 24 May 2006, the company's legal representative notified SINALTRAINAL of the acknowledgment of its list of demands and of the fact that a group of workers had joined another trade union organization, which led to the recommendation that SINALTRAINAL should set out internal procedures for defining certain aspects of the collective bargaining process, since the other trade union organization represented the most workers. Indeed, according to the administrative decision, there are three other trade union organizations in the company, with 113, 97 and 125 members, respectively, while SINALTRAINAL only has 20. Therefore, the company entered into negotiations with the organization in question and, on 14 September 2006, signed a collective agreement with it, effective from 1 September 2006 to 31 December 2009, without prejudice to the right to freedom of association. The appeal lodged against the administrative decision is still pending. The Government notes that, on 21 July 2006, the labour inspector was notified of the signing of a new collective agreement with SINALTRAINAL.

- 324.** With regard to the allegations concerning the anti-union persecution of Mr Walberto Quintero, the Government notes that the trade union organization met with the company in order to address Mr Walberto Quintero's case, and that the company undertook to respect the right to freedom of association. According to the information provided by the territorial directorate of César, there is currently no pending labour investigation into the case and the trade union organization has not indicated whether legal proceedings have been instituted in this regard.
- 325.** With respect to the allegations concerning the request for the suspension of Mr Luis Eduardo Lúquez Castilla's trade union immunity, the Government notes that the company requested the suspension of immunity before the labour court of the Valledupar circuit, on the grounds of unjustified absence from work and social security fraud for forging information about his illness. That led the DPA to request the competent authority, the labour court of the Valledupar circuit, to validate the facts, thus leading to the suspension of Mr Lúquez Castilla's trade union immunity, giving the company just cause for his dismissal. The first instance decision of the second labour court of Valledupar, on 26 June 2009, ordered the suspension of trade union immunity and authorized the DPA to dismiss the worker since just cause was proven. Mr Lúquez appealed against this decision, and the case is currently being heard before the César District High Court, in an appeals procedure.
- 326.** With regard to the dismissal of temporary or fixed-term employees for their support to SINALTRAINAL, the Government notes that it would be very useful if the trade union organization could provide information on the legal proceedings instituted by the dismissed workers in order to check on the progress of cases before the judicial offices. According to the company's report, which the Government encloses, the list of temporary hires at the Bugalagrande plant was consistently cited as problematic by SINALTRAINAL at meetings and in letters and communications. In 2004, the Bugalagrande plant had a list of 228 persons hired on a fixed-term basis. Recognizing the problem, it revised its recruitment scheme. After a selection process which involved interviews, psychotechnical testing, the validation of documents and other appropriate tests, in 2005, Nestlé Colombia hired 121 of those 228 workers on an open-ended basis, and informed the remaining 107 persons of the results of the selection process. The company subsequently hired 17 more workers, and issued prior notice to the 90 persons whose contracts would not be renewed and paid them more severance pay than that required by law. This group of former temporary workers and the company signed a voluntary consent agreement in October 2006.
- 327.** The company notes that the means of hiring workers on a temporary basis needs to be maintained in order to increase production, carry out specific projects or fill in for

absentees. In this context, the company hires staff on a direct and fixed-term basis until those specific needs have been met. Those terms are lawful and the temporary workers are even provided with special benefits under the collective agreement.

- 328.** Some of the 90 fixed-term workers who were not called back by the company after the review of their profile and work presented labour claims against the company, claiming that the company had an obligation to rehire them. In that regard, the company complied with the national labour legislation in force and Nestlé Colombia SA was absolved of the claims against it, thus nullifying all of the complainants' claims. The company adds that the collective labour agreement in force, signed in June 2006, includes a provision for special benefits to temporary workers, in addition to what is afforded by the law, with which the company complies.
- 329.** As regards the allegations concerning the dismissal of Mr Leonardo Gómez, Mr Héctor Marino Lasso and Mr Luis Fernando Arbeláez, the Government notes that since the former workers had instituted the respective legal proceedings, the Government shall be guided by the decision of the labour court. The company, in its report, notes that Mr Héctor Marino Lasso, Mr Luis Fernando Arbeláez and Mr Leonardo Gómez had been dismissed on the basis of an administrative decision in the context of an internal restructuring process with a view to optimizing the factory's performance, and that their dismissal was in no way meant as retaliation for trade union activities. This restructuring process resulted in the hiring of 17 additional workers on an open-ended basis and the dismissal of five workers on an open-ended basis – the three persons mentioned above and two others who were not unionized. In that context, section 64 of Colombia's Substantive Labour Code, which allows for the termination of employment without just cause in exchange for severance pay, was applied. This restructuring process took place after a three-year period during which no unilateral termination had been conducted by the company, which explains the very low turnover rate among operators as compared with administrative or non-unionized employees. Indeed the turnover rate in the plants among unionized staff is less than 2 per cent, and more than 8 per cent among non-unionized employees (working, inter alia, in sales, marketing, administration or management).

C. The Committee's conclusions

- 330.** *The Committee notes that, in the present case, SINALTRAINAL alleges that various acts of anti-union discrimination and interference have been committed by Nestlé at the national level and at its Bugalagrande and Valledupar plants, which currently form part of DPA.*
- 331.** *The Committee notes in particular that SINALTRAINAL alleges that: (1) the company, through certain high-level employees, exerts pressure on and has dismissed the new employees who have attempted to join the trade union organization; (2) in May 2002, the company transferred four workers with more than 24 years of service with the company (Mr Corrales Trejos, Mr Montoya Ortiz, Mr Pérez Restrepo and Mr Suárez Herrera) to the Bugalagrande plant, without their consent; (3) the company has implemented plans and programmes of work as well as policies for outsourcing, with a view to undermining the trade union organization; (4) the company denies union leaders access to the plants; and (5) the company implemented a collective dismissal of workers at the Facatativa plant in 1992 and refused to register a trade union organization in 1982.*
- 332.** *As to the allegations concerning the pressure exerted by team leaders on workers in order to dissuade them from joining the trade union organization, the Government and the company note that these allegations are vague and are not supported by evidence and that the trade union organization fails to indicate whether legal or administrative proceedings have been instituted on the basis of these elements. Since these allegations, if proven, would be serious, and recognizing that the trade union organization has not provided*

sufficient information to enable the Government and company to submit their observations on the matter, the Committee requests SINALTRAINAL to provide further information on the circumstances in which these developments allegedly took place, as well as on the dates and the affected workers. If the trade union organization does not provide this information, the Committee will not pursue its examination of the allegations.

- 333.** *As to the transfer, in May 2002, of Mr Corrales Trejos, Mr Montoya Ortiz, Mr Pérez Restrepo and Mr Suárez Herrera without their consent to the Bugalagrande plant, the Committee notes that, according to the Government, the company states that it acted in line with national legislation, respecting workers' fundamental rights and complying with the collective labour agreement in force.*
- 334.** *With regard to the allegations relating to the implementation of plans and programmes of work and policies for outsourcing aimed at undermining the trade union organization, the Committee notes that, according to the Government: the company notes that the relations it maintains with the trade union organization are in line with national legislation and regulations and the guiding principles on human rights and labour of the United Nations Global Compact, which are adhered to by the company, and in accordance with which various agreements have been concluded outside the collective agreement between the company and the trade union organization; according to the company, the outsourcing process carried out in the context of the right of employers to economic freedom, with a view to improving services, reducing the damage to goods during transport and improving operational efficiency, included a programme for the relocation of staff without compromising the right to freedom of association; the programmes implemented by the company are aimed exclusively at improving the working environment, and the trade union organization provides no information on the legal claims or proceedings instituted in connection with these programmes in defence of workers' rights. In this regard, the Committee recalls that it can examine allegations concerning economic rationalization programmes and restructuring processes, whether or not they imply redundancies or the transfer of enterprises or services from the public to the private sector, only in so far as they might have given rise to acts of discrimination or interference against trade unions. On the basis of the allegations and the Government's response, the Committee considers that there is no evidence that the measures constitute anti-union acts, but rather they seem to be general measures for ensuring the company's normal operations. In these circumstances, unless the organization sends further information in this regard, the Committee will not pursue its examination of these allegations.*
- 335.** *The Committee notes SINALTRAINAL's allegations that the company refuses to grant union leaders free access to the plants and that they must be accompanied by company staff each time they wish to access the premises, restricting the workers' right to communicate with union leaders. The Committee notes in this regard that, according to the Government, the complainant organization does not specify the place where the violations have occurred. The Committee notes that, according to the company, union leaders are allowed access to the premises provided that this does not disrupt the normal functioning of the production lines or distract the operators and these rules are applied without posing any problems to the trade union organization or to any visitors to the company. In this respect, recalling that governments should guarantee the access of trade union representatives to workplaces, with due respect for the company's rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization, the Committee requests the Government to ensure that the company fully respects this principle and that the workers are able to communicate freely with union representatives and without the presence of an enterprise representative.*

336. *Lastly, the Committee takes note of the allegations concerning the company's collective dismissal of workers at the Facatativa plant in 1992 and its refusal to register a trade union organization in 1982. In this respect, the Committee notes that the collective dismissal was authorized by the Ministry of Labour and Social Security and that the administrative proceedings brought against that decision were dismissed. As to the refusal to register the trade union organization in 1982, the Committee notes that, according to the Government, this matter has been resolved since the union has been duly registered. In these circumstances, and considering that the allegations date back many years, the Committee will not pursue its examination of these allegations.*

The Valledupar plant

337. *With respect to the allegations concerning the Valledupar plant, the Committee notes that, according to SINALTRAINAL, on 23 May 2006, the company threatened workers against joining the trade union organization and proposed that they set up a new trade union organization, with which it subsequently signed a collective agreement, refusing to negotiate the list of demands presented by SINALTRAINAL. No administrative sanctions were imposed on the company in the context of the claim brought before the Ministry for Social Protection. Moreover, according to the trade union organization, Mr Walberto Quintero, a trade union leader, filed an out-of-court claim against the company on the grounds of anti-union harassment and the company requested the suspension of the trade union immunity of Mr Luis Eduardo Lúquez Castilla, a SINALTRAINAL leader; these proceedings are still under way.*

338. *In this respect, the Committee notes that, according to the Government, the territorial directorate of Valledupar absolved DPA (which, according to the information provided by the company, is a joint venture between Nestlé and Fonterra) of its failure to negotiate with SINALTRAINAL through Decision No. 00455 of 12 December 2008. The Committee notes that, according to the administrative authority, a new trade union organization was established within the company on 23 May 2006, which submitted a list of demands on 29 May 2006. Since that union represented the most workers, the company decided to sign a collective agreement with that organization for the period from September 2006 to December 2009. The Committee notes that, according to the administrative decision, in addition to SINALTRAINAL, three other trade union organizations coexisted at the plant during that time, with 113 members, 97 members and 125 members respectively, while SINALTRAINAL had only 20. The Committee also notes that the Government adds that the appeals procedure against this administrative decision is still under way and that on 21 July 2006, the labour inspector was informed that a new collective agreement was signed with the trade union organization. The Committee requests the Government to keep it informed of the final outcome of the appeals procedure and to send a copy of the collective agreement in question.*

339. *With regard to the allegations concerning the out-of-court claim of anti-union harassment lodged by union leader Mr Walberto Quintero and the request for the suspension of the trade union immunity of union leader, Mr Luis Eduardo Lúquez Castilla, the Committee notes that the Government indicates, with respect to Mr Quintero's complaint, that the company met with the trade union organization and undertook to respect the right to freedom of association and that, according to the territorial directorate of César, there are no pending administrative investigations into these facts and the trade union organization has not indicated whether legal proceedings have been instituted. As to the request for the suspension of the trade union immunity of union leader, Mr Luis Eduardo Lúquez Castilla, the Committee notes that, according to the Government, the company requested the suspension of immunity because Mr Lúquez Castilla forged the certificate he provided as evidence of his inability to work in order to take leave from his job. The Committee notes that, according to the documentation submitted by the company, Mr Lúquez denied these*

facts during the discharge hearings. Noting that the judicial authority ordered the suspension of his trade union immunity on 26 June 2009 and that the appeals procedure remains pending, the Committee requests the Government to keep it informed of the final outcome of the proceedings.

The Bugalagrande plant

- 340.** *With regard to the allegations concerning the Bugalagrande plant, the Committee notes that, according to SINALTRAINAL: (1) in 2002, the company dismissed 12 workers for having participated in a protest in front of the Bogotá headquarters and the workers' application for legal protection (tutela) was denied; (2) in 2006, Mr Héctor Marino Lasso, Mr Leonardo Gómez and Mr Luis Fernández Arbeláez were dismissed without just cause, in violation of the collective agreement in force; (3) in 2006, the company also dismissed 90 temporary workers for supporting the trade union organization; and (4) in 2007, it dismissed five workers in violation of the collective agreement, the legal proceedings for which are under way.*
- 341.** *With respect to the 2002 dismissals of 12 workers for having participated in a protest, the Committee notes that, according to the Government, the competence for ruling on the legality of the dismissals rests with the judicial authority, not the Ministry for Social Protection, the trade union organization should therefore provide information on the proceedings that have been instituted and before which courts. In this regard, since the allegations date back to 2002 and it is difficult for the Government to present its observations on the matter without further information, the Committee requests the complainant to clarify the circumstances of the dismissals and to provide information as to whether and before which courts legal proceedings have been instituted. If the complainant organization does not provide additional information in this respect, the Committee will not pursue the examination of this allegation.*
- 342.** *As to the allegations concerning the company's dismissals without just cause, in 2006, of Mr Héctor Marino Lasso, Mr Leonardo Gómez and Mr Luis Fernández Arbeláez, in violation of the collective agreement in force, the Committee notes that, according to the company, the workers were dismissed in the context of a restructuring process and were duly compensated; this also applied to two non-unionized workers. The Committee notes that, according to the Government, the legal proceedings instituted remain pending before the labour court. The Committee requests the Government to keep it informed of the final outcome of these proceedings.*
- 343.** *With regard to the allegations that, in 2006, the company dismissed 90 temporary workers for supporting the trade union organization, the Committee notes that, according to the Government, the trade union organization should indicate whether it has instituted legal proceedings in that regard. The Committee also notes that, according to the company: (1) in 2004, the company had 228 temporary workers, and, as a result of the criticism and pressure exerted against it by the trade union organization, it decided to resolve that matter, and thus carried out a series of tests in 2005; (2) the enterprise then hired 121 of those workers on an open-ended basis; and (3) it subsequently hired 17 more persons, and the 90 remaining persons received more severance pay than was required by law and signed a consent agreement with the company in October 2006. The Committee notes that some of the dismissed workers instituted legal proceedings, but the judicial authority absolved the company of the claims.*
- 344.** *As to the allegations concerning the dismissal of five workers (Ms Edna Lucía Fernández, Mr Diego Lozano, Mr Hebert González, Mr Ignacio Millán and Mr Rogelio Sánchez), in 2007, in violation of the collective agreement, the Committee notes that, according to the trade union organization, the legal proceedings instituted are still under way. The*

Committee notes that the Government indicates that, concerning the legal action instituted by Mr Sánchez, the judicial authority ruled in favour of the company, a decision which was upheld at the appeals stage, and that, as to the other workers, further information is needed with regard to the courts handling the claims, if it is to be able to communicate its observations accordingly. Consequently, the Committee requests SINALTRAINAL to inform the Government which courts are handling the legal proceedings instituted by the dismissed workers, and requests the Government to keep the Committee apprised of the court rulings in that respect.

The Committee's recommendations

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

- (a) With respect to the allegations concerning Nestlé's refusal to grant the leaders of the trade union organization free access to the plants, recalling that governments should guarantee the access of trade union representatives to workplaces, with due respect for the company's rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization, the Committee requests the Government to ensure that the company fully respects this principle and that the workers can communicate freely with union representatives, and without the presence of a representative of the enterprise.*
- (b) As to the allegations concerning the company's refusal to negotiate with SINALTRAINAL at the Valledupar plant, and its conclusion of a collective agreement with another trade union organization, the Committee requests the Government to keep it apprised of the final outcome of the appeal against the administrative decision of the Ministry for Social Protection in favour of the company, and to send a copy of the collective agreement that the Government states was eventually signed with SINALTRAINAL in 2006.*
- (c) As to the allegations concerning the request for the suspension of the trade union immunity of union leader Mr Luis Eduardo Lúquez Castilla, from the Bugalagrande plant, the Committee requests the Government to keep it apprised of the final outcome of the appeals procedure against the ruling ordering the suspension of immunity in question.*
- (d) With respect to the dismissal, in 2002, of 12 workers from the Bugalagrande plant for having participated in a protest, noting that these allegations date back to 2002 and that it is difficult for the Government to present its observations on the matter without further information, the Committee requests the complainant organization to provide further information on the circumstances of the dismissals and indicate whether, and before which court, relevant legal proceedings have been instituted. If the complainant organization does not provide additional information in this respect, the Committee will not pursue the examination of this allegation.*
- (e) As to the allegations concerning the company's dismissal without just cause, in 2006, of Mr Héctor Marino Lasso, Mr Leonardo Gómez and Mr Luis Fernández Arbeláez in violation of the collective agreement in force, the*

Committee requests the Government to keep it apprised of the final outcome of the pending legal proceedings.

- (f) *With regard to the allegations concerning the dismissal of four workers (Ms Edna Lucía Fernández, Mr Diego Lozano, Mr Hebert González and Mr Ignacio Millán) in 2007, in violation of the collective agreement, the Committee requests SINALTRAINAL to inform the Government of which courts are handling the legal proceedings instituted by the dismissed workers, and requests the Government to keep it informed of the relevant court rulings.*

CASE NO. 2720

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

**Complaint against the Government of Colombia
presented by
the General Confederation of Labour (CGT)**

*Allegations: Dismissals of trade union leaders
and trade unionists in the telecommunications
sector*

- 346.** This complaint is contained in a communication of the General Confederation of Labour (CGT) of 10 June 2009.
- 347.** The Government sent its observations in communications dated 26 January and 8 March 2010.
- 348.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. Allegations of the complainant organization

- 349.** In its communication of 10 June 2009, the CGT alleges the dismissal by the TELEBUCARAMANGA company of eight workers on 29 July 2003, including six officials of the Trade Union of Communications Workers (USTC) (Claudia Yaneth García Espinosa, Raúl Arturo Mejía Herrera, Luis Alberto Alvarez Pabón, Reinaldo León Quintero, Jairo David Quintero Celis, Andelfo Díaz Amorochó, Diego Picón Morales and Angelmiro Hernández Niño) for participating in partial strikes on 22 and 24 January 2003, which were declared illegal by the Ministry of Social Protection on 14 April 2003 (resolution No. 0841). Ms Claudia Yaneth García Espinosa filed an action for reinstatement which was granted by the judicial authority at first and second instance, while the appeals lodged by the other workers were refused, and the action for protection (*tutela*) which had been filed was not admitted.
- 350.** The complainant organization also alleges that in the context of a restructuring process, the TELEBUCARAMANGA company requested and obtained authorization for the collective

dismissal of 95 workers (resolution No. A-0668 of 21 July 2004, which was the subject of applications for review and appeal, which led to the resolution being upheld). At the same time, the company presented a voluntary retirement plan which 201 workers accepted. As a consequence of the authorization of dismissals, the company dismissed 65 workers in 2005, despite the fact that some of them enjoyed trade union immunity as officials or because the trade union had submitted a set of claims in November 2004, which meant that the workers were covered by the circumstantial immunity of bargaining. The 65 dismissed workers initiated legal proceedings in the ordinary courts which are pending. Subsequently, on 24 May 2007, the company dismissed the trade union leader, Mr Barrera Beltrán, although the judicial authority in an action for protection (*tutela*) ordered his reinstatement, a decision which was upheld by the Constitutional Court in judgement No. T-249/2008. Finally, on 11 March 2008, the company dismissed a further 27 workers, who filed actions for protection (*tutela*) on identical terms as Mr Barrera Beltrán, and these actions are being reviewed by the Constitutional Court.

B. The Government's reply

- 351.** In its communication of 26 January 2010, the Government indicates with regard to the strikes in 2003, that the TELEBUCARAMANGA company is a telecommunications service provider which provides basic switched telephony to 205,000 users, Internet service to 58,000 users and television service to 7,000 users. The Ministry of Social Protection issued resolution No. 0841 of 14 April 2003 which declared the strikes by the workers on 22 and 24 January 2003 illegal, because they involved essential public services. The USTC filed an action for nullity before the Council of State, which was refused in a judgement of 19 June 2008. As a consequence of the illegality, TELEBUCARAMANGA determined the degree of participation of members of the executive board in the collective suspension of activities and terminated the individual employment contracts on 29 July 2003 of Raúl Arturo Mejía, Claudia Yaneth García, Jairo David Quintero, Luis Alberto Alvarez, Reynaldo León, Andelfo Díaz Amorochó, Angelmiro Hernández and Diego Picón Morales. These workers filed claims against the company. In seven cases, the company was exonerated and, in the case of Ms Claudia Yaneth García, her reinstatement was ordered, and that decision was implemented on 23 March 2007. The Government adds that the actions for protection (*tutela*) filed by the workers were unsuccessful.
- 352.** As regards the allegations relating to the collective dismissal of workers, the Government points out that the TELEBUCARAMANGA company requested authorization to undertake the collective dismissal of 417 workers in 2003. On 10 December 2003, the Ministry of Social Protection carried out a visual inspection of the facilities, with the involvement of the USTC. Finally, by resolution No. A-0668 of 21 July 2004, the dismissal of 95 workers was authorized. This decision was the subject of review and appeal by the USTC, which resulted in the confirmation of the authorization of the collective dismissal. The Government attaches the company's reply, which indicates that at the same time a voluntary retirement plan was introduced which was taken up by 201 workers who were paid double compensation and other benefits. The plan was the subject of conciliation agreements with the approval of the Ministry of Social Protection. Legal proceedings were initiated against the plan and the conciliation agreements by some workers who considered that their consent had been forced. In this regard, the judicial authorities considered that the workers had not been forced and that the consent was given in the presence of the labour inspector as observer to ensure that the workers' rights were not violated.
- 353.** The Government indicates, and this is confirmed by the company, that once the authorization of the dismissals was final, the company proceeded to carry out the following dismissals: on 17 January 2005, 28 workers; on 7 September 2005, 37 workers; on 24 May 2007, one worker; and on 11 March 2008, 27 workers. The company states that trade union immunity was respected in all the cases and that appropriate compensation was paid. The

company mentions that the high incidence of dismissals among union members is due to the high level of membership in the company.

- 354.** The Government adds, and this is confirmed by the company, that the workers whose employment contracts were terminated filed ten legal actions for reinstatement in the ordinary courts, because they considered that they were covered by the circumstantial immunity of collective bargaining. Of these ten cases, in one (which concerned 25 workers), the authority refused the workers' claims, and that decision was upheld. In three other actions (one of which concerned 26 workers), the workers' claims were refused in a decision at first instance. These cases are currently subject to appeal. Six other cases are pending in the lower courts.
- 355.** The company adds that numerous actions for protection (*tutela*) were filed, most of which were refused, while others are pending and one, filed by Mr Paulino Barrera Beltrán was upheld by the Constitutional Court in judgement No. T-249/2008 in March 2008, and his reinstatement was ordered. Another action for protection (*tutela*), filed by 27 workers, was also admitted for examination by the Constitutional Court and is pending.
- 356.** In its communication of 8 March 2010, the Government refers to the ILO preliminary contact mission which took place in Colombia from 2 to 5 March 2010, in the course of which the parties to the present case stated that the mediation by the mission had brought them closer together.

C. The Committee's conclusions

- 357.** *The Committee observes that in this case, the CGT alleges: (1) the dismissal in 2003 of six trade union officials and two members of the USTC in relation to a strike in the TELEBUCARAMANGA company, which belongs to the telecommunications sector, which was declared illegal by the Ministry of Social Protection because it was an essential service; and (2) the collective dismissal of numerous company workers in 2005, 2007 and 2008 in the context of a restructuring process.*
- 358.** *With regard to the allegations relating to the dismissals of six officials and two trade unionists of the USTC by the company for participating in a strike, the Committee notes that, according to the CGT, the dismissal concerned Claudia Yaneth García Espinosa, Raúl Arturo Mejía Herrera, Luis Alberto Alvarez Pabón, Reinaldo León Quintero, Jairo David Quintero Celis, Andelfo Díaz Amorcho, Diego Picón Morales and Angelmiro Hernández Niño for participating in partial strikes on 22 and 24 January 2003, which were declared illegal by the Ministry of Social Protection on 14 April 2003 by resolution No. 0841. The Committee notes that Ms Claudia Yaneth García Espinosa filed an action for reinstatement which was granted by the judicial authority at first and second instance, while the appeals lodged by the other workers were refused, and the action for protection (*tutela*) had been filed but was not admitted. In this respect, the Committee notes that the Government indicates that the company is a telecommunications service provider which provides basic switched telephony to 205,000 users, Internet service to 58,000 users and television service to 7,000 users, and because they involved essential public services, the Ministry of Social Protection issued resolution No. 0841 of 14 April 2003 which declared illegal the strikes by the workers on 22 and 24 January 2003. The Committee also notes that the Government informs it that the USTC filed an action for nullity before the Council of State, which was refused in a judgement of 19 June 2008. The Committee further notes that the Government indicates that, as a consequence of the illegality, the company, taking into account the degree of participation of members of the executive board in the collective suspension of activities, terminated the individual employment contracts of the abovementioned union officials and members on 29 July 2003. These workers filed claims against the company, in which the company was exonerated except in the case of*

Ms Claudia Yaneth García whose reinstatement was ordered, a decision which was implemented on 23 March 2007. The Committee notes that the actions for protection (tutela) filed by the workers were unsuccessful. In these circumstances, observing that the strike in 2003 occurred in an essential service, and that the affected officials and workers had initiated legal actions which were refused, with the exception of one case, that of Ms Yaneth García whose reinstatement was ordered, the Committee will not proceed with the examination of these allegations.

- 359.** *As regards the allegation relating to the collective dismissal, the Committee notes that, according to the complainant organization, in the context of a restructuring process, the company presented a voluntary retirement plan which was taken up by 201 workers. The Committee also notes that the company requested and obtained authorization for the collective dismissal of 95 workers (resolution No. A-0668 of 21 July 2004), that this authorization was the subject of applications for review and appeals, in which the resolution was upheld and, as a consequence: (1) the company dismissed 65 workers during 2005 (despite the fact that some of them enjoyed trade union immunity as officials or because the trade union had submitted a set of claims in November 2004, which meant that the workers were covered by the circumstantial immunity of bargaining) and those workers initiated legal proceedings in the ordinary courts which are pending; (2) on 24 May 2007, the company dismissed trade union official Mr Barrera Beltrán, although the judicial authority, in an action for protection (tutela) ordered his reinstatement, a decision which was upheld by the Constitutional Court in its judgement No. T-249/2008; and, lastly, (3) on 11 March 2008, the company dismissed a further 27 workers, who filed actions for protection (tutela) on the same terms as Mr Barrera Beltrán, and these actions are being reviewed by the Constitutional Court.*
- 360.** *The Committee notes that the Government states that: (1) the company requested authorization to undertake a collective dismissal in 2003; (2) in resolution No. A-0668 of 21 July 2004, the dismissal of 95 workers was authorized, the resolution was the subject of applications for review and appeals by the USTC, and these were decided in favour of the authorization of the collective dismissal; (3) once the authorization of the dismissals was final, the company proceeded to carry out the following dismissals: on 17 January 2005, 28 workers; on 7 September 2005, 37 workers; on 24 May 2007, one worker; and on 11 March 2008, 27 workers and, according to the company, always respecting the workers' trade union immunity and paying the appropriate compensation; and (4) the workers whose employment contracts were terminated filed legal actions for reinstatement in the ordinary courts, which were refused in one case and pending in others, and actions for protection (tutela), most of which were refused, except for one, filed by Mr Paulino Barrera Beltrán, which was upheld by the Constitutional Court in judgement No. T-249/2008 in March 2008, ordering his reinstatement; another action for protection (tutela), filed by 27 workers, was also admitted for examination by the Constitutional Court and is pending. The Committee requests the Government to keep it informed of developments in those appeals.*
- 361.** *In addition, observing that in its last communication the Government reports on an ILO preliminary contacts mission, which took place in Colombia from 2 to 5 March 2010, in the course of which the parties to the present case stated that the mediation by the mission had brought them closer together, the Committee notes this information with satisfaction and expects that this rapprochement will enable the parties to reach a solution to the matters raised in this case, in full compliance with the applicable national legislation. The Committee requests the Government to keep it informed of developments in this respect.*

The Committee's recommendation

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

With regard to the allegation relating to the collective dismissal in the TELEBUCARAMANGA company in January and September 2005, May 2007 and March 2008, the Committee requests the Government to keep it informed of developments in the pending appeals. In addition, observing that in its last communication, the Government reports on an ILO preliminary contact mission, which took place in Colombia from 2 to 5 March 2010, in the course of which the parties to the present case stated that the mediation by the mission had brought them closer together, the Committee notes this information with satisfaction and expects that this rapprochement will enable the parties to reach a solution to the matters raised in this case, in full compliance with the applicable national legislation. The Committee requests the Government to keep it informed of developments in this respect.

CASE NO. 2731

DEFINITIVE REPORT

Complaint against the Government of Colombia presented by the National Union of State Public Servants (SINTRAESTATALES)

Allegations: The National Union of State Public Servants (SINTRAESTATALES) alleges that workers were dismissed from the enterprise Metro de Medellín, despite the fact that they enjoyed trade union immunity

363. The present complaint is contained in a communication of the National Union of State Public Servants (SINTRAESTATALES) dated 21 May 2009.

364. The Government sent its observations in a communication dated 7 January 2010.

365. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

366. In its communication of 21 May 2009, SINTRAESTATALES alleges that the trade union organization was established on 20 June 2001 with the collaboration of workers from other State bodies and that the enterprise Metro de Medellín Ltda was notified on 21 June 2001. According to the complainant organization, nine days later, the enterprise began to give

notice of dismissal to the workers, regardless of their trade union immunity as union founders. The workers concerned initiated legal proceedings on the grounds of violation of trade union immunity and called for reinstatement and the payment of outstanding wages. The complainant organization indicates that the judicial authority ruled in the enterprise's favour and that this decision was upheld by the Medellín High Court. The workers then filed *tutela* proceedings for *amparo* protection of constitutional rights against the High Court decision. The Supreme Court of Justice rejected the petition for *amparo*. The workers also filed a petition with the Antioquia Administrative Court on the grounds that the dismissals were unlawful because they did not take place within the time frame allowed for restructuring and because no technical survey was conducted, as is required by law. However, the Administrative Court rejected the petition and the appeal lodged with the State Council against that decision was dismissed. The trade union has sent copies of the relevant administrative and judicial decisions.

B. The Government's reply

- 367.** In its communication of 7 January 2010, the Government indicates that the enterprise Empresa de Transporte Masivo del Valle de Aburrá Ltda – Metro de Medellín carried out administrative restructuring with a view to ensuring the efficient delivery of public services. With this objective, the changes to the organizational structure began in October 1999 and were formalized on 13 July 2000. The Government adds that the actual restructuring process was initiated by Resolution No. 2449 of September 2000 and emphasizes that the trade union organization was registered on 5 October 2001. The Government emphasizes that this demonstrates that there was no causal link between the notification of the termination of employment of the public employees (notification by the administrative authority that the workers' services were no longer needed) and the right to freedom of association, especially taking into account that the workers were involved in the process. The Government points out that, on 28 September 2000, the general manager of Metro de Medellín Ltda invited the workers by way of written communication to develop a participatory process of organizational change. This process affected 720 workers, who were divided into 25 groups to receive information and training on the organizational changes.
- 368.** The Government adds that the public employees initiated legal proceedings, which were dismissed, and points out that the Constitutional Court found that the modernization of the public body was in line with constitutional and legal provisions and therefore there was no need to seek judicial authorization before eliminating the posts. The Government notes that the decisions handed down by the different courts confirm that the notification of the termination of employment of the public employees was a result of the restructuring of the enterprise and was in no way to undermine a trade union organization that did not exist when the restructuring process began and when steps were first taken to dismiss the workers, who formed links with SINTRAESTATALES after the restructuring in question. The Government has sent a significant amount of documentation on the allegations.

C. The Committee's conclusions

- 369.** *The Committee notes that, in the present case, the allegations of SINTRAESTATALES concern the dismissal, in the context of the restructuring of the enterprise Metro de Medellín Ltda, of a large number of workers who enjoyed trade union immunity as the founders of the trade union. The Committee notes that the union was established on 20 June 2001 and that the enterprise was notified accordingly on 21 June 2001 and, that, according to the allegations, nine days later the enterprise began to dismiss the workers. The Committee notes that legal proceedings were initiated against this measure and that these were dismissed in the first and second instances, as were the tutela proceedings that*

were brought before the Supreme Court of Justice. The Committee notes that the proceedings brought before the Administrative Court and the State Council were also dismissed. The Committee also notes the evidence enclosed by the complainant.

370. *The Committee notes that, according to the Government: (1) the restructuring process was initiated by Resolution No. 2449 of September 2000, which in its section 3 provides for an “analysis of the relocation, transfer, elimination and/or conversion of posts”; (2) the trade union organization was registered on 5 October 2001, and it therefore follows that there was no causal link between the notification of the termination of employment of the public employees (notification by the administrative authority that the workers’ services were no longer needed) and the right to freedom of association; (3) the workers were involved in the process as they were invited to develop a participatory process of organizational change, which affected 720 workers who were divided into 25 groups to receive information and training on the organizational changes; and (4) the public employees initiated legal proceedings, which were dismissed, and the Constitutional Court found that the modernization of the public body was in line with constitutional and legal provisions and therefore there was no need to seek judicial authorization before eliminating the posts.*

371. *In this respect, the Committee has considered that it can examine allegations concerning economic rationalization programmes and restructuring processes, whether or not they imply redundancies or the transfer of enterprises or services from the public to the private sector, only in so far as they might have given rise to acts of discrimination or interference against trade unions. Furthermore, the Committee has emphasized that it is important that governments consult with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 1079 and 1081]. In these circumstances, observing that the establishment of the union (notified to the enterprise on 21 June 2001 and registered on 5 October the same year) took place after the issuance of Resolution No. 2449 of September 2000 ordering the restructuring of the body and providing in its Section 3 for the elimination of posts, that the workers were involved in the process and that the judicial authorities in several instances rejected the claims of the trade union organization, the Committee will not pursue its examination of these allegations.*

The Committee’s recommendation

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

CASE NO. 2707

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

**Complaint against the Government of the Republic of Korea
presented by
the Korean Confederation of Trade Unions (KCTU), and
its affiliate, the Korean Professors Trade Union (KPU)**

Allegations: The complainant and its affiliate, the Korean Professors Trade Union, allege that the national legislation restricts the right to organize of university professors

- 373.** The complaint is contained in a communication from the Korean Confederation of Trade Unions (KCTU), and its affiliate, the Korean Professors Trade Union (KPU), dated 8 April 2009.
- 374.** The Government forwarded its response to the allegations in a communication received 18 May 2010.
- 375.** The Republic of Korea has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 376.** In a communication dated 8 April 2009, the complainant organizations denounce the serious violation of the Preamble of the ILO Constitution, the Declaration of Philadelphia, ILO Conventions Nos 87, 98 and 151, and the Declaration on Fundamental Principles and Rights at Work, through laws which provide for criminal punishment and disciplinary action to be taken against trade unionists and the non-recognition of the KPU.
- 377.** The complainants indicate that the right to organize of government officials and teaching personnel is strictly forbidden since the military regime of 1961. Thus, the Government Officials Act and the Local Officials Act prohibited the establishment of trade unions by public service personnel, except the ones working in the labour section (article 66 of the Government Officials Act and article 58 of the Local Officials Act). Articles 78 and 84 of the Government Officials Act and articles 69 and 82 of the Local Officials Act imposed disciplinary action and criminal punishment on public service employees and tax-paid teachers exercising the right to organize. Furthermore, the Private Schools Act prohibited the right to organize of private school teachers by applying the provisions for public schools (article 55) and imposing punishment for any violation (article 61).
- 378.** According to the complainants, the total prohibition of the right to organize was internationally unprecedented, and led to recommendations being formulated by the ILO and other international organizations to the effect that the Government should reform labour laws in line with international labour standards. The complainant organizations allege that the progress made in guaranteeing the right to organize to public officials and teachers is limited. The Korea Tripartite Commission agreed to the guarantee of the right to organize for government officials and teachers in February 1998. Accordingly, the Act on the Establishment and Operation of Teachers' Trade Unions (Teachers' Union Act, effective as of 1 July 1999), and the Act on the Establishment and Operation of Public Officials' Trade Unions (Public Officials Trade Union Act, effective as of 28 January 2006), provide, in an incomplete and limited manner, for the right to organize and the right to bargain collectively of public officials and teachers. The complainants point out, however, that university professors were excluded from the Teachers' Union Act (article 2), and public education personnel was ruled out from the Public Officials Trade Union Act (article 6), which meant that the right to organize of public and private university professors remains prohibited and sanctioned, under the above laws.
- 379.** The complainants state that it was against this background that, in November 2001, the KPU was established and the bill of the union's establishment was submitted to the Government, which turned it down based on the laws above. According to the complainants, the fact that the KPU has not been recognized by law, results in the denial of the right to organize to more than 70,000 Korean professors.
- 380.** The complainant organizations further indicate that the Constitution of the Republic of Korea stipulates that: "To enhance working conditions, workers shall have the right to

independent association, collective bargaining and collective action". The Labour Standards Act states that "a worker" "refers to the person who offers personal labour to business premises to get wages regardless of the kind of work". The Trade Union and Labour Relations Adjustment Act (TULRAA) stipulates that "Workers refer to those who live with wages or salary regardless of the kind of job". In the complainants' view, these legal provisions clearly illustrate that university professors who are under the nation's and private school corporation's supervision and guidance are wage workers entitled to enjoy basic labour rights.

- 381.** With reference to the ILO Constitution and the Declaration of Philadelphia, as well as the ILO Declaration on Fundamental Principles and Rights at Work, 1998, the complainants consider that the right to organize and the right to bargain collectively are basic rights of labour, and all member nations including the nations that did not ratify the relevant Conventions relating to freedom of association are under an obligation to comply with the ILO Constitution.
- 382.** The complainant organizations further refer to Articles 2, 9(1) and 11 of Convention No. 87, Articles 1 and 4 of Convention No. 98, Articles 1(2), 4 and 7 of Convention No. 151. In light of these principles and standards regarding the right to organize and the right to bargain collectively, the complainants conclude that public and private university professors are entitled to these rights, and that the actions of the Government (i.e. denial of the right to organize in the Government Officials Act, the Local Officials Act and the Private Schools Act; and non-recognition of the KPU), are in clear violation of ILO standards.
- 383.** The complainant organizations also indicate that, recently, the National Human Rights Commission took up the issue and requested the National Assembly to take action. The Commission stated on 27 March 2006 that "The National Assembly needs to take legislative measures appropriately to guarantee the right to work of university professors in accordance with the Constitution and International Human Rights Law. The range of guarantee can be adjusted considering the necessity of respecting the right to study of students and particularity of official and legal position of university professors, unless the essential subject matters of the right to work are not violated".
- 384.** According to the complainants, however, the Government still takes a passive or negative stand regarding legislative measures to guarantee the right to organize of university professors, which explains the failure of efforts to revise the relevant laws in September 2004 and November 2005. Government, members of the National Assembly and university authorities, argued that it was difficult to treat university professors as general workers due to the working relations, particularity of legal positions, social positions, and law sentiment of the people. The complainants criticize the reasons invoked as unwarranted prejudice and a mere excuse to prohibit the right to organize of university professors.
- 385.** The complainants indicate that the National Human Rights Commission also concluded that the objections were unjustified based on the following considerations: (i) the Constitution guarantees the three basic labour rights of university professors, which cannot be limited due to the particularity of work as educators; (ii) it is not justified to limit the three basic labour rights of university professors, only because their academic freedom is highly guaranteed and they can participate in management of university through university autonomy; (iii) while the limitation of the right to labour on certain conditions, which is the guarantee of the right to have lessons, is a separate discussion, an overall limitation of the right to work cannot be justified; (iv) the guarantee of the political participation of university professors is the guarantee of the political basic legal rights and therefore it is not the basis for the overall prohibition of the exercise of the basic right to work. External value judgement without law such as the sentiment of people, social atmosphere, or an

appropriate time cannot deny the guarantee of the basic right to work, because value judgement within law is a priority; (v) there is a limitation in the improvement of the working conditions by voluntary association and this cannot be the basis of the overall denial of the right to work of university professors; (vi) based on article 31(6) of the Constitution, overall denial of the basic right to work of university professors is contradictory to the ideology of the maximum guarantee of the Constitution.

- 386.** According to the complainants, the ILO has already drawn attention to the fact that “workers can establish and join the organizations having a free choice to protect their interests, regardless of the particular positions under domestic law without any discrimination”, and has been urging the Government to “take steps for public service personnel and public and private school teachers to exercise the right to organize”. The fact that the Government did not take the legal steps required to guarantee the right to organize for university professors illustrates, in the complainants’ view, a lack of will to meet the relevant ILO obligations.
- 387.** Furthermore, the complainant organizations indicate that, due to the recent change of social and economic conditions and university policies, the public interest and democracy of university education have been disappearing, university professors are insecure about their employment, working conditions are getting worse, and the teachers’ authorities and privileges are frequently violated, due to the one-sided policy of the Government to incorporate national universities and restructuring and arbitrary management of private universities. The complainants condemn the fact that, under these circumstances, the right to organize, which is the effective and justifiable means for university professors to act against the Government, is fundamentally blocked, and that, although the KPU is established and conducting normal trade union activities, it cannot organize and bargain collectively and is under constant threat of disciplinary and criminal punishment, in breach of ILO principles and standards.
- 388.** The complainants therefore consider that the provisions of the relevant laws such as the Government Officials Act, the Local Officials Act, and the Private School Act, which forbid and restrict basic labour rights of university professors, should be revised or abolished in line with international labour standards, and legislative measures should urgently be taken so as to guarantee the right to organize for university professors in accordance with ILO standards. The complainants hope that the Committee on Freedom of Association will examine this case carefully and contribute to the progress of the labour rights situation and democratic industrial relations of university professors in the Republic of Korea.

B. The Government’s reply

- 389.** In its reply, the Government indicates that, in January 1999, the Act on the Establishment, Operation, etc., of Trade Unions for Teachers was enacted, thereby guaranteeing basic labour rights of teachers including university part-time lecturers. In the course of the discussion on the Act, the tripartite parties agreed to exclude full-time lecturers and professors from the Act and to later decide on ways to guarantee their rights. In 2001, the Tripartite Commission placed the issue of the basic labour rights of full-time lecturers and professors on the agenda. From February 2001 to February 2002, the Commission heard the opinions from interested parties, examined similar cases in other countries and conducted surveys. However, the parties failed to reach an agreement, and their discussions came to a halt in February 2002. In November 2005, lawmakers proposed a bill which would allow the establishment of a trade union of professors by extending the application of the Act on the Establishment, Operation, etc., of Trade Unions for Teachers to all university teachers. In April 2007, the Environment and Labour Committee of the National Assembly deliberated on the bill, but no agreement was reached. With the end of

the 17th Session of the National Assembly in April 2008, the bill was automatically scrapped.

- 390.** The Government further indicates that, according to 2001–07 surveys, while labour circles and professors’ organizations demanded that professors be allowed to establish a trade union, employers, including the Ministry of Education, took on a cautious attitude and opinion polls showed that opposing opinions prevailed.
- 391.** The Government believes that the various discussions on the establishment of a professors’ trade union mainly carried out at the National Assembly suggest that neither a social agreement nor a public consensus has yet been reached. The prevailing opinion is that a careful approach should be taken in deciding whether to allow professors to establish a trade union given the unique nature of their job and status, and the general perception that professors enjoy a higher social and economic status. The Government is of the view that it would be desirable to carefully review the issue of a professors’ trade union after a social consensus has been reached by narrowing the differences of opinion among interested parties, such as universities, professors, parents and students.

C. The Committee’s conclusions

- 392.** *The Committee notes that, in the present case, the complainant organizations allege that the national legislation restricts the right to organize of university professors.*
- 393.** *The Committee notes from the complainants’ allegations that, while the Teachers’ Union Act (1999) and the Public Officials Trade Union Act (2006) now provide for the right to organize and the right to bargain collectively of public officials and teachers to a limited degree, the national legislation still prohibits more generally the establishment of trade unions by public service personnel (article 66 of the Government Officials Act and article 58 of the Local Officials Act) and by private school teachers (article 55 of the Private Schools Act), and imposes disciplinary action and criminal punishment in this respect (articles 78 and 84 of the Government Officials Act, articles 69 and 82 of the Local Officials Act; article 61 of the Private Schools Act). Thus, since university professors are excluded from the Teachers’ Union Act (article 2), and public education personnel is not covered by the Public Officials’ Trade Union Act (article 6), the right to organize of public and private university professors remains prohibited.*
- 394.** *The Committee also notes the complainants’ indication that, in November 2001, the KPU was established and the bill of the union’s establishment was submitted to the Government, which refused to recognize the union based on the aforementioned laws. In the complainants’ view, this results in the denial of the right to organize of more than 70,000 Korean professors.*
- 395.** *Furthermore, the Committee notes from the complainants’ allegations that the National Human Rights Commission recommended on 27 March 2006 that the National Assembly take the appropriate legislative measures to guarantee the three basic labour rights (to organize, strike and bargain collectively) of university professors in accordance with the Constitution and international human rights law, taking into account the right to study of students and the particularity of the official and legal position of university professors. The Committee notes that, according to the complainants, the Government still takes a passive or negative stand in this regard, arguing that it is difficult to treat university professors as general workers due to their working relations, the particularity of their legal and social position and the law sentiment of the people. The Committee notes the complainants’ indication that the National Human Rights Commission concluded that the objections invoked by the Government were not justified, inter alia, because the particularity of work as educators, the academic freedom of university professors, their participation in the*

management of the university through university autonomy and their political participation could not provide the basis for a total denial of the right to organize.

- 396.** *The Committee notes from the Government's reply that various discussions have been held in the past at national level on a trade union of professors but that so far no agreement has been reached at the National Assembly to extend the application of the Act on the Establishment, Operation, etc., of Trade Unions for Teachers to all university teachers. Noting the Government's indication that opposing opinions prevailed as shown by the positions of the various stakeholders and opinion polls, the Committee observes that, in the Government's view, given the general perception that professors enjoy a higher social and economic status and given the unique nature of their job and status, it would be desirable to carefully review the issue of a professors' trade union after a social consensus has been reached by narrowing the differences of opinion among interested parties, such as universities, professors, parents and students.*
- 397.** *The Committee wishes to recall that public servants, like all other workers, without distinction whatsoever, have the right to establish and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 219]. Thus, university professors are not excluded from the scope of freedom of association principles. On the contrary, all public employees (with the sole possible exception of the armed forces and the police, by virtue of Article 9 of Convention No. 87) should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members [**Digest**, *op. cit.*, para. 220]. As regards teachers in particular, the Committee has always considered that teachers should have the right to establish and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests [**Digest**, *op. cit.*, para. 235].*
- 398.** *The Committee considers that neither the objections invoked by the Government nor any negative opinion polls should have any effect on the fundamental right to organize which should be guaranteed to all public officials without distinction, including university professors. The Committee underlines that the National Human Rights Commission has itself considered the objections unfounded and made recommendations to remedy the situation.*
- 399.** *The Committee, noting the above, requests the Government to take all necessary measures within its remit to ensure: (i) that the relevant provisions of the Government Officials Act, the Local Officials Act and the Private Schools Act, which deny the right to organize to university professors in the public and private sector, are abrogated without delay; and (ii) that the exclusions from the right to organize introduced in the Act on the Establishment and Operation of Public Officials' Trade Unions as well as its Enforcement Decree, and in the Act on the Establishment and Operation of Teachers' Trade Unions as well as its Enforcement Decree, are revised so as to ensure that university professors in the public and private sector have the right to establish and join organizations of their own choosing so as to defend their interests. The Committee also urges the Government to recognize and register the KPU without delay and requests to be kept informed in this regard.*

The Committee's recommendations

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

- (a) *The Committee, in line with the recommendation of the National Human Rights Commission, requests the Government to take all necessary measures within its remit to ensure that:*
- (i) *the relevant provisions of the Government Officials Act, the Local Officials Act and the Private Schools Act, which deny the right to organize to university professors in the public and private sector, are abrogated without delay; and*
 - (ii) *that the exclusions from the right to organize introduced in the Act on the Establishment and Operation of Public Officials' Trade Unions as well as its Enforcement Decree, and in the Act on the Establishment and Operation of Teachers' Trade Unions as well as its Enforcement Decree, are revised so as to ensure that university professors in the public and private sector have the right to establish and join organizations of their own choosing so as to defend their interests.*
- (b) *The Committee also urges the Government to recognize and register the KPU without delay.*
- (c) *The Committee requests to be kept informed in this regard.*

CASE NO. 2728

DEFINITIVE REPORT

**Complaint against the Government of Costa Rica
presented by
the Industrial Trade Union of Agricultural Workers, Cattle
Ranchers and Other Workers of Heredia (SITAGAH)**

Allegations: The complainant organization alleges anti-union dismissals in the banana sector

- 401.** The complaint is contained in a communication from the Industrial Trade Union of Agricultural Workers, Cattle Ranchers and Other Workers of Heredia (SITAGAH), dated 7 July 2009.
- 402.** The Government sent its observations in a communication of December 2009.
- 403.** Costa Rica 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

- 404.** In its communication of 7 July 2009, the SITAGAH alleges that the Standard Fruit Company, in disregard of trade union immunity, has carried out anti-union dismissals. It refers specifically to the following: (1) Isaac Eliel García Mendoza, dismissed on 7 May 2009 following his appointment as workers' representative on 14 April 2009;

(2) Filemón Velásquez Rayo, dismissed on 7 May 2009; (3) Freddy Mena Pérez, dismissed on 28 March 2009; (4) Wilberth Enrique Hernández Pérez, dismissed on 28 March 2009 (joined the union on 7 March 2009); (5) José Ríos Duarte, dismissed on 28 March 2009 (joined the union on 12 January 2008); (6) Santos González García, dismissed on 28 March 2009 (joined the union on 27 November 2008); and (7) Arturo Meneses Pérez, dismissed on 28 March 2009 (Undersecretary-General of SITAGAH since 25 January 2009).

- 405.** The complainant states that the company signed an agreement with the Coordinating Committee of the Costa Rica Banana Workers' Unions in 2007 and thereby undertook to respect freedom of association, but the agreement has not in fact been respected. It adds that the Coordinating Committee and the company met on a number of occasions (on 13 September 2007; 22 April, 25 June, 15 and 17 July, 11 September and 3 October 2008; and 20 March and 21 April 2009) in order to discuss matters of concern to the complainant organization, including the issue of the dismissals referred to above, but failed to obtain results.
- 406.** Lastly, the complainant states that the Government authorities have taken no steps to prevent these anti-union dismissals and is failing to guarantee the basic right to unionize, which exists only in theory, "on paper", not in reality.

B. The Government's reply

- 407.** In its communication of December 2010, the Government states that Costa Rica is endeavouring to respect freedom of association in all its aspects: freedom to join and leave a union; respect for union pluralism; autonomy of unions to act freely and independently of the State or employers; etc. The Ministry of Labour and Social Security, through the National Labour Inspection Directorate, ensures that labour legislation is respected, including legislation relating to trade union rights. In this regard, and in accordance with the Labour Code, the inspectorate intervenes in procedures relating to unfair employment practices which include unjustified or unlawful dismissals.
- 408.** The Government states that Administrative Directive No. 023-08 establishes a new streamlined and updated procedure for dealing with cases of unfair employment practice. This Directive stipulates that complaints of such practices must be dealt with within two months.
- 409.** With regard to the specific allegations in this case, the Government states that the company sent a report through a note dated 29 October 2009, which states among other things that none of the dismissals was due specifically to union membership; they were part of a general measure that was applied to groups 1 and 2 of the Zurqui plantation and was due to the project of modernizing the plantation and matching production to market demand; and the measure was applied throughout the banana sector, not just to the Zurqui plantation. According to the company, as African and Caribbean countries have increased their share of banana production since 2000, competition from a number of Latin American countries and a fall in productivity of Costa Rica's banana plantations have all led to increasing pressure to improve productivity in the country's plantations. This has led to modernization programmes, involving production control based on the use of cuttings and new planting with a view to restoring productivity. According to the company, both SITAGAH and the Coordinating Committee were informed of this situation before the measures were put into effect. Currently, there are unionized workers working on the plantation in areas not affected by the modernization programmes of 2009. The company states that it has openly offered work on the plantation to workers laid off in connection with the modernization programme but the offer was not accepted by the union, despite the fact that work had already resumed in those areas. The company emphasizes that, despite

this offer, none of the complainants has applied to the plantation for work, which proves that there is no foundation to the allegations of anti-union harassment made by SITAGAH. According to the company, the unionized worker Filemón Velásquez Rayo is working on the plantation.

- 410.** The Government states that the lay-offs carried out by the company are clearly not part of any supposed anti-union persecution but rather necessitated by modernization programmes involving production control with cuttings and new planting with the aim of restoring productivity of banana plantations and matching banana production to international demand. As regards failure to respect trade union immunity, the Government recalls that this comprises a range of measures intended to protect union officials from possible harm as a result of their union activities, but that protection is in no way intended to be unlimited. In this regard, the Constitutional Court in its jurisprudence has consistently stated that trade union immunity is not unlimited, and union officials can therefore be dismissed if there is good reason, in accordance with labour legislation and the principles of due process.

C. The Committee's conclusions

- 411.** *The Committee notes that, in this case, the complainant organization alleges the anti-union dismissal of a union official and six union members between March and May 2009 on a banana plantation, and that the Government takes no steps to guarantee the free exercise of trade union rights. The Committee notes that the complainant organization does not refer to any judicial proceedings that might have been instigated in connection with those dismissals, and that the company indicates that the unionized worker Filemón Velásquez Rayo is currently working on the plantation.*

- 412.** *The Committee notes from the Government's reply that the company indicates that: (1) none of the dismissals alleged were due specifically to the union membership of the individuals concerned; (2) the dismissals applied to everyone in groups 1 and 2 at the Zurqui plantation, and were connected with the programme of modernization; (3) the measure was not unique to the Zurqui plantation but a general one that applied to the entire banana sector; (4) as more African and Caribbean countries have entered the banana market since 2000, and the competitiveness of some Latin American countries has increased, while the productivity of Costa Rica's own banana plantations has fallen, there has been strong pressure to become more competitive, which has led to modernization programmes involving production control based on the use of cuttings and new planting to restore productivity; (5) SITAGAH and the Coordinating Committee of Costa Rica Banana Workers' Unions were informed of this objective situation before the measures were applied; (6) unionized workers are currently working on the plantation in areas not affected by the modernization programmes of 2009; and (7) there has been an open offer of employment on the plantation for workers who were laid off in connection with the modernization programmes, but the offer was not accepted by the union, despite the fact that work had resumed in those areas, and no one applied for work, which proves that there is no basis for the allegation by SITAGAH of trade union harassment.*

- 413.** *Taking into account this information, and in particular the fact that the company has offered to rehire the dismissed workers referred to in this case, the Committee will not pursue its examination of these allegations.*

The Committee's recommendation

- 414.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that the present case does not call for further examination.*

CASE NO. 2755

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

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

- the National Union of Educators (UNE) and
- Education International (EI)

Allegations: The complainant organization objects to a Ministry of Education circular which provides that dues to the UNE may not be deducted from the wages of members of the teaching profession

- 415.** The complaint is contained in communications of the National Union of Educators (UNE) and Education International (EI) of 6 November and 15 December 2009. The UNE sent additional information in a communication of 1 March 2010.
- 416.** The Government sent its observations in a communication of 27 February 2010.
- 417.** Ecuador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Allegations of the complainants

- 418.** In their communications of 6 November and 15 December 2009, the UNE and EI state that on 19 August 2009, the Ministry of Education of Ecuador issued circular No. 082 addressed to all regional undersecretaries, provincial directors, rectors and heads of educational institutions, heads of provincial human resources and payment offices and collectors of educational centres. The complainant organizations allege that in its communication, the Ministry of Education issued an order “that from the month of August 2009, deductions should not be made from the remuneration of members of the national teaching profession through the payroll of any financial units, whether central, regional, provincial, or the collectors or payment offices of individual educational establishments, for contributions to the UNE”.
- 419.** The complainants add that the Ministry’s communication is based on circulars from the year 1981 and the Constitution of the UNE, as it considers that there is no legal basis for continuing to make deductions from members of the teaching profession through the payroll of the Ministry and its various departments for contributions to the UNE. In the light of this decision, the UNE’s national membership is obliged to approach the union directly to pay their union dues.

B. The Government’s reply

- 420.** In its communication of 27 February 2010, the Government states that the Minister of Education, in circular No. 0392 DM-2010 of 17 February 2010, provided his observations on the allegations made by the UNE.

- 421.** The Ministry of Education states that at no time was a decision made to suspend deductions from members of the national teaching profession. What it said was that the facilities of the Ministry of Education should not be used to make the deductions in favour of the UNE through the payroll of the Ministry and its various departments. Under current legislation, it was prohibited to make deductions not authorized by the public servant himself or by legislation.
- 422.** In this respect, the Ministry of Education informs that article 124 of the Organic Act of the Civil Service and Administrative Service and Unification and Approval of Public Sector Remuneration, clearly establishes: “Remuneration and pensions are not transferable or subject to distraint. The amounts of remuneration and pensions of servants and workers subject to this Act may not be transferred between living persons and are not subject to distraint, except for the payment of maintenance due by law. Any type of deduction from the remuneration of public servants is prohibited, unless expressly authorized by the latter or by law”. The circular sets out the legal position. It is addressed by higher authority to its public servants (staff of finance departments at central, provincial or institutional level) to regulate a particular aspect of the administration. The circular provides instruction on a specific situation.
- 423.** The Ministry of Education also refers to article 23 of the Organic Education Act, which states “The Ministry of Education and Culture is responsible for the functioning of the national education system, the formulation and implementation of cultural and sports policy and the promotion of scientific and technological development”. In no way can the instruction given to the staff of Ministry finance departments be qualified as an excess or abuse of power, because it is contemplated in a legal provision and, moreover, it does not serve any particular interest but the general. Moreover, leaving the previous arrangement in place could be regarded as an abuse of power by benefiting a particular interest, exclusively that of a private organization, the UNE.
- 424.** Furthermore, article 17 of the Statute of the Judicial–Administrative Regime of the Executive Function (*Estatuto del Regimen Juridico Administrativo de la Funcion Ejecutiva* – ERJAFE) states as follows: “MINISTRIES. – Ministries of State have decision-making powers with respect to matters inherent in their ministries without the need for any authorization from the President of the Republic, except in those cases expressly indicated in special laws”. The Ministry of Education adds that account should be taken of the need to administer public resources properly, based on principles of efficiency and effectiveness, one of which is that public servants in the finance departments of provincial education directorates, like those of colleges, must devote their time to matters for which the Ecuadorian State pays them, i.e. real and effective provision of the public education service, without diverting part of their efforts to the service of particular entities.
- 425.** The Ministry of Education considers that ILO Convention No. 87 does not apply to this claim, since the ILO itself recognizes the internal capacity of each sovereign State to regulate its labour relations with its employees in the public sector, and national legislation recognizes the character of a worker to someone who carries out manual activities which place physical effort above intellect. The Constitution of the UNE is subject to the Constitution, Civil Code and Regulations for the approval of statutes, reforms and codification, liquidation and dissolution and registration of shareholders and directors, of the organizations listed in the Civil Code and special laws, and in no way to the provisions of article 440 of the Labour Code. Circular No. 082 indicates that there is no legal basis to continue making deductions from members of the teaching profession via the payroll of the Ministry and its departments with respect to contributions to the UNE.

C. The Committee's conclusions

426. *The Committee observes that in this case, the complainant organizations object to Ministry of Education circular No. 082 which provides that from the month of August 2009, deductions should not be made from the remuneration of members of the national teaching profession through the payroll of any financial units for contributions to the UNE and that members of the teaching profession who voluntarily wish to contribute to that trade union must approach the UNE directly to ascertain how to make their contribution.*
427. *The Committee notes that the Government states that the Ministry of Education indicated that: (1) at no time was a decision made to suspend deductions from members of the national teaching profession, but that the facilities of the Ministry of Education should not be used to make deductions in favour of the UNE through the payroll of the Ministry and its various departments; (2) under current legislation, it was prohibited to make deductions not authorized by the public servant himself or by legislation; (3) the instruction could not be qualified as an excess or abuse of power, because it is contemplated in a legal provision and, moreover, it does not serve any particular interest; (4) it had the obligation to administer public resources properly, based on principles of efficiency and effectiveness, and public servants must devote their time to matters for which the State pays them, without diverting part of their efforts to the service of particular entities; (5) the circular in question indicates that there is no legal basis to continue making deductions from members of the teaching profession via the payroll of the Ministry and its departments as contributions to the UNE; and (6) Convention No. 87 does not apply to this claim, since the ILO itself recognizes the internal capacity of each State to regulate its labour relations with its employees in the public sector.*
428. *The Committee recalls that on numerous occasions when it examined similar allegations, it emphasized that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, para. 475]. The Committee further recalls that the requirement that workers confirm their trade union membership in writing in order to have their union dues deducted from their wages does not violate the principles of freedom of association [see **Digest**, op. cit., para. 476]. In these circumstances, bearing in mind that, as recognized in Ministry of Education circular No. 082, retentions of trade union dues on behalf of the UNE had previously been taking place, and the decision to suspend them occurred without any special reason, and the cessation of these retentions could very seriously prejudice the UNE, in particular because it was a national organization, the Committee requests the Government that, in line with the practice which it had followed previously, it should immediately restore the deductions of dues of UNE members who had authorized that deduction. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendation

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

The Committee requests the Government, in line with the practice which it had followed previously, to immediately restore the deductions of dues of UNE members who had authorized that deduction. The Committee requests the Government to keep it informed in this respect.

CASE NO. 2683

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

**Complaint against the Government of the United States
presented by**

- **the Association of Flight Attendants – Communications Workers of America (AFA–CWA) and**
- **the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO)**

***Allegations: Acts of anti-union discrimination
against flight attendants at Delta Air Lines and
insufficient protection of their rights to organize***

- 430.** The complaint is contained in a communication dated 4 December 2008, the Association of Flight Attendants – Communications Workers of America (AFA–CWA) and the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO).
- 431.** The Government sent its observations in communications dated 8 October 2009, 25 January and 25 May 2010.
- 432.** The United States has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 433.** In a communication dated 4 December 2008, the complainant alleged that the National Mediation Board (“NMB” or “Board”), an independent agency of the US Government, has erected significant barriers to airline and railway workers in the United States who seek to form unions and obtain collective bargaining representation. The obstacles imposed by the NMB have deprived thousands of flight attendants at Delta Air Lines, Inc. of freedom of association and their rights to organize and bargain collectively.
- 434.** The complainants explain that in 2008, more than 13,000 flight attendants at Delta Air Lines, Inc. (“Delta”) sought to gain union representation with the Association of Flight Attendants – Communications Workers of America (“AFA–CWA”). Their struggle illustrates the severe challenges workers face in organizing under the NMB’s rules and procedures. Delta waged an aggressive anti-union campaign that successfully prevented its flight attendants from freely selecting union representation. The NMB refused to prevent or remedy Delta’s interference, leaving Delta’s flight attendants without union representation as the employer moves to conclude an historic merger that will affect the flight attendants’ work lives for years to come.
- 435.** The National Mediation Board administers the Railway Labor Act (“RLA”), which establishes a separate labour law regime specifically for railways and airlines, distinct from the National Labor Relations Act.
- 436.** The RLA provides the following:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter ...

- 437.** If any dispute arises regarding representation of a carrier's employees, the Board will investigate the dispute and certify the authorized representative to the carrier. In conducting such an investigation, the Board may take a secret ballot of the employees concerned or use any other method that will "ensure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier".
- 438.** The NMB's standard method for resolving representation disputes is to conduct an election by secret ballot. The NMB will conduct an election where no representation currently exists only after receiving signed authorization cards from at least 35 per cent of the employees in the craft or class concerned. Once sufficient authorization cards are received, the NMB will establish a voting period during which a secret ballot election is conducted. When the election period closes, the NMB tallies the votes in the following manner:
- First, the NMB requires an absolute majority of eligible employees to cast a valid ballot in order to have any representative certified as a bargaining agent. Consequently, the NMB counts any eligible employees who do not participate in the election as votes against representation.
 - Second, the NMB will also invalidate any ballots where the voter's intent is unclear, votes indicating no desire for representation, votes cast for a carrier or carrier official, and votes where the voter has written in "self", "self representation", or the equivalent, as votes against representation.
 - Finally, if the required majority of eligible employees cast valid ballots, a representative must receive a majority of the ballots that were cast in order to be certified.
- 439.** If the required majorities in favour of representation are not reached, the NMB will dismiss the application and refuse to certify a bargaining representative for the employees concerned.
- 440.** The US Supreme Court has upheld the NMB's election rules, finding the choice of balloting method to be within the Board's discretion. In upholding these rules, the Supreme Court noted that, contrary to prevailing wisdom at the time, omitting a "no union" box on the ballot and counting all non-votes as "no" votes could actually make it easier for employers to avoid unionization rather than facilitating worker organization and collective bargaining.

Using the Board's ballot an employee may refrain from joining a union and refuse to bargain collectively. All he need do is not vote and this is considered a vote against representation under the Board's practice of requiring that a majority of the eligible voters in a craft or class actually vote for some representative before the election is valid. The practicalities of voting -the fact that many who favor some representation will not vote – are in favor of the employee who wants "no union". Indeed, the method proposed by the Board might well be more effective than providing a "no union" box, since, if one were added, a failure to vote would then be taken as a vote approving the choice of the majority of those voting. This is the practice of the National Labor Relations Board.

- 441.** As foreshadowed by the Court, the NMB's rules have indeed been extremely effective in preventing workers from unionizing and gaining bargaining representation. Anti-union employers have taken shrewd advantage of the fact that "the practicalities of voting" will often prevent even those who do support representation from casting a vote. It is much

easier for an employer to influence an employee to simply take no action and not vote at all than it is to persuade an employee to take the time to actively participate in an election and then cast a vote against representation. Employers can capitalize on this fact to lower participation rates, resulting in more non-voting employees who are counted by the NMB as opponents of representation.

- 442.** Even more troubling is the increasingly common practice among employers such as Delta of waging sophisticated and aggressive campaigns to suppress employee turnout in representation elections. A key element of such campaigns is a pervasive communications strategy, which takes advantage of the employer's unique position as the only entity in regular and predictable contact with a travelling workforce to inundate workers with anti-union messages. The goal of these campaigns is not just to convince employees to oppose unionization on its merits, but to prevent employees from participating in the election at all. These voter suppression campaigns include coordinated and persistent instructions from employers to their employees to destroy their ballots or the government-issued balloting information they need to participate in the election. In these campaigns, it is the ballot, the official balloting instructions, and the voting process itself that employers seek to transform into objects of derision, disdain, and fear. Employers direct their employees to rip up or shred the ballot and balloting instructions, warn them not to click or dial into the Internet and telephone voting systems, and alert them to beware of supposed ballot tampering or voter fraud.
- 443.** According to the complainants, through such campaigns, employers hope to avoid an honest debate among employees regarding the potential benefits of unionization. Once an employee follows her employer's directions to destroy her balloting information, she is divested and disengaged from the election process. By destroying the balloting instructions, the employee has effectively cast a vote against representation before she has had time to discuss the merits of union representation with her co-workers or reflect upon what union representation may mean for her work life.
- 444.** In addition, the NMB rules create an incentive for employers who oppose unionization to try to inflate the number of employees supposedly eligible to participate in the election and thus artificially raise the number of votes required to establish a majority in favour of representation. Since information about employee status is uniquely within the province of the employer, opportunities for such manipulation of the system are rife, requiring constant vigilance by employees, unions, and the NMB itself.
- 445.** Furthermore, the NMB's rules greatly increase the impact of even minor omissions and oversights by the election administrator on the right to organize. When the NMB fails to fully verify employee eligibility lists, it permits employer manipulation to inflate the number of non-voting employees counted by the NMB as opposing representation. In addition, when the NMB fails to mail balloting instructions properly, or indeed at all, the error carries a much higher cost in light of the NMB's rules. While such failures may deny affected employees the ability to cast their votes for or against representation under other balloting regimes, under NMB rules these failures result in each affected employee being counted as an opponent of representation.
- 446.** Reflecting an implicit recognition that standard NMB election rules fail to offer adequate safeguards against employer interference, the Board will re-run an election under alternative procedures to remedy carrier interference after it has occurred. The so-called "Laker" ballot the NMB makes available in such cases is in a yes/no format, which permits voters to select a "no union" option. Under this method, the NMB does not require a majority of eligible employees to participate in the election, and the Board will certify a representative as long as it receives a majority of the votes cast.

- 447.** Despite the greater protection from employer interference afforded by this balloting method, the NMB will only provide a “Laker” ballot after an employer has already interfered in an election run under standard procedures. When employees request a “Laker” balloting method at the outset of an election campaign in order to discourage such employer interference from occurring in the first place, the NMB ordinarily denies those requests. Moreover, even after a tainted election has concluded, the NMB will not approve use of the “Laker” ballot until after an investigation and other proceedings establishing the extent of interference have been completed. Employees are deprived of representation during the pendency of these lengthy proceedings.
- 448.** In addition, the NMB has set an exceedingly high bar for access to a “Laker” ballot even after a standard election is completed. First, workers must establish that interference has occurred to a sufficient extent to merit remedial action. In nine out of the 13 interference decisions published by the NMB since 2001, the Board found insufficient evidence of interference to warrant the provision of any remedy. This was the case even where incidents of employer surveillance, harassment, and pervasive anti-union communications campaigns were presented. The NMB has granted particularly broad leeway to employers to mount campaigns urging employees not to participate in union elections. In part, this stems from judicial interpretations of the First Amendment of the US Constitution that protect the right of employers to speak out against unionization. The NMB applies these protections for employers’ speech to permit carriers to urge workers in the midst of union election campaigns to destroy their ballots and balloting information, as long as such employer communications are not deemed coercive and do not contain material misrepresentations.
- 449.** Even if workers are able to demonstrate the existence of employer interference to the Board’s satisfaction, in some cases the Board still will not remedy such interference through access to a “Laker” ballot. The Board’s practice is to only grant requests for a “Laker” ballot in “unusual and extraordinary circumstances” where “egregious” employer interference has been demonstrated. In the four cases since 2001 where the Board has found that employer interference tainted the election period, a re-run election with a “Laker” ballot was provided in only one case. In that case, the workers were able to gain union representation in the re-run election with a “Laker” ballot. In the other three cases – even where the employers had dismissed union activists, held mandatory anti-union meetings, interviewed workers as to their union preferences, and/or granted benefits during the election period to influence the outcome – the Board authorized a re-run of the election but refused to provide a yes/no ballot that would allow workers to select a union based on a majority of the votes cast. Employees were able to gain union representation in the re-run election under standard NMB procedures in only one of these three cases.
- 450.** The NMB’s refusal to provide a “Laker” ballot or other sufficiently dissuasive remedial measures to protect employees from interference has contributed to the denial of union representation to thousands of railway and airline carrier employees since 2001. By far the most significant recent violation of workers’ freedom of association and rights to organize and bargain collectively under NMB rules has been the dismissal of applications for representation on behalf of flight attendants at Delta Air Lines, Inc.
- 451.** In 2001 and 2008, Delta waged an aggressive and sustained anti-union campaign to suppress voter turnout in the union election and interfere with their workers’ right to organize. As a result, even though AFA–CWA received virtually all of the votes cast in both elections, the NMB did not certify the union for failure to meet quorum requirements. Despite the evidence of Delta’s anti-union tactics presented to it, the Board refused to grant requests for a “Laker” ballot or to take any other measures to redress employer interference. The NMB’s actions facilitated and encouraged Delta’s violations of workers’ rights and denied Delta’s workers union representation.

452. Delta holds a unique position in the US airline industry as the largest single carrier with unrepresented flight attendants. Delta's non-union status is no accident according to the complainants. It is the result of Delta management's instillation of a pervasive anti-union culture at the airline and its fierce commitment to fighting all efforts by its employees to organize. Unfortunately, Delta has benefitted in its anti-union campaigns from the rules and decisions of the NMB.

The 2001 flight attendant election at Delta

453. A brief summary of the 2001 representation election provides important context for the 2008 election that is the chief subject of this complaint. On 29 August 2001, the AFA filed an application for investigation of a representation dispute with the NMB involving the unrepresented flight attendants at Delta.

454. Before the application was filed and during the election itself, Delta engaged in numerous tactics to coerce flight attendants into not participating in the election. These interference tactics included the following: (1) the establishment of an employer-dominated "Flight Attendant Advisory Forum" to discuss wages and working conditions directly with employees; (2) company sponsorship of, and coordination with, an anti-union employee group called the "Freedom Force" and company promotion of the group's anti-union message over that of pro-union workers; (3) management harassment, interrogation, and surveillance of AFA supporters, including through increased presence of supervisors in crew lounges where employee discussions regarding the representation election would otherwise occur; (4) a coordinated communications campaign that pervaded the workplace with anti-union messages; and (5) misinformation to employees regarding the election process and repeated entreaties from management to employees to "give a rip" and destroy their ballots.

455. The AFA twice sought the NMB's assistance to combat this employer interference, once before the election took place and again after the election was completed. In both instances, the NMB refused to take action to protect the flight attendants' right to organize.

456. On 6 September 2001, the AFA filed a motion with the NMB seeking a determination that Delta was interfering with its employees' right to organize and requesting that the election be conducted with a "Laker" ballot. On 26 October 2001, the NMB found that a prima facie case of interference had been established, but denied the request for a "Laker" ballot and committed to further investigate the interference allegations after the election took place. On 7 November 2001, the Board determined that the election would take place under standard balloting procedures.

457. Delta continued to wage its aggressive anti-union campaign, distributing and promoting anti-union messages, harassing union supporters, and urging flight attendants to destroy their ballots and not participate in the election. The NMB counted the ballots on 1 February 2002. The AFA received 5,520 votes, accounting for 98 per cent of the non-void ballots that were cast. However, since only 30 per cent of the 19,033 eligible employees participated in the election, the NMB dismissed the AFA's application.

458. After the election, the Board continued the interference investigation it had initiated in response to the AFA's pre-election motion. The NMB issued its findings on 12 December 2002. While the Board found an array of evidence supporting the AFA's interference claims, and announced that it was "troubled" and "disturbed" by Delta's anti-union conduct, the Board ultimately concluded in a split decision that these instances of employer interference did not merit ordering a repeat election with a "Laker" ballot: One member of the three-person Board issued a strongly-worded dissent, stating that he was "at a loss to understand [the majority's] tortured reasoning". The dissenting Board member

concluded that Delta's interference had tainted the laboratory conditions necessary to conduct a free and fair election.

459. Because the NMB refused to act on this "troubling" and "disturbing" evidence of employer interference, Delta's flight attendants were denied the opportunity to use a yes/no "Laker" ballot. Unable to overcome Delta's anti-union voter suppression campaign, and denied redress by the NMB, the flight attendants were deprived of bargaining representation.

The 2008 flight attendant election at Delta

460. In 2008, Delta's flight attendants once again sought union representation. On 14 February 2008, AFA-CWA filed an application for investigation of a representation dispute with the NMB. The NMB authorized an election on 18 March 2008. The election period was set to run from 23 April 2008 through 28 May 2008.
461. During the 2008 election, the NMB once again permitted Delta to wage a comprehensive interference campaign that successfully suppressed turnout in the representation election and effectively denied Delta's flight attendants freedom of association and the right to organize and bargain collectively. The NMB, both through its standard rules and procedures and its specific actions in this case, allowed Delta's campaign to proceed unchecked and even abetted that campaign.
462. On 1 April 2008, AFA-CWA filed a request with the Board that a "Laker" ballot be used in the Delta election, particularly in light of the employer's past practice of interfering with its employees' right to organize. On 15 April 2008, the Board rejected the request, concluding that "unusual and extraordinary" circumstances meriting the use of alternative election procedures did not exist. Thus, as in the 2001 election, the NMB provided no additional protection to flight attendants and allowed Delta to continue to deploy interference tactics aimed at suppressing turnout in the election.
463. On 5 May 2008, AFA-CWA filed another letter with the NMB regarding Delta's interference with flight attendants' right to select a representative of their own choosing, requesting that the NMB conduct an investigation. The submission described the company's recently-launched anti-union campaign, including Delta's repeated instructions to employees to destroy their NMB balloting information and misleading management communications regarding employees' eligibility to participate in the election. The same day it received the letter, the NMB determined that no action was required to address Delta's conduct during the election period.
464. Throughout the election period, Delta again waged a vigorous campaign to interfere with the flight attendants' right to organize. A detailed account of Delta's anti-union campaign, and documentation of the campaign, is attached to the complaint. Key elements of Delta's anti-union conduct are summarized below.
- *Anti-union communications campaign:* Delta instituted a pervasive communications campaign against the union that saturated the flight attendants' workplace with an overwhelming anti-union message. A key element of the campaign was consistent instructions from Delta management to destroy the government-issued voting instructions that flight attendants needed to participate in the election. The communications campaign also included false claims that the confidentiality of the instructions may have been compromised to commit voter fraud. The communications campaign was designed to inundate employees with anti-union messages and misleading information so they would not participate in the representation election.

- As part of this campaign, Delta erected information tables and displayed large posters and banners in every Delta crew lounge imploring flight attendants to destroy the voting instructions they received from the NMB. The materials all carried the same slogan: “Give a rip – Don’t click, don’t dial”. The company also distributed “shred-it” pins to those attendants who opposed unionization to wear during flights, in order to urge others to shred their instructions. The campaign was designed to suppress turnout by instructing flight attendants to permanently destroy their voting instructions before they had time to think about voting and discuss their options with their co-workers.
- The company further inundated flight attendants with anti-union messages through its “I believe in our Delta” newsletter. The newsletters instructed employees to destroy their voting instructions and made the baseless claim that destroying the voting instructions was necessary to prevent the union from committing voter fraud. In addition, the newsletter warned employees against engaging in union activity on aircraft and derided the benefits of unionization. Delta programmed an electronic version of the newsletter to appear on the company’s computer system every time flight attendants logged in to check their work schedules, and management also distributed copies in crew lounges and airport concourses.
- Delta also produced a DVD and sent it to each flight attendant’s home. The DVD included a personal message from Delta’s CEO stating that selecting union representation would harm the “great relationship” between Delta and its employees. The DVD contained a variety of misinformation regarding the benefits of a union-free workplace and the hardships that would result from selecting union representation. A copy of the DVD was enclosed with the complaint.
- *Harassment, intimidation, and surveillance of union supporters:* Delta management further interfered with the election process by harassing and intimidating flight attendants who supported the union. Management and sympathetic employees were deployed to create a constant anti-union presence in crew lounges and airport concourses, as well as a presence on aircraft at times. Management and their representatives told union activists to remove pro-union signs and materials, interrogated flight attendants about their union sympathies, watched over union supporters, and harassed those supporters. These activities interfered with the ability of flight attendants to communicate with their co-workers about unionization and to participate in the election without fear of recrimination.
- *Conferral of benefits to influence employees during the election period:* Delta further sought to influence the outcome of the election by announcing two new benefits for employees during the period. Conferral of such benefits tilts the playing field during the election period, as it reminds employees of the employer’s ability to give (and take away) benefits and uses the power of the employer’s purse to influence employees in a way that a union cannot. In the middle of the election period, Delta announced a raise for non-contract employees that would be effective after the last day of the union election period, successfully undermining support for union representation. In addition, after AFA–CWA filed its election application, Delta announced two new voluntary early retirement programmes for employees – the enrolment period for the programmes overlapped substantially with the election period, and the last day to designate an exit date coincided with the day of the ballot count. Employees participating in the retirement programmes had little incentive to participate in the election given their imminent departures, but they were all still on the Delta payroll during the election period (even if they notified the employer of their intent to sever employment before the end of the election period). The leave programmes thus enabled Delta to maintain an artificially high number of votes

required to meet the NMB's quorum while simultaneously eliminating the incentive for many employees to participate in the election at all.

- 465.** Delta's interference campaign successfully suppressed employee turnout in the representation election. The NMB counted the ballots on 28 May 2008. In the final vote tally, 5,253, or 99 per cent, selected AFA-CWA as a bargaining representative. However, because only 5,322 of the 13,380 eligible employees cast non-void ballots, the NMB again refused to certify AFA-CWA as the flight attendants' bargaining representative.
- 466.** After the Board tallied the votes and dismissed the application, the AFA-CWA filed another complaint with the NMB detailing the employer's interference campaign and seeking a new election. After nearly four months, the Board issued a decision declining to initiate an investigation into the interference complaint. The Board found that the tactics documented by the union were isolated incidents that failed to establish a prima facie case of employer interference. Moreover, the NMB concluded that urging employees to destroy their balloting information did not constitute employer interference, because Delta's instructions accurately informed employees how they could vote against the union. In a vigorous dissent, a member of the Board stated that the majority had abrogated its duty by refusing to initiate an investigation. As a result of the Board's decision, there can be no re-run of the election with a "Laker" ballot and Delta's flight attendants will remain without union representation.
- 467.** In addition, the NMB unilaterally curtailed the election period. On 24 March 2008, the NMB issued a notice establishing the election period from 23 April 2008 through 3 June 2008. After receiving the AFA's concerns regarding employer interference on 1 April 2008, the Board decided unilaterally and without consultations to curtail the election period. On 3 April 2008, the NMB changed the ballot count date from 3 June 2008 to 28 May 2008. AFA-CWA protested the decision, noting that a smaller unit of flight attendants in another election had been granted a six-week election period while the Delta flight attendants were being granted only five weeks. The Board rejected the AFA-CWA's concerns, reiterating without explanation that the election period would be shortened by one week. By cutting the election period short, the Board denied AFA-CWA sufficient opportunity to reach out to flight attendants and counteract Delta's anti-union campaign.
- 468.** An adequate election period was particularly important in the case of Delta, where thousands of flight attendants are spread out all over the United States and indeed the world at any one time. The employer is in a unique position as the only entity in regular contact with each of these employees. This gives the employer a profound advantage in communicating its anti-union message to workers. The union and its supporters, on the other hand, face an uphill battle in their efforts to reach out to as many of their broadly dispersed and constantly travelling colleagues as possible in a short period of time.
- 469.** Furthermore, the NMB permitted employer manipulation of the eligible employee list on 29 February 2008, Delta submitted to the NMB a list of the names it wished to include among the group of employees eligible to participate in the election. As noted above, the employer has an incentive to pad the eligibility list with as many names as possible in order to drive up the number of participating voters required to certify a union. On 9 May and 15 May 2008, after reviewing Delta's list and challenges submitted by AFA-CWA, the NMB's investigators ruled on the eligibility of employees to participate in the election. AFA-CWA appealed the investigators' eligibility rulings, and their appeal was dismissed by the NMB in a determination issued on 28 May 2008. In its dismissal, the NMB ruled that 82 trainees who had completed training, but had not yet been assigned to work as required crewmembers, could nonetheless be included on the eligibility list that is supposed to be limited to employees "working regularly" in the bargaining unit. In addition, the NMB ruled that 901 flight attendants on voluntary furlough could also be

included on the list of eligible employees, even though the furlough could last as long as five years and Delta had chosen to hire new flight attendants rather than recall furloughed attendants into service.

- 470.** The NMB thus permitted flight attendants with only minimal connections to the workplace – trainees not yet assigned to regular work and furloughed attendants whom the airline did not bother to recall when it had unmet staffing needs – to remain on the eligibility list. The NMB’s ruling allowed Delta to inflate the universe of eligible employees by 983 workers, and thus increase the number of votes required to reach a quorum by 492 votes. At the same time, by permitting those employees with the least incentive to participate in an election to remain on the list, the NMB increased the likely incidence of non-votes that would later count as votes against representation.
- 471.** The NMB’s lack of concern for the integrity of the employee eligibility list is also apparent in the manner in which the Board addressed the inclusion of a deceased flight attendant on the list. When the Board was notified that one of the flight attendants on the eligibility list was deceased, the Board refused to remove her from the list because the notice was received less than seven days before the ballot count. The Board stuck to its standard rules regarding the cut-off date for notification of status changes, finding that death was not an “extraordinary circumstance” that would warrant waiving the deadline. As a result, the deceased flight attendant stayed on the eligibility list, and the Board counted her non-vote as one more vote in opposition to union representation. The Board later reversed this decision in its review of the union’s post-election interference charges, noting that it made no difference to the election outcome. However, the decision highlights the Board’s practice of refusing to protect workers’ right to freely select union representation when that protection is most needed – that is, before and during the election period itself.
- 472.** Moreover, the NMB failed to ensure that all employees received proper voting instructions. Under the NMB’s election procedures, flight attendants were able to cast their vote over the telephone or the Internet. To ensure the integrity and secrecy of the balloting process, the NMB’s practice is to mail each flight attendant an individual, confidential identification number to enter over the telephone or the Internet. However, numerous Delta flight attendants reported receiving their balloting information in envelopes that were damaged, unsealed, or stuck to other attendants’ envelopes. These mailing errors occurred against the backdrop of Delta’s campaign (described in more detail below) to dissuade employees from voting by, among other things, suggesting that the confidentiality of personal identification numbers may have been violated in order to commit voter fraud. As a result, a number of flight attendants who received balloting information that appeared to have been tampered with or otherwise mishandled refused to vote. Under NMB rules, each of these non-votes was counted as a vote against representation.
- 473.** Finally, the NMB further thwarted Delta flight attendants’ ability to gain bargaining representation by failing to promptly provide replacement voting information when requested. As discussed below, Delta repeatedly urged its employees to destroy the voting information mailed to them by the NMB. In addition, several flight attendants received voting instructions that appeared to have been tampered with or mishandled. The NMB received numerous requests for duplicate voting information from flight attendants, but failed to act promptly on those requests. As of the day before the final ballot count, at least 58 flight attendants had still not received the duplicate voting information they had requested from the Board. Every flight attendant who lacked balloting instructions was not only denied the opportunity to vote, but was also counted by the NMB as an opponent of union representation in the final tally.
- 474.** As an ILO Member, the United States is responsible for ensuring that all workers in the country can exercise freedom of association and their rights to organize and bargain

collectively. The NMB, an independent US government agency, has failed to live up to that responsibility in several respects.

- 475.** The NMB's rules and conduct are not only inadequate to protect workers from employer interference as required by the Conventions – they actually encourage and reward such interference. The NMB facilitates employer interference in a variety of ways.
- 476.** First, the NMB's rules and procedures permit employers to avoid unionization by suppressing employee turnout in representation elections. Employers depress turnout by capitalizing on employee ambivalence and inertia, fomenting unfounded fears and misunderstandings about the balloting process, and deriding the election itself. Such employer communications campaigns, including those urging workers to destroy their voting materials, are protected as free speech by the NMB. Employers can also lower turnout by offering benefits and other inducements during the election period to reduce beneficiary employees' interest in the election. All of these tactics were evident in the Delta campaign. Anti-union employers do not have to convince employees on the merits that union representation is not in their interests, nor do employers need to persuade workers to actively participate in an election and cast their vote against representation. All the employer needs to do is sow enough doubts and confusion to keep employees from voting. The NMB counts every employee who fails to vote as a result of these tactics as a vote against representation.
- 477.** Second, NMB rules and practice encourage employers to manipulate the lists of eligible employees they provide to the Board in order to artificially inflate the number of votes required to meet the NMB's majority requirement. By maximizing the number of votes required while simultaneously minimizing the number of employees who actually participate in the election, employers can avoid unionization. Delta employed this strategy in the most recent campaign. The cost of failing to guarantee the accuracy of the list is high. Each inaccurate name remaining on the list represents one more non-vote, and, under the NMB's rules, one more vote against union representation.
- 478.** Finally, the NMB continues to conduct elections under these rules even though the Board recognizes that the rules provide employees with inferior protection from employer interference. The Board has found that employees receive greater protection from interference when elections are conducted with a yes/no ballot and a representative is selected by a majority of votes actually cast. This "Laker" ballot method eliminates some of the incentives for employer interference outlined above. But the Board will only provide a "Laker" ballot in "unusual and extraordinary circumstances," ordinarily only after employees have already endured "egregious" employer interference during an election conducted under the Board's standard procedures. When such ballots are requested at the outset of a campaign, as they were in the Delta case, the NMB generally denies the request. Even after an election is concluded and interference is found to have tainted the election period, the Board will still deny workers access to a "Laker" ballot – in 13 published interference decisions since 2001, the Board has granted a re-election using a "Laker" ballot in only one instance.
- 479.** The Board's standard election rules deny employees the ability to select their bargaining representative by a majority of votes actually cast, and the Board maintains these rules with the knowledge that its decision subjects workers to greater interference from their employers. Even when confronted with evidence of interference, the Board fails to act to prevent and remedy such actions in order to protect workers' rights. The NMB's rules and conduct thus fail to ensure that workers may freely exercise the right to organize, provide inadequate protection against acts of employer interference, fall short of the government machinery required to ensure respect for the right to organize, and neither encourage nor promote collective bargaining.

- 480.** The action and inaction by the NMB in the Delta elections clearly demonstrated the inadequate protection provided by the Board for the exercise of workers' freedom of association and collective bargaining rights. First, the NMB refused to address concerns about Delta's history of anti-union behaviour and failed to act even when it was notified of a renewed interference campaign by the company. The NMB legitimized employer instructions to destroy balloting information as a permissible exercise of free speech. The Board denied requests to provide a "Laker" ballot despite the evidence of interference it was presented with.
- 481.** Second, the NMB further tilted the playing field towards Delta and away from the flight attendants when it unilaterally curtailed the election period and thus cut short the time in which the union and its supporters could reach out to their co-workers. This action was taken without prior notice to, or consultation with, the parties involved.
- 482.** Third, the Board permitted Delta to manipulate the roster of eligible employees by allowing trainees, inactive furloughed employees, and even a deceased flight attendant to remain on the employee list.
- 483.** Fourth, the NMB contributed to employee scepticism about the integrity of the election process and further lowered turnout by failing to ensure that all balloting instructions were properly mailed and by not promptly fulfilling requests for replacement instructions.
- 484.** In conclusion, the AFA-CWA and the AFL-CIO respectfully request the Committee to urge the following steps in order to ensure respect for workers' rights and bring the United States into compliance with its responsibilities as an ILO Member:
- First, the NMB should amend its election rules to provide employees with the option of a yes/no ballot to select an exclusive bargaining representative in all cases – workers should not have to demonstrate that interference has already occurred before having access to such balloting procedures. At a minimum, access to such balloting procedures should not be restricted to "extraordinary and unusual" circumstances where "egregious" interference has already occurred.
 - Second, the NMB should ensure that it provides workers with adequate protection against employer interference in practice, through the availability of swift and efficient procedures and sufficiently dissuasive sanctions.
 - Finally, the NMB should take prompt action to remedy the employer interference perpetrated by Delta and to ensure that Delta's flight attendants can freely elect a bargaining representative of their own choosing.

B. The Government's reply

- 485.** In a communication dated 8 October 2009 the Government recalled that the United States has not ratified ILO Conventions Nos 87 and 98, and therefore has no international law obligations pursuant to these instruments and thus no obligation to accord their provisions domestic effect in US law. Nonetheless, the US Government has on numerous occasions demonstrated that its labour law and practice are in general conformity with Conventions Nos 87 and 98, and the ILO supervisory bodies have generally upheld this view.
- 486.** The Government states that the complaint does not assert any concern with relevant US law. Rather, it focuses on the 2008 Delta representation election to assert general defects in the NMB election process along with specific errors in election administration. Therefore, the observations below will address the NMB process and then focus on the 2008 Delta election case to demonstrate that the NMB's actions in determining whether to certify a

collective bargaining representative were consistent with US law and did not conflict with ILO principles of freedom of association, the right to organize, or collective bargaining.

- 487.** The Government adds that on 29 October 2008, Delta purchased Northwest Airlines. Subsequent to this merger, the AFA filed an application with the NMB seeking a determination that Delta and Northwest Airlines are a single transportation system for purposes of representation. If the NMB rules, as it has in the recent case involving the carriers, that there is a single transportation system at Delta/Northwest, the AFA would have 14 calendar days from the decision date to submit evidence of representation from at least 35 per cent of the employees in the craft or class. This submission would be facilitated by the fact that the AFA would get credit for all of the Northwest flight attendants that they presently represent. If the AFA is successful, an NMB-administered representation election will be initiated. Additional information on this situation will be provided as it becomes available.
- 488.** The Government asserts nonetheless that, despite the complainants' allegations, the NMB process used in the 2008 Delta election is consistent with freedom of association principles. The Railway Labor Act (RLA) is the principal statute for the extension of rights to private sector employees who wish to form, join or support unions in the railroad or airline industries, (45 USC 151-188). In authorizing the NMB to conduct representation elections, the RLA provides:
- If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter ...
- 489.** As stated above, the NMB is charged with the duty of investigating disputes among a carrier's employees to determine their representative and to certify to the parties the name of the representative. The NMB initiates an investigation when a union files an application alleging a representation dispute, within a craft or class of employees on a particular carrier, and seeking an election to determine worker choice of representative for collective bargaining purposes. Where the workers are unrepresented, the application must include authorization cards from 35 per cent of the workers. The Board's "investigation" encompasses oversight of the entire representation election process.
- 490.** The RLA grants broad discretion to the NMB in running the election and the Supreme Court has recognized the Board's authority in making final determinations as to the details in representation elections.
- 491.** The RLA requires that "[t]he majority of any craft or class of employees shall have the right to determine who will be the representative of the craft or class ..." (45 USC 152, fourth). The NMB is granted discretion to determine by any appropriate method who will be the employees' representative, and this discretion includes the authority to reasonably construe this statutory requirement. For 70 years the Board has required, when there is no representative and just one organization is seeking to be the representative, a majority of the workers in the craft or class to vote for that organization.
- 492.** The Board's long-standing practice of requiring a majority of eligible voters to cast valid ballots is true to the RLA's first general purpose, which is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 USC 151a), and provides

an effective safeguard to maintain stable labour relations. As a strike at an RLA-covered carrier could effectively shut down interstate commerce, it is critical to maintain harmonious labour relations, which is more effectively accomplished if the union involved represents a majority of the workers on whose behalf it is negotiating.

493. The Supreme Court has affirmed the NMB's balloting standard, stating "[t]he selection of a ballot is a necessary incident of the Board's duty to resolve disputes. The [Railway Labor] Act expressly says as much, instructing the Board alone to establish the rules governing elections."

494. The Committee has consistently recognized the significance of a union representing a majority of workers:

The competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers in an undertaking, provided that such a claim appears to be plausible. If the union concerned is found to be the majority union, the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes [see *Digest of decisions and principles of the Freedom of Association Committee*, 2006, para. 959].

495. Unlike the National Labor Relations Act (NLRA), the RLA does not provide for a decertification process. Therefore, the union's certification continues until another union makes a showing of interest to represent the respective class or craft. In this circumstance, as this showing requires authorizations from at least a majority of the class or craft, the alleged disadvantage of the NMB certifying method works to the advantage of the incumbent union. Consequently, it is of utmost importance that a certified union has the support of the workers it is certified to represent.

496. The NMB election standard has not resulted in a suppression of unions. In fact, 84 per cent of rail employees and 60 per cent of airline employees are unionized, whereas less than 10 per cent of private sector employees under the jurisdiction of the NLRA are unionized. Further, a review of NMB elections held since 1990 shows that union certifications were achieved in over 60 per cent of elections. Significantly, the NMB recently certified the Air Line Pilots Association as the representative of Delta's flight deck crewmembers and the Professional Airline Flight Control Association as the representative of Delta's flight dispatchers.

497. If the complainants believe that the Board exceeded its statutory authority in selecting the proposed ballot, they could have appealed any of the 2008 decisions in *Delta*. There is no indication that this occurred.

498. Reading the complaint broadly, it appears that a question is raised as to the NMB's ability "to offer adequate safeguards against employer interference" during a representation election. However, an examination of the law and NMB practice indicates that the Board is intimately involved in the administration of representation elections and empowered to employ a variety of remedies where improper conduct is established.

499. The Committee has consistently stated that pre-established, precise and objective criteria for the determination as to representativity of workers' organizations should exist in the legislation and such a determination should not be left to the discretion of government [see *Digest*, op. cit., para. 348]. Beyond this general principle and the directive to follow established procedures in determining the most representative organization for collective bargaining purposes, the Committee has allowed member nations to define in law and practice the specific methods and procedures for certifying a representative union for collective bargaining purposes [see *Digest*, op. cit., para. 971].

- 500.** The Board's process in administering a representation election is described in part above. The RLA imposes upon the Board the duty to conduct the election so as to ensure that the employees have an opportunity to make a choice free of interference, influence or coercion by the carrier. Therefore, if the Board determines that due to employer conduct such conditions have not been achieved, a rerun election is the appropriate remedy.
- 501.** Although the issue of "interference" is discussed at length below, it is critical to note that the Board's investigation of a representation dispute includes adjudging union objections asserting that a carrier has exercised unlawful influence or coercion, or has otherwise unlawfully interfered with the free choice of a representative. In making these determinations, the Board examines the totality of the circumstances as established through its investigation.
- 502.** Where the Board determines that the employer interfered with the employees' free choice, the Board remedies the violations based on the severity of employer conduct and the extent to which a future representation election may be rerun in laboratory conditions.
- 503.** If the NMB determines that the carrier's unlawful conduct has interfered with the employees' choice of a representative, it may employ any of a variety of remedies in order to "eliminate the taint of interference on the employees' freedom of choice of representative". The remedy designated by the Board to provide employees a choice of representative varies on a continuum determined by the extent of the carrier interference found. "The continuum begins with a finding that the carrier ha[s] not interfered with the employees' choice of representative. The continuum ends with interference so outrageous that, in the Board's judgment, alternate means of gauging employee sentiment other than a secret ballot election are appropriate."
- 504.** The NMB typically calls for a rerun election where interference is found, but it has an array of remedies as to how the rerun election is administered. These remedies include changing the form of the ballot, e.g., using a yes/no ballot with no write-in space provided (known as a "Laker" ballot, discussed below); sending copies of findings upon investigation citing the carrier with violations of the RLA to employees eligible to vote; posting a notice stating that the employer will not influence, interfere or coerce employees; ordering a rerun election using the Board's standard ballot procedures and a special notice; and devising a ballot procedure in which the union would be certified unless a majority of eligible voters returned votes opposing union representation. In the most extreme cases, the Board can certify the applicant union based on submission of authorization cards from a majority of the class or craft. For example, in *Sky Valet*, the Board, without holding an election, certified the union based on a mere check of authorization cards as a remedy for what it found to be "egregious" interference (including terminating union supporters and giving the impression of surveillance of those signing authorization cards).
- 505.** The complaint makes a specific assertion that goes to the NMB's use of a "Laker" ballot. This remedy is only available where the Board has found carrier interference and ordered a rerun election. The reference is to *Laker Airways Ltd*, 8 NMB 236 (1981), where Laker's conduct was among "the most egregious violations of employee rights in memory" and required an "extraordinary" remedy.
- 506.** In *Laker*, the Board found that the carrier had violated the RLA by actions such as: soliciting employees to turn their ballots to carrier officials; increasing pay immediately prior to the election period; and polling employees as to their representation choice. Based on this egregious conduct, the NMB ordered a rerun election with a ballot that contained a "yes" or "no" vote as to the applicant organization with no space for write-ins, and with the majority of the ballots cast determining the outcome of the election.

- 507.** The “Laker” ballot remedy is imposed only in truly exceptional cases. In fact, of the 172 representation elections handled by the NMB since 2003, only 11 (6 per cent) involved allegations of employer interference and none rose to the level of behaviour necessary to employ “Laker” ballot procedures.
- 508.** Before ballots were sent for the 2008 Delta election, the AFA requested the use of a “Laker” ballot based on previous representation efforts in 2000 and 2002. The AFA asserted that the NMB procedures should be changed as a prophylactic measure to prevent interference in the election. The NMB rejected the request on two grounds. First, the Board was unwilling to assume employer interference in advance of the election period. Second, the appropriate response to allegations and findings of employer interference is to set aside an initial election and to rerun the election. Moreover, it is only in cases of egregious employer interference that the Board orders the second election be conducted under the “Laker” ballot procedures requested by the AFA.
- 509.** The NMB acted consistent with the RLA and Board practice in using a certification standard that requires a majority of workers to evince their desire that a union have exclusive bargaining status. The Board also acted consistent with the RLA and Board precedent in denying the AFA’s April request for the use of a “Laker” ballot, which was not supported by sufficient evidence to require a rerun election under such circumstances. This decision was appropriate and does not demonstrate inadequate safeguards in the administration of representation elections. In both instances, the Board’s decisions were not inconsistent with ILO principles.
- 510.** The complaint disputes several decisions of a factual nature made by the NMB. Did the NMB improperly change the election date? Did the NMB err in not finding “interference” by the employer? Did the NMB properly define those eligible to vote and were they provided voting instructions? In its 2008 decisions, the Board appears to have considered the entire set of issues raised here and in each instance, discussed and reasonably resolved these matters consistent with US law and practice and ILO principles.
- 511.** As established above, the NMB is uniquely qualified to administer a representation election and to adjudge whether events occurring in the course of the election constitute illegal interference under the RLA. In *Delta*, the NMB considered the facts in a thoroughly litigated case and produced extensive decisions on 28 May 2008 (addressing voter eligibility issues) and 30 September 2008 (addressing election interference issues). Significantly, these decisions were not appealed.
- 512.** The observations below specifically address the complainants’ concerns as to the decisions of the NMB. These matters are discussed in chronological order to illustrate the NMB’s involvement in the election process and the soundness of the Board’s decisions.

Election period

- 513.** The NMB’s standard practice is to provide three weeks from distribution of ballots to election tally in a representation election. For larger groups, longer periods of time may be allotted to allow the Board investigator sufficient time to process challenges and objections.
- 514.** In the 2008 Delta election, the investigator initially suggested a period of six weeks to allow for resolution of such issues as election eligibility challenges and objections. As most elections, even involving large groups, are completed within five weeks, the Board decided to shorten the election period by six days. This administrative decision was within the Board’s broad discretion, based on the typical time frames of NMB elections. The change was made prior to the start of the election period, and there is no evidence that the

decision either caused voter confusion or affected the election results. This decision was not inconsistent with ILO principles of freedom of association.

515. The RLA provides that:

No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it *shall be unlawful for any carrier to interfere in any way with the organization of its employees ...* or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization ...

(45 USC 152, fourth (emphasis added)).

516. Section 17.0 of the NMB's Representation manual discusses "Allegations of election interference" and provides, in relevant part, that:

Allegations of election interference must state a prima facie case that the laboratory conditions were tainted and must be supported by substantive evidence. Allegations of election interference not sufficiently supported by substantive evidence will be dismissed.

517. The Board has stressed that the "laboratory conditions" test in representation election cases focuses on whether employees' rights to choose representation free of coercion or influence was protected, rather than upon whether the carrier violated the law. The "laboratory conditions" standard requires that, under the "totality of the circumstances", sterile conditions, without contamination by carrier interference, be maintained. The Board will generally consider, except in extraordinary circumstances, evidence of occurrences from up to one year before the representation application was filed, through the election and any subsequent investigation.

518. In *Delta*, the NMB found that the AFA failed to establish a prima facie case of interference. Specifically, the Board concluded that the AFA's assertions regarding interference were not supported by substantive evidence, did not establish interference under long-standing NMB precedent, and, in several cases, constituted "isolated incidents out of a workforce of 13,000 that do not amount to the kind of systematic, pervasive conduct that would have tainted laboratory conditions".

519. Consistent with law, the Board determined that the employer was within its rights in communicating with workers and expressing its views on the election (citing the Supreme Court position that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit'". *NLRB v. Gissel Packing Co.*, 395 US 575, 618 (1969)). The Board thoroughly analysed the Delta DVD and newsletters and reasonably found that they did not establish employer interference.

520. The complaint repeatedly asserts that Delta's anti-union campaign, which encouraged workers to destroy their ballots, was improper. However, the NMB has consistently held that informing workers that they can express their desire to remain unrepresented by ripping up their ballots is not "interference" and does not taint laboratory conditions.

521. In *Delta*, the NMB noted that a finding of interference is justified where employer surveillance is established. Similarly, it stated that interrogation of workers regarding their election preference is evidence of interference. Although there were assertions of surveillance and harassment, there was insufficient evidence proffered to support these claims. The Board performed a thorough analysis of the 23 alleged instances of harassment and found that they did not constitute interference with a worker's free choice or tainted laboratory conditions.

- 522.** The complaint also asserts that Delta improperly offered employees benefits during the election period. The RLA prohibits the offer of benefits during an organizational campaign to influence the outcome of an organizing campaign. Board precedent is clear that “either the promise or actual conferral of benefits during the laboratory period has the effect of coercing and influencing employees in their choice of representation”. The Board has generally held that laboratory conditions are not tainted where changes in benefits were planned before the election period or where there is “clear and convincing evidence of a compelling business justification ...”.
- 523.** The Board’s conclusion that Delta’s 1 July 2008, 3 per cent pay increase to all non-contract employees was awarded for legitimate business reasons is supported by the record evidence and consistent with NMB precedent. Similarly, the Board found the voluntary retirement programme to be business based and not merely directed to Delta flight attendants. Moreover, the Board noted that the number of flight attendants participating in the voluntary programmes, even if dissuaded from voting, would not have affected the election outcome.
- 524.** The Board’s findings as to interference were reasonable, consistent with the law and past practice, and supported by the evidence. These decisions were not inconsistent with ILO principles of freedom of association.

Voting

- 525.** The RLA bestows broad discretion to the NMB to “designate who may participate in the election and establish the rules to govern the election ...”. In *Delta*, the NMB’s handling of the eligibility and voting processes were within this broad discretion in running representation elections, consistent with NMB procedure and practice, and reasonable in light of the case facts.
- 526.** The NMB investigator for the Delta election agreed with the AFA’s challenge to the election eligibility list with regard to 245 trainees, who were then deemed ineligible to vote in the election. However, the investigator ruled that 82 other trainees challenged by the AFA were to remain on the election eligibility list; a ruling that was upheld on appeal by the NMB. The Board found, consistent with the NMB Manual’s eligibility standard and with precedent, that since these trainees had completed their initial operating experience prior to the eligibility cut-off date, which included services under the employer’s supervision, they were eligible to vote.
- 527.** The NMB investigator also agreed with the AFA that 31 flight attendants on voluntary furlough should be removed from the eligibility list, based on their change of status. However, the investigator ruled that 901 other flight attendants on furlough were eligible to vote, as they were entitled to five-year recall rights, had not refused recall, and their positions had not been eliminated. This ruling was upheld by the Board on appeal. There has not been any evidence proffered to put the accuracy of these decisions into question.
- 528.** The NMB concluded that there was not widespread voter confusion due to four ballots, which were alleged to have been either received open or misdirected, among the more than 13,000 election ballots sent to eligible voters. The Board found “no evidence that the unsealed and misdirected voting instructions were the result of anything other than the normal wear and tear that results from a mass mailing”.
- 529.** Similarly, the Board addressed the AFA’s concerns regarding duplicate ballots. The entire universe of such ballots was only 64, far fewer than would have affected the outcome of the election. Nonetheless, it appears that the Board provided duplicate ballots to

15 requesting voters and that 40 of the workers named by the AFA had not requested a duplicate ballot. Three others were apparently not on the eligibility list.

- 530.** The Board's findings were reasonable, consistent with the law and past practice, and supported by the evidence. These decisions were not inconsistent with ILO principles of freedom of association.

Recent NMB developments

- 531.** On 11 September 2009, the Board announced the formation of a new joint labour–management committee to examine recommendations made in the 1990s by the Commission on the Future of Worker–Management Relations (commonly known as the “Dunlop Commission”), as well as the NMB’s internal functions, policies, and procedures. The Dunlop Commission, in part, focused on methods to resolve disputes that arise during collective bargaining. The new committee has been asked to issue recommendations for agency improvement by 1 November 2009.
- 532.** On 22 September 2009, in response to an AFA request, the Board announced that it will consider allowing participants in a representation election to post hyperlinks to the voting web site. This practice has been restricted in the past because of NMB concerns that the identities of those visiting the voter web site could be tracked. Comments are being accepted until 22 October 2009.
- 533.** In a September 2009 letter to the NMB, the AFL–CIO proposed changing the board policy that requires a majority of employees in a class or craft to vote in favour of union representation for the Board to certify a union as the exclusive bargaining agent. The proposal suggests that the outcome in a representation election should be determined by a majority of those who cast ballots, even if fewer than half of eligible workers participate in the election. The NMB has not yet commented on the proposal.
- 534.** Additional information on these board-related developments will be provided as it becomes available.

Conclusion

- 535.** The foregoing observations demonstrate that neither NMB procedures nor the Board’s handling of the 2008 representation election involving the AFA and Delta resulted in denials of freedom of association, the right to organize or to bargain collectively. Accordingly, the remedies requested by the complainants are neither necessary nor appropriate.
- 536.** The Government also transmitted the comments made by the United States Council for International Business (USCIB) and Delta Air Lines, Inc. in their communication of 25 January 2010. The USCIB maintains that, contrary to the complainants’ claims, the long-established procedure for designating a collective bargaining representative under the Railway Labor Act (RLA) fully embraces the principles of freedom of association, as those principles have been defined by the Committee. Indeed, it is through this well-tested, seventy year old system that a majority of all US airline industry employees have come to be represented by a union. It is inappropriate for the AFA to blame the RLA, the NMB or Delta for its failure to convince Delta flight attendants to designate it as their collective bargaining representative. Simply put, the AFA lost the 2002 and 2008 representation elections because a majority of Delta’s flight attendants did not wish to have it represent them. The flight attendants’ decision to reject representation was based in no small part on

Delta's corporate culture of mutual respect among employees and the corporation, and has nothing to do with the RLA's election procedure or the policies of the NMB.

537. The USCIB asserts that the complaint is unfounded for the following reasons: (1) the Committee may not apply specific elements of Conventions Nos 87 and 98 to the United States because the United States has not ratified either Convention. Instead, the Committee must limit its examination of this case to application of principles of freedom of association as the Committee has defined them; (2) the naming of Delta in the complaint is inappropriate because the arguments advanced therein are ostensibly directed toward the laws of the United States, and not a specific enterprise or group of enterprises; (3) the complaint is procedurally defective because it has initiated a proceeding before the Committee without first exhausting available remedies before effective judicial authorities at the national level; (4) it is inappropriate for the complainants to seek to have the Committee act as a "super-appellate body" to review or otherwise substitute its own conclusions for those of a well-established, independent government agency (in this case the NMB) that reached its decisions with the benefit of a full evidentiary record created by the AFA and Delta; and (5) the RLA procedures provide employees an effective, pre-established means to select a representative of their own choosing without prior authorization or risks of reprisal. Those procedures are wholly consistent with the principles of freedom of association at the international level.

538. The USCIB states that events involving Delta have made the complaint, which was premised upon allegations involving an election that occurred in 2008, moot. On 27 July 2009, the AFA filed its third application with the NMB for investigation of a representation dispute involving the flight attendants. In the application, the AFA sought to represent the 20,640 flight attendants who work for the now-combined Delta (which merged in 2008 with Northwest Airlines). This application renders further consideration of the allegations of the complaint by the Committee unnecessary.

539. Under normal circumstances, the NMB would have promptly conducted an investigation and scheduled a secret ballot election. Without explanation, it did not do so. Instead, it placed the July representation application involving Delta on "hold". At the same time, it processed representation applications involving other carriers within the normal time frame of approximately two months. Delta believes the reason for such disparate treatment was the result of an ex parte request by the AFL-CIO to have the NMB change its election rules in the middle of Delta's merger with Northwest and after the AFA submitted its election application. Following an unprecedented period of delay in the processing of the AFA application by the NMB, the AFA withdrew its application for representation of the Delta flight attendants on 3 November 2009. On the very same day, the NMB published a notice of proposed rule making and request for comments, pursuant to which it has proposed to change the balloting procedure in the representation election. Whether the AFA even seeks to have the NMB conduct another election has yet to be determined. Even so, the events that have transpired since the 2008 election have rendered the current complaint moot, for the following three reasons.

540. Firstly, the current complement of flight attendants employed by Delta is far different from the group the AFA sought to represent in 2008. The number of flight attendants in the craft or class is 35 per cent larger now than it was in 2008, and consists of a substantial complement of former Northwest Airlines flight attendants who had already worked under a collective bargaining agreement negotiated by the AFA. Secondly, the makeup of the NMB today is substantially different from what it was when it resolved issues related to the 2008 election. Linda Puchala, a former International President of the AFA, was appointed by President Obama to serve as a Member of the NMB and was confirmed by the United States Senate on 21 May 2009. She joined NMB Chairperson Elizabeth Dougherty and Member Harry Hoglander, a former Executive Vice-President of the

Airline Pilots Association, on the three member Board. Finally, the fact that the AFA again resorted to the NMB process to establish representation rights for the flight attendants in the newly combined Delta, shows that the issues raised in the complaint have more to do with how the NMB ruled on facts related to the 2008 election than with problems concerning the RLA or the NMB as an institution. The allegations that gave rise to the complaint have been superseded and no longer have a bearing on the outcome of the case. Were the Committee to examine the complaint now, it would reach conclusions and recommendations that will have been effectively superseded by the time they are written. Accordingly, the Committee should dismiss the complaint.

- 541.** The USCIB explains that Delta employs nearly 80,000 people throughout the world. It offers excellent wages and benefits to its employees that are well within industry standards, and has a top-tier profit sharing and operational rewards program, which enable employees at all levels to receive compensation that frequently exceeds industry standards. Delta has demonstrated a strong commitment to business ethics and doing what is right when it comes to its employees; it embraces diversity, fosters a workplace that is safe, professional, and values teamwork and trust. Delta has historically enjoyed excellent employee relations and has received numerous industry awards for its outstanding customer service. Such repeated success in these areas can only be achieved in a work environment that consists of mutual commitment and respect between an employer and its employees.
- 542.** An example of Delta's culture of mutual commitment occurred in the late 1980s when Delta's financial health was in question. Three Delta flight attendants started a campaign to collect donations from the company's employees worldwide and donated them to Delta for the purchase of a new Boeing 767 aircraft. The aircraft is now on display in the Delta employee museum at the company's headquarters, in Atlanta, Georgia. It serves as a symbol of the special relationship between Delta and its employees, and is a tangible and lasting example of the strong bond between them. Consistent with its commitment to preserving a culture of positive labour relations after the merger with Northwest, Delta has taken measures that benefit all employees, including the new arrivals from Northwest. First, it has committed not to involuntary furlough flight attendants, ground crew, pilots and other operations personnel as a result of the merger. Second, as part of the merger, 15 per cent of the stock in the combined company is set aside for distribution to employees. These acts demonstrate Delta's continued commitment to fostering positive employee relations.
- 543.** Historically, only a small portion of Delta's workforce has been represented by a labour organization because most Delta employees do not believe they need representation in their dealings with the company. Delta's pilots and flight dispatchers are the only post-merger crafts or classes of workers currently represented by a union. The pilots have been represented by the Air Line Pilots Association (ALPA) for many years, and the flight dispatchers have been represented by the Professional Airline Flight Control Association. There has never been a strike or other work stoppage at Delta. Shortly after the announcement of the merger, Delta finalized a collective bargaining agreement with ALPA covering all pilots of the combined company. As a result, Delta pilots are now the single largest group of pilots in the world represented by the ALPA.
- 544.** Delta's flight attendants have never chosen to be represented by a labour organization. On two occasions, first in 2002 and later in 2008, the AFA sought to represent Delta's flight attendants. On both occasions, the AFA lost the representation election by a significant margin. Pre-merger Northwest flight attendants were represented by the AFA, but pursuant to the NMB rules, the newly merged company cannot consolidate the craft or class of flight attendants until representation in the combined group has been resolved. On 27 July

2009, the AFA filed an application to consolidate the craft or class of 20,640 flight attendants. As described above, the AFA has since withdrawn that application.

- 545.** Recently, Delta participated in two NMB elections following the merger. The first election involved individuals employed by the two airlines as meteorologists. In that election, only six of the thirty-two eligible employees cast votes for the named union, and the petition was dismissed. The second election involved individuals employed in the craft or class of flight dispatchers. In that election, 306 of the 335 eligible voters cast votes in favour of representation, and the Professional Airline Flight Control Association was certified as the employees' representative. In both elections, there were neither allegations nor findings of interference by Delta.
- 546.** The USCIB contends that the RLA representation procedure is a highly effective method for employees to secure representation by a labour union. In the US, approximately 84 per cent of employees in the railroad industry and 60 per cent of employees in the airline industry are represented by labour unions. The AFA has also benefitted from the existing election procedure: excluding the Delta elections at issue here, the AFA has prevailed in a majority (13 of 20) of representation elections in which it has participated over the past ten years. Furthermore, an assessment of NMB representation elections involving other labour unions reflects a similar success rate. In light of their recent successes under the RLA, it is difficult to believe the AFA is in fact even making the allegations they have made in the complaint.
- 547.** As regards the 2002 election, the USCIB recalls that only 5,609 out of a total of 19,033 eligible voters cast ballots for representation. The AFA asked the NMB to investigate allegations of interference by Delta in the election. The NMB conducted an on-site investigation into the allegations, and at the conclusion of the investigation found that none of the conduct attributed to Delta tainted the laboratory conditions for the election.
- 548.** On the 2008 election, the AFA again lost by a significant margin: of the 13,380 eligible voters, only 5,306 voted for representation. The AFA again sought to have the NMB investigate allegations of interference; however, the AFA supplied little, if any, credible evidence to support their interference claims. On 30 September 2008, the NMB concluded that the AFA failed to establish even a prima facie case for interference and closed the case. It is this decision that forms the foundation of the AFA's complaint to the Committee. Almost immediately after losing the 2008 election, the AFA started the process of garnering support among the flight attendants of the combined airline with the expectation of filing another application for a representation election with the NMB. While the AFA initially filed an application to consolidate the craft or class of 20,640 flight attendants, after a lengthy and unprecedented delay by the NMB in processing, the AFA withdrew its application.
- 549.** As the US has not ratified Conventions Nos 87 or 98, the USCIB objects to the AFA's repeated allegations that the NMB in general, and the alleged conduct of Delta in particular, violate specific provisions of these Conventions. Under the Charter of the United Nations and the Constitution of the ILO, the United States has no international law obligations to comply with Conventions it does not ratify. Although the AFA acknowledged this reality, it nonetheless premised the arguments in its complaint on specific provisions of both Conventions. Furthermore it is incumbent upon the Committee not to conduct its examination using components of either Convention, but to base its analysis on the general principles of freedom of association outlined in the ILO Constitution, and to determine whether the application of labour laws in the United States is consistent with those principles.

- 550.** The ILO Constitution mentions the freedom of association exactly once, in its preamble. The US, through its comprehensive system of laws and regulations, supports the principles of freedom of association as articulated in the ILO's Constitution. In fact, it presents a model of how a system of laws can achieve the optimum balance of power between labour and management while respecting the rights of individual workers vis-à-vis their employers and labour organizations that represent or desire to represent them. It also presents a model of how that system of laws and their protections are accessible by, and available to, everyone. Indeed, the US has made freedom of association one of the cornerstone principles of its own labour laws and international labour policy and is party to numerous international agreements and treaties that make reference to freedom of association and the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. A principle-based examination of the RLA and the NMB's administration of that law shows that the US recognizes, both in law and practice, the freedom of American workers to associate with whom they choose, as well as the freedom of workers not to associate.
- 551.** The present complaint against Delta is one more example of the increasingly popular, and disturbing, practice of workers' organizations using the Committee as a weapon to attack companies with which they have a dispute. The practice dilutes the core mission of the Committee which "is not to blame or punish anyone, but rather to engage in a constructive tripartite dialogue to promote respect for trade union rights in law and practice". Implicit in the act of naming an enterprise in a complaint to the Committee is the request that the latter pass judgement on the enterprise and its conduct. Similarly, inclusion of reference to the enterprise in the Committee's report implies that the Committee has indeed passed judgement on the enterprise and its conduct. The Committee's mandate does not extend to an analysis or critique of the conduct of individual parties, because those inquiries are made at the national level. If a nation's laws and practices permit conduct inconsistent with the principles of freedom of association, then it is the province of the Committee to provide guidance as to how those national laws and practices should be corrected. It is not within the province of the Committee to provide guidance as to how enterprises are to comply with those national laws and practices.
- 552.** In May of 2008, the International Organisation of Employers (IOE) submitted a letter to the ILO seeking fundamental changes to the procedures of the Committee. The Secretary-General raised the IOE's concern about the increasing number of references to private companies in CFA case examinations and observed that "complaints are increasingly being submitted to the Committee by the unions with the clear intention of attacking and discrediting multinational enterprises". He further observed that "the mandate of the Committee is to ensure that governments apply the principles of freedom of association; (the Committee) has no authority to make reference to or directly comment upon private companies". We support this position, and encourage the Committee to adopt it. The fact that the NMB has conducted thousands of representation elections without its conduct having ever been called into question before the ILO, along with the prominence of Delta in the dispute, show that the complainants' true motives are to attack the company and not the legal system. That is wrong; to preserve its ability to guide national law and practice, the Committee should remove any identifying reference to enterprises from this and all future reports containing case examinations.
- 553.** The Committee has repeatedly observed that "national machinery" should be used to address complaints against acts of anti-union discrimination. However, here the complainant had immediate and unrestricted access to national courts to stop and/or remedy any acts of interference or discrimination it could attribute to Delta, yet never pursued these remedies. It simply chose to file its complaint with the Committee. By filing its complaint without even initiating the process to obtain available remedies at the national level, the AFA has created an awkward dilemma for the Committee, for if it

examines the case, the Committee will effectively disregard its own observations that encourage the creation of effective mechanisms at the national level to remedy and prevent anti-union discrimination.

- 554.** The Committee states that it “has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures”. However, it has also maintained that “the use of internal legal procedures, whatever the outcome, is undoubtedly a factor to be taken into consideration”. Indeed, the Committee has long promoted the creation of these internal legal procedures at the national level to provide rapid and effective protection against anti-union discrimination. Therefore, the Committee must carefully assess whether its decision to examine a particular case justifies its disregard of the national machinery that it works so hard to promote. Certainly, where the complaining party can articulate that the national mechanism is ineffective or otherwise does not conform to the principles of freedom of association, then CFA examination of the case before exhaustion of national procedures may be justified. However, where there is no explanation for the failure to even engage available procedures at the national level, the Committee should not examine the case. The present complaint falls into the latter category of cases, and the Committee should treat it accordingly.
- 555.** Through its complaint, the AFA asks the Committee to serve as a super-appellate body providing a version of events which is merely a cursory summation of convenient facts assembled to portray its plight in the best light. This is a one-sided version of events. It is not what the NMB considered when it reached its decisions and it should not be what the Committee considers when examining the instant case.
- 556.** Contrary to the complainants’ assertions Delta did not wage a vigorous campaign to interfere with the right of flight attendants to organize. Delta merely communicated its opinions on unionization and provided accurate information to employees about the election process, all of which the NMB found to be in compliance with Delta’s obligations under the RLA. Such communications are wholly consistent with core principles of freedom of association, which provide both workers and employers the right to freedom of opinion and expression. The Committee has written that “(t)he 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”. On numerous occasions, the Committee has sought to ensure that governments “guarantee through the existence of independent means of expression, the free flow of ideas, essential to the life and well-being of employers’ and workers’ organizations”. All social partners, including employers’ representatives, enjoy the exercise of civil liberties which include freedom of opinion and expression.
- 557.** The AFA relies on the *Digest of decisions and principles of the Freedom of Association Committee* to support its contention that Delta’s communications to employees about the election process and how to vote were in fact “attempts by the employer to persuade employees to withdraw authorizations given to a trade union”. The AFA argument is misplaced. Delta’s communications were to employees who had yet to make any designation of a representative; there were no authorizations to withdraw because the employees first had to vote through secret ballot to designate the AFA as their representative.
- 558.** In addition to, and consistent with, the principles stated by the Committee with respect to free speech, the First Amendment of the United States Constitution protects the freedom of speech by employers and workers in the context of unionization efforts so long as those communications “do not contain a threat of reprisal or force or promise of benefit”. While employers under the RLA enjoy a certain amount of latitude to communicate with

employees during elections, such speech is not without limit. “Carriers may accurately portray the way an employee can vote no, and disseminate publications expressing their views on the representation election.” However, when carrier statements exceed acceptable norms, there may be a finding of election interference, particularly where such statements misrepresent NMB voting procedures. To that end, a carrier must not engage in a systematic and pervasive campaign to “overwhelm the employees’ ability to choose a representative freely” or the NMB will find interference. The AFA’s claim that Delta’s statements to employees through newsletters, banners, videos, and other materials, including “shred it” pins, amounted to interference with the election process is simply not correct either under the law of the NMB or principles of freedom of association. Not surprisingly, the NMB found that the statements were in fact accurate representations of the NMB process and the actions employees needed to take if they did not wish to be represented by the AFA. Moreover, the NMB noted that on several occasions in the allegedly offensive communications, Delta specifically acknowledged the employees’ right to make their own choice regarding representation. Finally, the AFA’s argument that Delta’s communications campaign was “pervasive,” “overwhelming,” and “designed to inundate employees”, was not accepted by the NMB.

- 559.** Like the NMB, the Committee has concluded that the display of flags and insignia, as well as the publication and distribution of newsletters and leaflets, is consistent with the principles of freedom of association. While the preponderance of case examinations by the Committee address this right as exercised by labour unions and their supporters, the Committee has repeatedly emphasized that these rights apply equally to employers and their representatives. Indeed, the principles of freedom of association draw little distinction between the expression of an opinion about union representation by a trade union supporter or an employer, so long as it is done in an atmosphere that is free of coercion, intimidation, or fear of reprisal.
- 560.** The NMB concluded that Delta did not engage in the harassment, intimidation, and surveillance alleged by the AFA. The NMB views harassment, intimidation, and surveillance, if supported by substantive evidence, as interference with a representation election and may result in the rerun of the election. This NMB principle is wholly consistent with the concept of freedom of association promoted by the Committee.
- 561.** Furthermore, the AFA failed to meet its evidentiary burden to present credible, reliable evidence of such conduct by Delta to the NMB. To the extent the AFA presented any evidence to the NMB, the facts did not establish that Delta engaged in any harassment, intimidation, or surveillance. First, with respect to surveillance, the AFA merely presented evidence that supervisors were present in crew lounges where AFA supporters and activists were working. Nothing under the RLA or principles of freedom of association requires employer representatives to vacate employer-controlled premises just because union supporters are present. Second, with respect to the alleged harassment, the AFA presented 23 instances of alleged harassment. Not one of these allegations was supported by direct evidence as is required for a finding of interference. The NMB concluded that the 23 alleged incidents in an election involving over 13,000 eligible voters over a five-week period did not amount to any “systematic pattern” of harassment to constitute interference even if they were supported by viable evidence.
- 562.** As regards the allegation that Delta conferred benefits to influence employees, the law governing the granting of benefits to employees in representation cases under the RLA is well settled. “Changes in working conditions during the laboratory period may taint laboratory conditions, except if the changes were planned before the laboratory conditions attached, or there is clear and convincing evidence of a compelling business justification.” The AFA wrongly asserted that Delta conferred a 3 per cent pay increase to the flight attendants on 1 July 2008 in violation of the RLA. The NMB found upon review of the

facts that the 2008 increase not only was announced before the laboratory conditions attached to the 2008 election, but was planned in 2007 when Delta emerged from bankruptcy. Had the facts revealed that Delta instituted the pay increase to influence the results of the election, then the NMB would have found it to constitute interference.

- 563.** As concerns the allegation that the NMB unilaterally curtailed the election period, the AFA attempts to mislead the Committee with its allegation that the NMB engaged in misconduct when it moved the tally date from 3 June 2008 to 23 May 2008. Although required to do so, the AFA could produce no evidence that it suffered any prejudice by the date change. The NMB Representation Manual, which sets forth the rules by which all parties are obligated to abide, provides that the voting period shall be at least 21 days. In this case, it was actually 35 days, which is ample time for the employees to vote using the Internet and telephone voting procedure which takes mere minutes to complete.
- 564.** As concerns the allegation that the NMB permitted manipulation of the employee list, the NMB has a well-established procedure for determining voter eligibility, and the AFA's assertion that Delta gerrymandered the list to its advantage with the NMB's approval is patently false. The NMB rules governing voter eligibility have existed for years, and were scrupulously followed in the Delta election. Indeed, when provided the list of eligible voters following its application for representation, the AFA requested, and was granted additional time to challenge names of employees on the list it believed were ineligible to vote. The very assertions the AFA made to the Committee were considered and resolved by the NMB after the customary investigation. Moreover, in many of the situations raised by the AFA, the NMB ruled in the AFA's favour, proving that the procedure in fact worked as planned.
- 565.** The AFA seeks to further misrepresent facts of the case to the Committee by raising its objection to the inclusion of one deceased flight attendant on the eligibility list. Once this was brought to the attention of the NMB, the NMB removed the name from the list of eligible voters, and issued a revised tally of ballots. Ultimately the presence of one ineligible voter on a list containing over 13,000 names has no actual bearing on the outcome of the election, which as described above, was not even close.
- 566.** The AFA alleges that the NMB failed to ensure all employees received proper voting instructions, as 64 of the more than 13,000 eligible voters did not receive ballots. Curiously, 40 of the individuals identified by the AFA never requested duplicate ballots as they must do under the rules if they wish to vote. Fifteen were mailed duplicate ballots, and the remaining individuals either were not eligible voters, the ballots were returned as undeliverable, or their request was untimely. As for the four ballots that were allegedly opened or unsealed, once the issue was brought to the NMB's attention, the NMB conducted an investigation and found "no evidence that the (four) unsealed and misdirected voting instructions were the result of anything other than the normal wear and tear that results from a mass mailing". Per its rules, the NMB sent duplicate instructions to the four attendants promptly. If anything, the fact that such a small number of individuals claimed not to receive ballots out of an electorate so large demonstrates how effective the NMB election process in fact is. As with other AFA criticisms of the NMB election process, the claim that the NMB process somehow violates the principles of freedom of association in this context is simply not plausible.
- 567.** As concerns the allegation that the Laker Ballot procedure is inappropriate, the AFA's request that that procedure be replaced by a different one is not within the province of the Committee. A method that enables workers to designate their exclusive collective bargaining representative based upon "pre-established, precise and objective criteria ... (that exist) in the legislation" conforms to the principles of freedom of association. The NMB has not deviated for over 70 years from its established election process that requires

a majority vote of the total number of eligible voters in the craft or class unless there has first been interference in the election process. No doubt, this legacy is the result of plain language in the statute that provides a clear directive to the NMB that a majority of the craft or class must determine a representative. The only practical way to implement the directive of the statute is to require that a majority of the members of the craft or class vote in favour of representation. Anything less would amount to a contravention of those “pre-established, precise and objective criteria” unambiguously set forth in the legislation.

- 568.** If, upon the filing of allegations of election interference, the NMB concludes that a carrier did not interfere with the election, or the conduct was sufficiently isolated so as not to constitute a “systematic effort to interfere with the election” it will sustain the result of the election. However, where the NMB finds interference, in most cases it will order a rerun election using the standard NMB election process. Occasionally, if the circumstances require, it may extend the duration of the voting period.
- 569.** By way of exception only, and a rare exception at that, the NMB will vary the election process after it has concluded that a carrier has substantially interfered with the laboratory conditions of the election. To remedy the most egregious election interference and to mitigate the effects of an environment in which the “independence of judgement” of the voters has been eroded by the carrier’s conduct, the NMB has altered the balloting procedures altogether for a rerun election. This is known as a *Laker* election after the case *Laker Airways, Ltd* (1981). In *Laker*, the NMB found the carrier’s conduct to be “among the most egregious violations of employee rights in memory”, when it effectively interrogated employees about their sentiment towards union representation. The infractions of the employer in *Laker* included polling employee sentiment; interfering with the mailing process used by the NMB to conduct the first election; and engaging in conduct to keep track of those who did or did not have ballots.
- 570.** As a response to the NMB’s finding of such egregious misconduct in *Laker*, it reconfigured the election process for the rerun. In doing so, the NMB wrote, “the actions we take here should not be considered a precedent for the usual election situation, but is limited to situations where there is gross interference with a Board conducted election”. In the rerun election in *Laker*, the NMB conducted the election using a ballot box located on premises, and modified the form of the ballot to give employees the choice of voting “yes” or “no”, with no place for a write-in candidate. Finally, the NMB held that the election outcome would be determined by a majority of those who cast valid ballots instead of a majority of those eligible to vote. In a few cases after *Laker*, the NMB has similarly ordered modifications to the voting procedure for rerun elections when it has concluded the carrier engaged in misconduct akin to polling employees as to their sentiments in the election or the equivalent. Again, such action by the NMB is the exception, not the rule.
- 571.** The AFA’s claim that the NMB’s use of the standard election procedure, instead of a *Laker* ballot, demonstrates that the NMB “rules provide employees with inferior protection from employer interference” is false. In *Laker* the NMB used the on-site ballot box and the modified vote tally to encourage maximum employee participation and provide complete safeguarding of ballots and voting procedures. In *Laker*, the employer had already interfered with the mail ballot procedure and it was feasible to use a ballot box because of the employer’s small size. Within the context of the facts of the *Laker* case, the NMB concluded the modified process would achieve the desired remedy. In the case involving Delta, the NMB confronted neither the same facts nor the same outrageous conduct. As such, the NMB correctly concluded that a *Laker* election was unnecessary in the Delta case.
- 572.** In concluding, the USCIB maintains that the AFA’s complaint fails to demonstrate that the NMB’s election procedures diminish the rights of workers to associate freely or bargain

collectively. The right to organize and designate a representative of one's own choosing is alive and well under the RLA. The Committee often has to wrestle with cases involving murder, incarceration, death threats, and other horrific violations of basic human rights of individuals who seek to exercise their freedom of association. In the face of such serious cases, it seems hardly appropriate for the AFA, a well-financed labour union that has the benefit of enforceable legal mechanisms to perfect its rights under the laws of the US, to distract the Committee from its good work with complaints about nuances in an election it lost by a significant margin.

573. In its communication dated 25 May 2010, the Government draws the Committee's attention to the fact that, on 11 May 2010, the NMB published a final rule that amends its election procedures so that, in representation disputes, a majority of valid ballots cast will determine the craft or class representative. The new rule, which takes effect 30 days after publication, will end the NMB's 75-year-old practice that required a majority of workers to vote for representation before a union would be certified as the representative and where those workers who did not participate in the election were counted as "no" votes. In adopting the new rule, the NMB noted that the new election procedures will more accurately measure employee sentiment in representation disputes and provide employees with clear choices in representation matters. The change, therefore, appears to resolve the chief concern raised by the complainants in this case.

574. The US Government will provide further information relevant to this case and the new NMB rule as it becomes available. It is reasonable to expect that the complainants and the USCIB will wish to share their perspectives on the new rule as well. Under the circumstances, the Government suggests that it might be in the Committee's interest to postpone briefly its consideration of the case. In any event, the Government trusts that this new development will be taken into account in the Committee's examination.

C. The Committee's conclusions

575. *The Committee observes that the allegations in this case concern anti-union acts at Delta Air Lines and insufficient national mechanisms and procedures for the protection of the right to organize. In particular the complainants allege a number of failures on the part of the NMB to effectively ensure their rights under the RLA with respect to the 2002 and especially the 2008 certification elections held for flight attendants at the airlines.*

576. *The Government, for its part, states that its law and practice are in general conformity with Conventions Nos 87 and 98 and with the principles of freedom of association. The Government describes in detail the procedures followed by the NMB and concludes that its findings in the specific case before the Committee were reasonable and wholly within the NMB's discretion in implementing the RLA.*

577. *In addition, the Government forwards a communication from the USCIB asserting, among other things, that the complaint is not admissible because: (1) the proceeding before the Committee has been initiated without first exhausting available remedies before effective judicial authorities at the national level and; (2) it is inappropriate for the complainants to seek to have the Committee act as a "super-appellate body" to review or otherwise substitute its own conclusions for those of a well-established, independent government agency that reached its decisions with the benefit of a full evidentiary record created by the AFA and the airline. In addition, the USCIB asserts that the Committee's mandate does not extend to an analysis or critique of the conduct of individual parties, because those inquiries are made at the national level. It therefore calls upon the Committee to remove any identifying references to enterprises.*

- 578.** *As regards the first matter of the admissibility of the complaint raised by the USCIB, the Committee indeed takes into account, when examining a complaint, the situation whereby available national appeal procedures before independent courts have not been used by the complainant. The Committee observes in this specific case that the complainants do not only contest the specific alleged anti-union acts on the part of the airline – for which the degree of review of the finding on the facts is uncertain – but more importantly draw a link between those findings and what they contend to be an inadequacy in the national legislation to ensure effective protection of the right to organize. It is within this light that the Committee will proceed with its examination of the case. As regards the question of naming of enterprises, the Committee considers that the decisions it has reached in this regard following important discussions during the examination of other complaints to the effect that the repetitive use of company names should be avoided remain valid in this particular case and it will proceed on that same basis.*
- 579.** *The Committee notes that the complainant makes a number of allegations in relation to acts of interference on the part of employers generally, and in this specific case of the airlines, to try to interfere with the rights of workers to freely choose the organization to represent them. Such alleged acts range from abuse of the employers' freedom of speech through the waging of anti-union communication campaigns, harassment and intimidation of employees, manipulating employee eligibility lists to raise the amount that needs to be obtained to demonstrate majority representation, and the conferral of benefits in order to influence employees.*
- 580.** *The Government responds to each of these allegations stating that the NMB thoroughly considered all of the issues raised and reasonably resolved them in a manner consistent with US law and practice and ILO principles. More specifically, the Government refers to the NMB jurisprudence that allegations of election interference must meet a prima facie case that the laboratory conditions were tainted and must be supported by substantive evidence. In the specific circumstances of this case, the NMB found that the allegations were not supported by substantive evidence and did not establish interference. Similarly, the USCIB asserts that the complainant AFA failed to meet its evidentiary burden to present credible, reliable evidence of anti-union conduct on the part of the airline to the NMB and responds to each of the claims made by the complainants. The USCIB further asserts that, to the contrary, the airline has always had a special relationship with its employees in a culture of mutual commitment.*
- 581.** *The Committee observes that some of the information with respect to the actions of the airlines provided by the complainants, on the one hand, and the Government and the USCIB, on the other, is contradictory. As asserted by the USCIB, and more indirectly by the Government, the Committee is not in a position to assess the factual evidence in this specific case and weigh the various elements with meaningful authority, especially in the light of the contradictions brought to light between the complainants' allegations and the information transmitted by the Government. The Committee therefore will not attempt to re-evaluate the assessments already undertaken by the NMB of the facts in this particular dispute.*
- 582.** *The Committee does, however, take due note of the stress placed by the complainants on what they consider to be the unacceptable practice of encouraging employees to rip up their voting instructions, displaying posters and banners calling on employees to shred their ballots and distributing similar pins to flight attendants. The complainants have explained that such campaigns are especially damaging to an industrial relations system based on majority representation where the union must obtain the majority of all employees, not just those voting, before being certified as the bargaining representative. In the case at hand, while over 5,000 flight attendants expressed their desire to be*

represented by AFA–CWA, they were left without trade union representation as they did not meet the 50 per cent requirement of the over 13,000 eligible employees.

- 583.** *The Government and the USCIB do not challenge the facts as set out above but rather contend that such actions are fully in conformity with established national jurisprudence and the principles of the Committee in relation to freedom of expression. The Government refers in particular to the Supreme Court position that “an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit’”. According to the USCIB, the airline merely communicated its opinions on unionization and provided accurate information to employees about the election process, including about how to vote against the union by shredding their ballot.*
- 584.** *While having stressed the importance which it attaches to freedom of expression as a fundamental corollary to freedom of association and the exercise of trade union rights on numerous occasions, the Committee also considers that they must not become competing rights, one aimed at eliminating the other. While noting that the national process did not find interference with freedom of association, the Committee expresses a general concern at the use of “shred it” buttons in this regard. While providing all relevant ballot information, including how to vote against a union, would be acceptable as part of the process of a certification election, the Committee considers that the active participation by an employer in a way that interferes in any way with an employee exercising his or her free choice would be a violation of freedom of association and disrespect for workers’ fundamental right to organize.*
- 585.** *In this regard, the Committee wishes to recall that it has had the opportunity to review the question of employers’ freedom of expression in a recent case where, observing that the protection afforded by unfair labour practices in the country included protection against freedom of speech that would interfere with the formation of any labour organization or with the selection of a trade union as a representative for the purpose of bargaining collectively, found that the principles of freedom of association did not appear to be violated (see Case No. 2654, 356th Report, para. 381.) In addition, it has requested a Government in another case to ensure that employers do not express opinions which would intimidate workers in the exercise of their organizational rights, such as claiming that the establishment of an association is unlawful, or warning against affiliation with a higher-level organization, or encouraging workers to withdraw their membership (see Case No. 2301, 356th Report, para. 80). The Committee draws the Government’s attention to the importance of providing for specific and effective protection in relation to the right to organize and the selection of a collective bargaining agent and requests it to review the current application of the RLA, in respect of the issues raised in this specific case, with the social partners with a view to taking the necessary measures so as to ensure full respect for these principles in practice.*
- 586.** *The Committee further observes that the complainants had linked the risks of an abuse of the right to free speech on the meaningful exercise of the right to organize to the special process of elections as carried out by the NMB on the basis of the requirement for a majority of the employees to vote in favour of the union for it to be certified as bargaining agent. It is within this context that the complainant not only states that a “Laker” ballot (a “yes” or “no” ballot with certification being granted if the union wins the majority of the votes cast) should have been used in the specific case before it, but argues more generally that the NMB election rules should provide employees with an option for a “Laker” ballot or should at the very least no longer restrict such balloting procedures to “extraordinary and unusual” circumstances.*

587. *The Committee notes that the Government refers in this regard to the special concerns of the sector covered by the RLA and the need to ensure stable labour relations so as to avoid any interruption to inter-state commerce. In addition, the Government refers to the fact that the RLA does not provide for a decertification process and therefore it is of the utmost importance that the certified union have the support of the workers it is certified to represent. The Government further describes the extraordinary circumstances giving rise to the “Laker” ballot and puts forward that the NMB’s decision not to use the ballot in the circumstances at hand in this case were fully concordant with its use over the years. Finally, the Committee notes the information provided by the USCIB which set out the distinction between the present case and the egregious case which gave rise to the “Laker” ballot.*
588. *The Committee recalls that it has considered numerous labour relations systems over the years to be in conformity with freedom of association principles, including both systems requiring majority representation and those that do not. It is not necessarily incompatible with Convention No. 87 to provide for the certification of the most representative union in a given unit as the exclusive bargaining agent for that unit. This is the case, however, only if a number of safeguards are provided. The Committee has pointed out that in several countries in which the procedure of certifying unions as exclusive bargaining agents has been established, it has been regarded as essential that such safeguards should include the following: (a) certification to be made by an independent body; (b) the representative organizations to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organization which fails to secure a sufficiently large number of votes to ask for a new election after a stipulated period; and (d) the right of an organization other than certified organizations to demand a new election after a fixed period, often 12 months, has elapsed since the previous election. The Committee further recalls that where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members (see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 969 and 976). The Committee observes that the system practiced by the NMB would appear to correspond to these essential safeguards in relation to systems based on exclusive bargaining rights for the most representative union: (1) the certification is made by an independent body; (2) the representative organization is chosen by a majority vote of the employees in the unit concerned; and (3) a non-certified organization has the right to request a new election after a stipulated period.*
589. *The Committee further observes that the request made by the complainants in relation to a greater use of the “Laker” ballot appears largely to be linked to what they perceive as an imbalance of power in favour of the employer rendering success on a normal ballot, where all eligible votes count, excessively difficult to achieve. The Government in its initial reply maintains to the contrary that the election standard as practised by the NMB had not resulted in the suppression of unions and that there is a significantly higher percentage of unionization in the workforce covered by the RLA. The Committee welcomes in this regard the social dialogue described by the Government currently taking place. This dialogue includes the information from the Government’s most recent communication that the NMB published a final rule on 11 May 2010 that amends its election procedures so that, in representation disputes, a majority of valid ballots cast will determine the craft or class representative, apparently resolving the chief concern raised by the complainant; the review of that new rule under applicable law; and the formation by the NMB of a new joint labour–management committee to examine the recommendations made in the 1990s by the Commission on the Future of Worker–Management Relations (the “Dunlop Commission”). The Committee expects that the issues raised in this case and the principles of freedom of association will be fully borne in mind within this framework and within any other review processes undertaken.*

The Committee's recommendations

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

- (a) *The Committee draws the Government's attention to the importance of providing for specific and effective protection in relation to the right to organize and the selection of a collective bargaining agent and requests it to review the current application of the RLA with the social partners in respect of the issues raised in this specific case, with a view to taking the necessary measures so as to ensure full respect in practice for the principles set forth in its conclusions.*
- (b) *The Committee expects that the issues raised in this case and the principles of freedom of association will be fully borne in mind within the framework referred to in its conclusions and within any other review processes undertaken.*

CASE NO. 2516

INTERIM REPORT

Complaint against the Government of Ethiopia presented by

- **the Ethiopian Teachers' Association (ETA)**
- **Education International (EI) and**
- **the International Trade Union Confederation (ITUC)**

Allegations: The complainant organizations allege serious violations in the ETA's trade union rights including continuous interference in its internal organization preventing it from functioning normally, and interference by way of threats, dismissals, arrest, detention and maltreatment of ETA members

591. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 968–1010]. By a communication dated 30 November 2009, the International Trade Union Confederation (ITUC) transmitted a communication dated 3 November 2009 from Education International (EI) containing new allegations.

592. The Government sent its observations in communications dated 14 October 2009 and 7 March 2010.

593. Ethiopia 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

594. At its March 2009 meeting, the Committee considered it necessary to draw the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein and made the following recommendations [see 353rd Report, paras 5 and 1010]:

- (a) The Committee urges the Government to take all necessary measures to ensure that the National Teachers' Association is registered without delay so that teachers may fully exercise their right to form organizations for the furtherance and defence of teachers' occupational interests without further delay. It requests the Government to keep it informed of the progress made in this regard.
- (b) The Committee once again urges the Government to take the necessary steps to ensure that the freedoms of association rights of civil servants, including teachers in the public sector, are fully guaranteed. It requests the Government to keep it informed of all progress made in this respect.
- (c) The Committee expects that decisions in respect of the original complainant, ETA, members mentioned in the complaint will be handed down by the courts without further delay. It requests the Government to communicate the full texts of these judgements as soon as they have been rendered.
- (d) The Committee urges the Government to ensure that Mr Mengistu is released or brought to trial without delay before an impartial and independent judicial authority.
- (e) The Committee urges the Government to initiate without delay an independent inquiry into the allegations of torture and maltreatment of the detained persons to be led by a person that has the confidence of all the parties concerned, and if it is found that they have been subjected to maltreatment, to punish those responsible and to ensure appropriate compensation for any damages suffered. The Committee requests the Government to keep it informed of the steps taken in this regard and the results of the inquiry.
- (f) The Committee expects that all trade unionists appearing before the court enjoy the due process guarantees necessary for their defence.
- (g) The Committee urges the Government to initiate a full and independent investigation into the allegations of harassments in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu, Ms Elfinesh Demissie and Mr Wasihun Melese, all members of the National Executive Board of the complainant organization; as well as over 50 of its prominent activists in order to determine responsibilities, punish the guilty parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.
- (h) The Committee requests the Government to take the necessary measures without delay in order to ensure the payment of lost wages to Ms Demissie, as well as adequate indemnities or penalty constituting a sufficiently dissuasive sanction against any further act of anti-union discrimination. It requests the Government to keep it informed in this respect.
- (i) The Committee requests the complainants to indicate how the decision of the Government with regard to the conduct of the census in the Somali region affected trade union rights of the teachers concerned.
- (j) The Committee requests the Government to reply in substance to the allegations of dismissal of two trade union leaders, Nikodimos Aramdie and Wondewosen Beyene, and, as regards the dismissal in 1995 of Kinfu Abate, requests the complainant to provide relevant and detailed information in respect of this dismissal and to indicate why it was not possible to provide this information previously.
- (k) The Committee requests the Government to conduct an independent investigation into the allegations of harassment of seven trade unionists and to provide a detailed reply as to its outcome.

B. The complainants' new allegations

- 595.** In their communication dated 30 November 2009, EI recalls that on 15 December 2008, the National Teachers' Association (NTA) was denied registration by the Ministry of Justice, making its activists vulnerable to government pressure, including imprisonment and harassment. EI indicates that on 25 and 29 December 2008, two founding members of the NTA lodged petitions with the Minister of Justice and the Ombudsperson deploring that the decision of the Registration Office restricts the constitutional rights of an independent teacher association to exist in addition to the existing Ethiopian Teachers' Association (ETA) 1993. Copies of the letter addressed to the Ombudsperson were sent to all relevant institutions in Ethiopia including the House of People's Representatives, the Office of the Prime Minister and the Human Rights Commission.
- 596.** On 7 January 2009, the Vice-Commissioner of the Ombudsperson gave audience to representatives of the NTA founding members. The Vice-Commissioner demonstrated interest in the case and indicated that teachers' constitutional freedom of association right had been violated when they were asked to produce a letter of support from their employer. The Vice-Commissioner pledged to discuss this issue with the colleagues in the Office of the Ombudsperson. Despite several reminders, the Ombudsperson is silent.
- 597.** Following attempts for three months to get an audience with the Minister of Justice and after consultation with the relevant teachers, representatives of the NTA decided to file a charge against the Ministry of Justice. On 30 March 2009, they brought the case to the Ninth Civil Bench of the Federal First Instance Court in Addis Ababa. The court gave instruction to the Ministry of Justice to produce its written response to the complaint. On 22 April 2009, the court indicated that the Ministry of Education was not entitled to allow or deny the right to organize to its employees. The court also stated that the names ETA and the NTA were different.
- 598.** On 30 April 2009, at the court hearing, the case *NTA v. Ministry of Justice* was adjourned till 6 May 2009. Later in May, the court ruled that the NTA could not blame the Ministry of Justice for the refusal of its registration as a professional association. In line with the newly proclaimed Charities and Societies Proclamation, the NTA had to lodge a request at the Charities and Societies Agency (CSA), a state agency yet to be established pursuant to the new legislation. EI points out that this decision implies that an agency which does not yet exist will be made accountable for the December 2008 decision of the Ministry of Justice not to register the NTA.
- 599.** In this respect, EI explains that on 6 January 2009, the Parliament adopted a draft law which subjects all civil society groups to government control and surveillance through a CSA. The draft law established an oversight agency with extensive discretionary powers to refuse legal recognition to non-governmental organizations (NGOs), to disband associations that were already legally recognized, and to interfere in the management of associations up to the point of altering their organizational missions. The draft law prohibits activities carried out by foreign NGOs relating to human rights, governance, protection of the rights of women, children and people with disabilities, conflict resolution, strengthening of judicial practices or law enforcement, and would strip national NGOs that work on human rights and good governance issues of access to foreign funding. The draft law defines as foreign any NGO that receives more than 10 per cent of its funding from foreign sources or has any members who are foreign nationals and bars foreign NGOs from working on human rights and governance issues. The draft law also imposes harsh criminal penalties, including fines and up to 15-years' prison sentences, on anyone participating in unlawful civil society activities.

- 600.** EI further alleges that one official of the ETA, which was dissolved in June 2008, is still detained in the Kaliti prison centre contrary to a statement made by a Government representative to the ILO Commission on the Application of Standards in 2009. Meqcha Mengistu, a teacher at a secondary school in Dejen, chairperson of the former ETA East Gojam Zonal Executive and member of the former ETA Committee for the implementation of EI-ETA Education for All and HIV/AIDS programme (EFAIDS), Meqcha Mengistu was arrested on 30 May 2007. As of 31 August 2009, he was still in detention. Furthermore, knowing that the litigation process could keep her longer in detention, Ms Wubit Legamo, spouse of a former ETA activist, gave up her right to appeal against the verdict of the Federal High Court of 8 May 2009. She was subsequently released on 21 July 2009. Contrary to the official statement made by the Government representative, Ms Wubit Legamo was not treated humanely, according to a legal report analysing the ill-treatment she and former ETA members received during their interrogation and detention in 2007. The report indicated that the beating suffered by Ms Wubit Legamo in front of her child, resulted in the abortion of a five-month foetus. The report was sent to the Ethiopian Ambassador, as well as to the UN Special Rapporteur on Torture, in June 2008.
- 601.** In addition, contrary to a statement made by a Government representative, Ms Elfinesh Demissie, teacher at the Misraq Goh Primary School in Addis Ababa, did not miss 56 days of school. She did not work in her school for five days in total: three days when she could not reach school during the street protest in November 2005 (most headmasters and teachers were unable to get to their school due to the transport disruption) and two days in August 2006 when she asked for leave to attend the ETA General Assembly which was suspended by the security forces. These days of absence could not justify 36 days of suspension imposed on her. Neither did it justify the weekly harassment she endured.
- 602.** For several years, the Committee of Experts on the Application of Conventions and Recommendations has made comments demanding to bring national legislation into conformity with the requirements of Convention No. 87. Despite the commitment expressed by the Government, the revision of the Proclamation on the Public Service with a view to grant the right of freedom of association to public employees such as judges, prosecutors and other categories of workers was not undertaken. Although the Proclamation of 1993 was modified in 2003, teachers employed in the public services, who represent more than 200,000 civil servants, are still deprived of the right to establish trade unions and join the national trade union confederation (CETU). Furthermore, EI expresses hope that the Government will implement the ILO supervisory bodies' recommendation to release the union colleague still detained because of his support to the independent teachers' association and to reinstate and compensate teachers who have been dismissed and/or detained and tortured because of their membership in the independent ETA (Kassahun Kebede, Anteneh Getnet, Tilahun Ayalew, Woldie Dana and Berhanu Aba-Debissa).

C. The Government's reply

- 603.** In its communication dated 14 October 2009, the Government welcomes the ILO direct contacts mission, which visited the country between 6 and 9 October 2009, and provides its comments on the recommendations thereof.
- 604.** On the question of registration, the Government indicates that the mission has correctly concluded that the dispute between the two groups claiming to represent the ETA had been resolved in the judicial system. However, this final decision was not fully accepted by all parties. Despite the final decision of the Supreme Court, there were further attempts to register an entity, the so-called NTA, giving an impression that the NTA had some credibility even before it was registered. EI allowed one of the organizers of the NTA to

make a statement at the last International Labour Conference. The Government considers that allowing this organizer to represent an entity which had not even been registered in the country represents what is wrong with the system. The Government indicates that the complainants also submitted their case to the Office of the Ombudsperson and that this case was pending for a final decision. The Government stresses that the question of registration could only be dealt with through the processes established by national law.

- 605.** With regard to the second recommendation of the mission referring to the call for an independent investigation into the allegations of torture and maltreatment of teachers, the Government explains that all allegations presented with credible evidence were fully investigated by constitutional bodies including courts, the Human Rights Commission, the Office of the Ombudsperson, or by a mechanism approved by the House of Peoples' Representatives.
- 606.** With regard to the third recommendation referring to the right of civil servants to form trade unions, the Government indicates that it had explained on several occasions, including at the last International Labour Conference, that this right was enshrined in article 42 of the Constitution, entitled "Rights of Labour" and states that factory and service workers, farmers, farm labourers, other rural workers and government employees whose work compatibility allows for it, and who are below a certain level of responsibility, have the right to form associations to improve their conditions of employment and economic well-being. The Government points out that it explained to all relevant bodies that full compliance must be achieved by gradually preparing the necessary conditions and the capacity of the country to shoulder the full extent of this right. It concludes by stating that civil servants have the right to form associations and enjoy full protection of due process under the Civil Service Law.
- 607.** The Government recalls that the report also covers allegations of imprisonment of teachers and states that the assumption that there were a large number of teachers in detention is without foundation. Those that were cited by name were detained on the basis of a court order. Those found guilty by the court for involvement in violent acts against the constitutional system were completing their sentences. The allegation that they were detained due to their union activities is unfounded.
- 608.** In its communication dated 7 March 2010, the Government transmits additional comments concerning the new allegations. The Government indicates that it has repeatedly explained that the right to form associations was a constitutionally protected freedom that citizens freely exercise. The 2006 Labour Proclamation upholds this fundamental constitutional right and guarantees to trade unions the right to engage in organized collective bargaining within the scope delineated by its provisions. The numerous freely functioning trade union and professional associations attest to the fact that the national legislation is in compliance with the ILO Convention.
- 609.** The Government indicates that the new Charities and Societies Proclamation, which was promulgated after extensive public discussions involving all stakeholders entered into force after the expiry of the period of time which was given to associations and various charities and societies to align themselves with the requirements of the new law. No trade union or related association raised complaints on being aggrieved or restrained by this new law. The Proclamation aims at enhancing the participation of civil society organizations in developmental efforts of the country. It clearly defines and regulates charities and societies and provides the necessary safeguards and due process in the framework of democratization efforts. The CSA is the newly established and legally competent state agency that registers associations based on transparent legal requirements. In its preamble, the new law provides that it is necessary to enact a law in order to ensure the realization of

citizens' rights to association enshrined in the Constitution and to aid and facilitate the role of the CSA in the overall development of workers.

- 610.** The Government explains that the ETA, which had 350,000 card-carrying and trade union dues-paying members, maintained its registration. The ETA was recognized as a legitimate association and was registered as such by the competent state agency. The Government reiterates that the same procedure and principle applies to the NTA, which can request registration from the newly formed CSA. Furthermore, if registration is refused by the CSA, the NTA can bring the issue before a court of law that could establish that the organization was unfairly denied registration by the CSA. At this stage, before the issues found legal closure, it is not appropriate for the Government to get involved in this regard. Once the NTA will be registered as a duly constituted association by the CSA, the Government reiterates its assurance that, as required by law, the NTA will enjoy all the entitlements of recognition and services that all legal associations are entitled to receive.
- 611.** The allegation that the Charities and Societies Proclamation limits the right to strike and collective bargaining is completely without legal or practical foundation. The conditions for the exercise of the right to strike and collective bargaining are governed by the Labour Proclamation. Likewise, as no undue limitations exist on the right to strike, unions can pursue their objective through this available option. The law also provides for peaceful settlement of labour disputes and encourages the parties to arrive at an amicable settlement and avoid confrontations that disturb industrial peace. Nevertheless, as elsewhere, if strike is unavoidable, the law provides for a list of essential public services to be maintained during a strike. The law also holds the guilty party accountable in the event that property damage occurs in the course of the exercise of such activities.
- 612.** The Government categorically rejects the allegations of interference in the affairs of independent associations. The Government states that without the free and unfettered operation of independent associations, the democratization effort in the country will not succeed. The proliferation of associations and trade unions and their membership is a clear demonstration of the Government's commitment. The current labour law also permits multiple unions at the enterprise level and provides unions and associations with a legal arsenal to defend themselves against any form of undue intervention.
- 613.** With regard to the freedom of association rights of civil servants, the Government indicates that it was important to re-emphasize the fundamental fact that the Constitution explicitly provides that every person, including every civil servant, has the right to form associations for any cause or purpose. Civil servants with grievances in respect of their conditions of work are entitled to resort to legal mechanisms of redress under the legislation governing the civil service and other legal recourses, including the Office of the Ombudsperson. The Government reiterates its position that there was not, nor could there be, any difference on whether civil servants should be able to form associations. The only difference is the timing. In the Government's assessment, the country is not ready to fully cater for such a framework. This is the only explanation why the Civil Service legislation did not yet provide a separate association in the civil service. As part of the democratization process in the country, the Government is fully engaged in implementing the civil service reform programme designed to provide efficient and speedy service to citizens. At the present juncture, the Government has not developed the capacity to engage in a fully fledged collective bargaining process with civil servants. This is a matter to be presented for consideration by the legislature once the reform programme is successfully implemented and the necessary national capacity is in place. The Government suggests that the ILO supervisory mechanisms take a global view on this matter as it was not productive to repeat endless allegations that did not respect the country's legislative process and realities on the ground.

614. With regard to the allegation concerning criminal cases involving 55 defendants, including those with connection to the ETA, in particular Meqcha Mengistu and Wubit Ligamo, the Government indicates that the criminal charges against them were brought in accordance with the provisions of the Criminal Code in relation to involvement with an illegal organization. The charges had nothing to do with the defendants' ETA activities. On 8 May 2009, the second Criminal Bench of the Federal High Court found Meqcha Mengistu guilty and sentenced him to three years' imprisonment. He was released after receiving a pardon. Ms Wubit Ligamo, who the Government denies was mistreated while in prison, was also released.

D. The Committee's conclusions

615. *The Committee notes the new allegations sent by the ITUC and EI. It further notes the Government's reply thereon, as well as its comments on the October 2009 direct contacts mission report.*

616. *With regard to the registration of the NTA (recommendation (a)), the Committee notes that the Government refers to the newly adopted Charities and Societies Proclamation establishing the CSA, a registering authority. The Government indicates that the NTA can submit its request for registration to the CSA and, if registration is denied, the NTA has a right to submit a complaint to the court. The Government therefore considers that, at this point, it is not appropriate for it to get involved.*

617. *The Committee notes with concern the complainants' allegation in respect of this new legislation and, in particular, with regard to the allegedly discretionary power of the CSA to refuse registration, and its powers to interfere in internal administration and activities of trade unions. The Committee requests the Government to provide its observations thereon as well as all relevant information on the application of the Proclamation in practice.*

618. *The Committee deeply deplores that almost two years after the NTA's request for the registration, this organization is still not registered. It recalls that the right to official recognition through legal registration is an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 295]. The Committee draws the Government's attention to its responsibility in ensuring that this right is respected in law and in practice. The Committee therefore once again urges the Government to take all necessary measures to ensure that the appropriate authorities register the NTA without delay so that teachers may fully exercise their right to form organizations for the furthering and defence of teachers' occupational interests without further delay. It urges the Government to keep it informed in this respect.*

619. *With regard to the civil servants' right to freedom of association (recommendation (b)), the Committee notes the Government's statement that, while it considers that civil servants, like all other workers, should enjoy the right to form their associations at present, the country is not ready to provide and ensure freedom of association and collective bargaining rights to civil servants, as it has not yet developed the capacity to engage in a fully fledged collective bargaining process with civil servants. The Committee emphasizes that trade union rights, like other basic human rights, should be respected no matter what the level of development of the country concerned [see **Digest**, op. cit., para. 17]. The Committee therefore once again urges the Government to take the necessary steps to ensure that the freedom of association rights of civil servants, including teachers in the public sector, are fully guaranteed. It requests the Government to keep it informed of all progress made in this respect.*

620. *With regard to the cases of arrests and detention of trade unionists (recommendations (c) and (d)), the Committee notes from the complainants' communication that, as of 31 August 2009, one official of the ETA, which was dissolved in June 2008, Mr Meqcha Mengistu, was still in prison and that Ms Wubit Legamo was released on 21 July 2009, once she abandoned her appeal against the verdict of the Federal High Court of 8 May 2009. The Committee further notes the information provided by the Government, according to which the criminal charges against the accused persons were brought in accordance with the provisions of the Criminal Code in relation to their involvement with an illegal organization. The Government claims that the charges had nothing to do with the defendants' ETA activities. On 8 May 2009, the second Criminal Bench of the Federal High Court found Mr Meqcha Mengistu guilty and sentenced him to three years' imprisonment. He was released after receiving a pardon. The Government also confirms the release of Ms Wubit Ligamo. While welcoming the release of these two persons, the Committee regrets that the Government failed to provide the full texts of the relevant judgements in relation to these cases, as it had requested.*
621. *In this respect, and with reference to its previous recommendation (e), the Committee recalls the allegation of the use of torture to extract confessions, which could have been used in court against the defendants. In particular, the Committee notes with concern the allegation of ill-treatment suffered by Ms Wubit Legamo. The Committee notes that the Government denies that prisoners were mistreated while in custody and indicates that all allegations corroborated by credible evidence were fully investigated by constitutional bodies including courts, the Human Rights Commission, the Office of the Ombudsperson, or a mechanism approved by the House of People's Representatives. The Committee deeply regrets that, despite its repeated requests, the Government has failed to provide any report containing findings or conclusions on investigations carried out by these bodies. The Committee recalls that it has previously stressed the need to ensure that an independent inquiry into the allegations of torture and maltreatment of the detained persons is led by a person that has the confidence of all the parties concerned. The Committee therefore urges the Government, once again, to initiate without delay an independent inquiry into the allegations of torture and maltreatment of the detained persons, to be led by a person that has the confidence of all the parties concerned, and if it is found that they have been subjected to maltreatment, to punish those responsible and to ensure appropriate compensation for any damages suffered. The Committee requests the Government to keep it informed of the steps taken in this regard, the results of the inquiry, as well as that of any other investigations that have been carried out in relation to these allegations.*
622. *With regard to the allegations of harassment, dismissal and suspension of trade union activists (recommendations (g), (h), (j) and (k)), the Committee notes the Government's general statement that it categorically rejects the allegations of interference in the affairs of independent associations and that the current Labour Law also provides unions and associations with a legal arsenal to defend themselves against any form of undue intervention. The Committee stresses the importance for Governments to formulate detailed replies to the allegations brought by complainant organizations, so as to allow the Committee to undertake an objective examination [see **Digest**, op. cit., para. 24] and expects that the Government will be more cooperative in the future.*
623. *With reference to its previous examination of this case and the additional clarifications provided by the complainants, the Committee once again urges the Government to initiate a full and independent investigation into the allegations of harassment in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu, Ms Elfinesh Demissie and Mr Wasihun Melese as well as over 50 of its prominent trade union activists, who have been taken to police stations near their respective schools and strongly advised by security agents to quit their union activities in order to determine responsibilities, punish the guilty*

parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.

- 624.** *The Committee further requests the Government to take the necessary measures without delay in order to ensure the payment of lost wages to Ms Demissie (who was suspended for 36 days as a punishment for her trade union activities) as well as adequate indemnities or penalties constituting a sufficiently dissuasive sanction against any further act of anti-union discrimination. It requests the Government to keep it informed in this respect.*
- 625.** *The Committee recalls that it had previously noted the complainants' allegation that Woldie Dana and Berhanu Aby-Debissa, although released, have been denied reinstatement in their teaching duties. The Committee notes that, according to the complainant's latest communication, these persons were not able to return to their duties. The Committee requests the Government to provide information in this respect, as well as to reply in substance to the complainants' previous allegations of dismissal of two trade union leaders, Nikodimos Aramdie and Wondewosen Beyene.*
- 626.** *It further requests the Government to conduct an independent investigation into the allegations of harassment, between February and August 2008, of seven trade unionists and to provide a detailed reply as to its outcome.*
- 627.** *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

The Committee's recommendations

- 628.** *In the light of its forgoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to provide all relevant information on the application in practice of the Charities and Societies Proclamation.*
 - (b) The Committee once again urges the Government to take all necessary measures to ensure that the appropriate authorities register the NTA without delay so that teachers may fully exercise their right to form organizations for the furthering and defence of teachers' occupational interests without further delay. It urges the Government to keep it informed of the progress made in this respect.*
 - (c) The Committee once again urges the Government to take the necessary steps to ensure that the freedom of association rights of civil servants, including teachers in the public sector, are fully guaranteed. It requests the Government to keep it informed of all progress made in this respect.*
 - (d) The Committee urges the Government to initiate without delay an independent inquiry into the allegations of torture and maltreatment of the detained persons, led by a person that has the confidence of all the parties concerned, and if it is found that they have been subjected to maltreatment, to punish those responsible and to ensure appropriate compensation for any damages suffered. The Committee requests the Government to keep it informed of the steps taken in this regard, the results of the inquiry, as well as that of any other investigations that have been carried out in relation to these allegations.*

- (e) *The Committee urges the Government to initiate a full and independent investigation into the allegations of harassment in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu, Ms Elfinesh Demissie and Mr Wasihun Melese, all members of the National Executive Board of the complainant organization; as well as over 50 of its prominent activists in order to determine responsibilities, punish the guilty parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.*
- (f) *The Committee requests the Government to take the necessary measures without delay in order to ensure the payment of lost wages to Ms Demissie, as well as adequate indemnities or penalties constituting a sufficiently dissuasive sanction against any further act of anti-union discrimination. It requests the Government to keep it informed in this respect.*
- (g) *The Committee requests the Government to provide information on the alleged denial of reinstatement of Woldie Dana and Berhanu Aby-Debissa and to reply in substance to the allegations of dismissal of two trade union leaders, Nikodimos Aramdie and Wondewosen Beyene.*
- (h) *The Committee requests the Government to conduct an independent investigation into the allegations of harassment of seven trade unionists and to provide a detailed reply as to its outcome.*
- (i) *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*
- (j) *The Committee calls the Governing Body's attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2678

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

**Complaint against the Government of Georgia
presented by
the Georgian Trade Unions Confederation (GTUC)
and supported by
Education International (EI)**

Allegations: The complainant alleges interference in activities of the Educators & Scientists Free Trade Union of Georgia (ESFTUG), its member organization, as well as dismissals of trade unionists

629. The complaint is contained in communications from the Georgian Trade Unions Confederation (GTUC) dated 14 November and 24 December 2008, and 7 May 2009.

Education International (EI) associated itself with the complaint by a communication dated 21 November 2008.

- 630.** The Government sent its observations in a communication dated 20 November 2009.
- 631.** Georgia 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

- 632.** By its communications dated 14 November and 24 December 2008, and 7 May 2009, the GTUC submits a complaint against the Government of Georgia on behalf of its affiliate, the Educators & Scientists Free Trade Union of Georgia (ESFTUG). The complainant explains that the ESFTUG was established on 19 November 2005 and represents 100,000 employees in the education sector.
- 633.** The GTUC alleges that, on 21 January 2008, a new teachers' organization, the Professional Education Syndicate (PES) was registered by the Tbilisi Tax Inspection. According to the complainant, the PES was not established as a trade union, but rather as a non-governmental and non-commercial legal entity in the field of education. According to the GTUC, from the moment of its establishment, the PES has been illegally trying to force members of the ESFTUG to join the PES by spreading incorrect information and, to that effect, is using administrative resources. Furthermore, school directors use their authority and influence in favour of the PES and interfere in the ESFTUG's activities. The complainant refers in particular to the actions of the directors of Tbilisi public schools Nos 10 and 136 and alleges that the directors of these schools transfer money to the account of the PES. According to the complainant, the PES is also supported by directors and heads of educational resource centres of the Ministry of Education and Science.
- 634.** The complainant alleges that, on 5 February 2008, school directors and chairs of public school boards of the district of Bolnisi were invited to a meeting to be introduced to the representatives of the new organization. At the meeting, school directors were invited to encourage their employees to renounce the ESFTUG affiliation and join the PES, which offered a 50 per cent rebate on teacher certification training fees. Such trainings, while not compulsory, are strongly recommended by the Ministry of Education and Science. One of such trainings was organized by the Education Institute, which specifically required PES membership.
- 635.** The complainant further alleges that on 8 February 2008, the PES organized a meeting with the ESFTUG members in Tbilisi Public School No. 10. Representatives of the ESFTUG – its Vice-President, the head of the Organizational Department and the head of the Legal Department – wished to attend the meeting, but the director of the school denied access to the school territory. The ESFTUG lodged an administrative complaint to the General Inspectorate of the Ministry of Education and Science. However, this complaint was dismissed.
- 636.** The GTUC indicates that, on 15 February 2008, the web site of the Ministry of Education and Science of the Autonomous Republic of Adjara announced that the PES would offer free training for its members. The Ministry web site included a downloadable PES membership application form. Moreover, the Deputy Minister of Education and Science of the Autonomous Republic of Adjara, upon the instruction of the Minister, sent letters to all educational resource centres requesting that they introduce the new union to all teachers.

- 637.** The complainant also alleges instances of violation of section 25(3) of the Law on Trade Union, according to which, an employer shall deduct trade union membership fees from his or her employees' salary and transfer them to the trade union upon a written request by an employee. The GTUC indicates that article 4.13 of the sectoral agreement signed by the Ministry of Education and Science and the ESFTUG provides for an obligation imposed upon the administration of educational institutions to transfer deducted membership fees to the ESFTUG account. However, when, in April 2008, employees of the Senaki nursery made written statements that they wished to rejoin the ESFTUG and asked the head of the Senaki Educational resource centre to transfer their membership dues to the ESFTUG, their request was ignored and their membership fees kept being transferred to the PES account. On 12 July 2008, nine teachers of a Nakolakevi public school requested the school director to transfer their membership dues to the ESFTUG account. However, July and August dues were transferred to the PES.
- 638.** Furthermore, according to the complainant, the ESFTUG primary trade union of Tbilisi Public School No. 85 was dissolved and its members were forced to join the PES. The complainant also alleges that because of incorrect information spread by the PES, ESFTUG members at the Zugdidi Technical College terminated their union membership. The GTUC also alleges that school directors force members of the ESFTUG to become members of the PES by threatening teachers with dismissals and terminating their employment contracts if they refuse. In particular, the complainant alleges that in Achabeti and Kekhvi villages, two ESFTUG trade union members were forced by the school directors to leave their union. Moreover, the director of Public School No. 1 of Dedofliskaro district terminated the employment contracts of the following eleven members of the ESFTUG pursuant to section 37(d) of the Labour Code: Ms Makvala Madzgharashvili, head of ESFTUG regional trade union of Dedofliskaro district, Ms Eter Davitashvili, Ms Natela Popiashvili, Mr Vasil Paatashvili, Ms Manana Zurashvili, Ms Maia Pockhverashvili, Ms Tamila Javashvili, Ms Tamar Aladashvili, Ms Mzia Ivanidze, Ms Marina Natroshvili and Ms Matina Khichenko. All these persons refused to follow the director's request to join the PES.
- 639.** On 16 April 2008, the ESFTUG sent an official letter to the Office of the Public Prosecutor denouncing interference in its activities and referring to a number of illegal financial operations by the PES. According to the complaint, the Office of Public Prosecutor never replied.
- 640.** The complainant also alleges that the PES has tried to discredit the ESFTUG through mass media. In particular, according to the GTUC, in an interview published in a daily newspaper, *Alia*, on 19 July 2008, a founder of the PES confirmed that the goal of the PES is to "cut off" the members of the ESFTUG. Reference to allegedly "unlawful" activities of the ESFTUG was also made in the article that appeared in the 17 March 2009 issue of *The Resonance* newspaper. Furthermore, on 18 March 2009, the Georgian Public Broadcasting also reported on a conflict between the School Directors' Association and the ESFTUG. The ESFTUG representatives were not invited to participate in the TV programme along with the Executive Director of the School Directors' Association, the Director of the Centre of National Plans of Teaching and Evaluation of the Ministry of Education and Science and the director of Tbilisi Public School No. 24.
- 641.** Furthermore, the complainant indicates that on 10 March 2009, a meeting of almost all school directors across the country was held. The PES President was present at that meeting. The meeting called for a protest action against the ESFTUG and, for that purpose, school directors were ordered to bring teachers together to act against the ESFTUG President. On 17 March 2009, the protest action was organized by the Executive Director of the School Directors' Association and the PES President in front of the ESFTUG office. On 26 March 2009, another meeting of school directors was held and another call was

made to persuade teachers to leave the ESFTUG. The meeting was attended by the chairperson of the public schools' accreditation department of the Ministry of Education and Science, the Director of the Centre of National Plans of Teaching and Evaluation of the Ministry of Education and Science and an associate professor of Ilia Chavchacadze State University. All above mentioned persons stated that directors of public schools were not obliged to transfer membership dues to the ESFTUG account. Based on this disinformation, directors of Tbilisi Public Schools Nos 115, 127 and 160 stopped transferring membership dues to the ESFTUG account.

- 642.** The complainant concludes by stressing that the Government favours the PES and ignores and disadvantages the ESFTUG. Despite several attempts to dialogue with the Ministry of Education and Science, and despite the Court of Appeals' decision of 27 February 2008 requiring the Ministry to commit to social dialogue, the Ministry did not initiate a real discussion on the negotiation of a sectoral agreement with the ESFTUG. The GTUC considers that all of the abovementioned facts prove that the Government interferes in the ESFTUG activities.

B. The Government's reply

- 643.** In its communication dated 20 November 2009, the Government explains that the PES is a professional union of people employed in the education sector established pursuant to the Georgian Civil Code. According to the Government, none of the founders of the PES are representatives of a training centre or high officials of the Ministry of Education and Science. The Government indicates that the director of Tbilisi Public School No. 122 was one of the PES founders and refers to his constitutional right to join any kind of union or association.
- 644.** The Government points out that national legislation does not restrict the existence of membership-based non-governmental organizations. The PES concluded contracts with teachers and schools and received membership fees pursuant to these agreements.
- 645.** With regard to the Senaki nursery school, the Government indicates that this case was investigated by the Office of the Public Prosecutor upon request of the ESFTUG, but none of its accusations could be proven. All persons who wished to join the ESFTUG actually did so.
- 646.** With regard to the GTUC statement that the PES used administrative resources to force employees to join the PES, the Government states that there is no evidence to prove that fact. The PES organized several meetings in the regions of Georgia (including Bolsini) to present its programme, goals and activities to people.
- 647.** With regard to the GTUC claim that the Ministry of Education of the Autonomous Republic of Adjara assisted the PES when it placed the information about the PES on its official web site, the Government indicates the ESFTUG announcements were also placed on various official web sites.
- 648.** The Government also denies that the ESFTUG was discredited by one of the founders of the PES when he gave an interview to the daily newspaper *Alia* and states that the PES is ready to provide a translation of the article to prove the groundlessness of this accusation.
- 649.** The Government explains that the PES organizes a number of trainings for teachers aimed at preparing them for the certification process. All these training programmes are designed in accordance with teachers' demands as one of the main components of the ongoing secondary education reform in Georgia. These training programmes are not compulsory and each person can decide whether to participate or not.

650. The Government states that the existence of professional unions in the education sector makes this field more competitive. Moreover, as employees have the right to be members of several unions at the same time, it therefore cannot be claimed that the Government discriminates the ESFTUG or interferes in its activities.

C. The Committee's conclusions

651. *The Committee notes that, in the present case, the complainant trade union – the Georgian Trade Unions Confederation (GTUC) – alleges interference in the activities of the Educators & Scientists Free Trade Union of Georgia (ESFTUG), its member organization, as well as dismissals of trade union members.*

652. *The Committee notes that the complainant further alleges that discrediting information had been spread about the ESFTUG in educational establishments and, through mass media, to the public in general, resulting in membership loss. Furthermore, the GTUC alleges that the relevant authorities in the education sector, including directors of educational establishments, promote membership in and the activities of the PES at the expense of the ESFTUG. The Committee notes in this respect that according to the complainant, the PES was not established as a trade union, but rather as a non-governmental and non-commercial legal entity in the field of education. It is involved in providing certification training to teachers recommended by the Ministry of Education and Science in the framework of the ongoing education reform. The Committee notes the Government's explanation that the PES is a professional union of people employed in the education sector established pursuant to the Georgian Civil Code. The Government also indicates that employees have the right to be members of several unions at the same time and that those who wish to join the ESFTUG can do so. In the light of the above, it is not clear to the Committee whether the PES is a workers' organization in the sense of Article 10 of Convention No. 87, i.e. an organization of workers established for furthering and defending the interests of workers. It requests the Government to provide further information on the status of this organization, so as to allow the Committee to make an assessment in this regard. The Committee recalls, however, that the existence of an organization which provides services or advantages to workers in the specific sector or area should not be used to encroach upon the activities of existing trade union organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 313].*

653. *The Committee notes that the Government refutes the allegation that the PES enjoys favourable treatment or that the ESFTUG was being discredited. While the Committee cannot determine whether any favoured treatment was provided to the PES or whether discrediting information has caused a decrease in the ESFTUG membership, it notes the allegations, which suggest the following violations of freedom of association rights: denial of access to the workplace of trade union members, refusal to transfer trade union dues to the ESFTUG account, dismissal of the ESFTUG members and refusal of the Government to negotiate a sectoral agreement with the ESFTUG. The Committee regrets that no information has been provided by the Government in respect of these allegations, which are detailed below. The Committee draws the Government's attention to the importance of formulating detailed replies to the allegations brought by complainant organizations, so as to allow the Committee to undertake an objective examination. It expects that the Government will be more cooperative in the future.*

654. *The Committee notes that the GTUC alleges that, on 8 February 2008, the director of Tbilisi Public School No. 10 denied access to the school territory to the ESFTUG representatives, who wished to participate in the PES organized meeting with the ESFTUG members of that school. The Committee considers that, when a meeting with trade union members is held, their union representatives should be granted access to the workplace to*

participate in such a meeting so as to enable them to carry out their representation function [see **Digest**, op. cit., para. 1104]. The Committee expects the Government to ensure respect for this principle.

- 655.** The Committee further notes several alleged instances of non-transfer of trade union dues to the ESFTUG account despite written requests by the ESFTUG members. Allegedly, when in April 2008 employees of the Senaki nursery made written requests to the head of the Senaki educational resource centre to transfer their membership dues to the ESFTUG, their request was ignored and their membership fees continued to be transferred to the PES account. In this respect, the Committee notes that while in its reply the Government does not refer to the issue of check-off facilities specifically, it indicates that the Public Prosecutor has carried out an investigation at the Senaki nursery school at the request of the ESFTUG and found that the accusations could not be proven and that all persons who wished to join the ESFTUG did so. The complainant further alleges that, on 12 July 2008, nine teachers of a Nakolakevi public school requested the school director to transfer their membership dues to the ESFTUG account; however, July and August dues were allegedly transferred to the PES. Furthermore, the GTUC alleges that the check-off facility previously enjoyed by the ESFTUG at Tbilisi Public Schools Nos 115, 127 and 160 has been discontinued. The Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest**, op. cit., para. 475]. Furthermore, workers should be ensured the right to choose freely the organization to which they wish to contribute for the defence of their occupational interests. It requests the Government to ensure that the check-off facilities at the abovementioned establishments are re-established, without delay, if they have not yet been, and to ensure that any remaining arrears are paid to the ESFTUG. The Committee requests the Government to keep it informed in this respect.
- 656.** The Committee also notes the allegation of dismissal of the following eleven ESFTUG members: Ms Makvala Madzgharashvili, head of ESFTUG regional trade union of Dedoplistskaro district, Ms Eter Davitashvili, Ms Natela Popiashvili, Mr Vasil Paatashvili, Ms Manana Zurashvili, Ms Maia Pockhverashvili, Ms Tamila Javashvili, Ms Tamar Aladshvili, Ms Mzia Ivanidze, Ms Marina Natroshvili and Ms Matina Khichenko. According to the complainant, they were dismissed by the director of Public School No. 1 of Dedoplistskaro district pursuant to section 37(d) of the Labour Code, following their refusal to become members of the PES, as requested by the school director. The Committee, 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], requests the Government to conduct an independent inquiry into this allegation and, if it is found that these teachers were dismissed on account of their ESFTUG affiliation, to take the necessary measures to reinstate them without loss of pay. If reinstatement is not possible, for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the trade union leader and members concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-union dismissal. It requests the Government to keep it informed in this respect.
- 657.** The Committee further recalls that, in an earlier case concerning Georgia, it has had the occasion to comment upon sections 37(d) and 38(3) of the Labour Code and expressed its concern that the current legal framework in the country may well be insufficient for ensuring adequate protection against anti-union discrimination [see 356th Report, Case No. 2663, para. 762]. As in this previous case, the Committee requests the Government to take the necessary measures, without delay, in full consultation with the social partners concerned, to amend the Labour Code so as to ensure specific protection against anti-

union discrimination, including anti-union dismissals, and to provide for sufficiently dissuasive sanctions against such acts. It requests the Government to keep it informed of the measures taken in this respect.

658. *The Committee welcomes the information from the examination of the previous case concerning Georgia, with regard to the establishment of the National Social Dialogue Commission and the instruction issued by the Prime Minister for issues concerning anti-union discrimination to be investigated and discussed therein. The Committee requests the Government to keep it informed of all developments in this regard.*

659. *With regard to the alleged refusal by the Government to negotiate a sectoral agreement with the ESFTUG, the Committee draws the Government's attention to Article 4 of Convention No. 98, according to which measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee requests the Government to indicate the measures taken or envisaged to promote collective bargaining in the education sector and to inform it as to whether any collective agreement has since been signed in the education sector and whether the ESFTUG was a party to such an agreement or participated in the negotiation.*

The Committee's recommendations

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

- (a) The Committee requests the Government to ensure that the check-off facilities at the Senaki nursery, Nakolakevi public school and Tbilisi Public Schools Nos 115, 127 and 160 are re-established, without delay, if they have not yet been, and to ensure that any remaining arrears are paid to the ESFTUG. The Committee requests the Government to keep it informed in this respect.*
- (b) The Committee requests the Government to conduct an independent inquiry into the allegation of dismissal of eleven workers from Public School No. 1 of Dedoplistskaro district and, if it is found that these teachers were dismissed on account of their ESFUG affiliation, to take the necessary measures to reinstate them without loss of pay. If reinstatement is not possible, for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the trade union leader and members concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-union dismissal. It requests the Government to keep it informed in this respect.*
- (c) The Committee requests the Government to take the necessary measures, without delay, in full consultation with the social partners concerned, to amend the Labour Code so as to ensure specific protection against anti-union discrimination, including anti-union dismissals, and to provide for sufficiently dissuasive sanctions against such acts. It requests the Government to keep it informed of the measures taken in this respect, as well as in relation to any progress made in the discussions to be placed on the agenda in the National Social Dialogue Commission.*

- (d) *The Committee requests the Government to indicate the measures taken or envisaged to promote collective bargaining in the education sector and to inform it as to whether any collective agreement has since been signed in the education sector and whether the ESFTUG was a party to such an agreement or participated in the negotiation.*
- (e) *The Committee requests the Government to provide further information on the status of the PES so as to allow it to make an assessment of its situation.*

CASE NO. 2361

INTERIM REPORT

Complaints against the Government of Guatemala presented by

- **the Union of Workers of the Chinautla Municipal Authority (SITRAMUNICH)**
- **the National Federation of Trade Unions of State Employees of Guatemala (FENASTEG)**
- **the Union of Workers of the Directorate General for Migration (STDGM) and**
- **the Union of Workers of the National Civil Service Office (SONSEC)**

Allegations: Refusal of the Mayor of Chinautla to negotiate a collective agreement and dismissal of 14 union members and a union leader; reorganization of sections of the Ministry of Education with the possible elimination of posts with the aim of destroying the union that operates in that Ministry; measures taken by the Directorate General for Migration to dismiss union leader Mr Jaime Roberto Reyes Gonda without court authorization; dismissal of 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material as a result of a reorganization ordered by the Minister of Education and action taken to dismiss all members of the union’s executive committee

- 661.** The Committee last examined this case at its meeting of March 2009 and submitted an interim report to the Governing Body [see 353rd Report, paras 1011–1027 approved by the Governing Body at its 304th Session].
- 662.** The Government sent its partial observations in a communication of 13 November 2009.
- 663.** In the absence of a full reply from the Government, the Committee had to defer the examination of this case on two occasions. Furthermore, at its meeting of March 2010 [see

356th Report, para. 9] the Committee addressed an urgent appeal and drew to the Government's attention that, in accordance with the procedure laid down in paragraph 17 of the 127th Report, 1972, approved by the Governing Body, it would submit to the next meeting a report on the substance of this case, even if the Government's information or observations had not been received on time. To date, the Government has not sent additional information.

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

A. Previous examination of the case

- 665.** In its previous examination of the case, the Committee made the following recommendations [see 353rd Report of the Committee, para. 1027]:

- (a) With regard to the allegations relating to the dismissal of 16 members of the Union of Workers of the "José de Pineda Ibarra" National Centre for Textbooks and Educational Material and the action taken to dismiss all the members of the executive committee in the context of a process of reorganization by the Minister of Education, the Committee, so as to be able to reach its conclusions in full knowledge of the facts, requests the Government to provide information, including figures, indicating whether the dismissal affected only unionized workers or whether the reorganization process and subsequent dismissal also affected other workers of the institution in question. The Committee also requests the Government to send a copy of the court decisions handed down.
- (b) ...
- (c) With regard to the dismissal of 14 trade union members and the union leader, Mr Marlon Vinicio Avalos, from the Chinautla Municipal Authority, the Committee requests the Government to keep it informed concerning the judicial proceedings under way in connection with the six workers mentioned by the Government and concerning the workers who have been effectively reinstated in their posts, and to provide information on the other dismissed workers, including the trade union leader Mr Marlon Vinicio Avalos.
- (d) The Committee requests the Government to take the necessary measures to promote collective bargaining in the Chinautla Municipal Authority and to keep it informed in this respect.
- (e) With regard to the dismissal by the Directorate General for Migration of trade union leaders Mr Pablo Cush and Mr Jaime Roberto Reyes Gonda, the Committee requests the Government to do everything in its power to ensure that Mr Pablo Cush – who according to the Government has been reinstated in his post – receives payment of lost wages and to keep it informed of the outcome of the judicial proceedings relating to the dismissal of trade union leader Mr Jaime Roberto Reyes Gonda. If the law prohibits or prevents the payment of these wages, the Committee considers that it should be modified.
- (f) The Committee requests the Government to send its observations on the latest allegations presented by SITRAMUNICH relating to the dismissal by the Chiquimula Municipal Authority and the pressure placed by the Municipal Authority on the workers, who are not paid until they resign or accept a fixed-term contract, even though because a collective labour dispute is before the judicial authority and in accordance with the court's instructions, acts of reprisal among the parties and the dismissal of workers without the court's authorization are prohibited.

B. The Government's partial reply

- 666.** In its partial reply of 13 November 2009, the Government indicates that it had requested the Protection (*amparo*) and Pre-trial Investigation Chamber of the Supreme Court of

Justice to inform it whether Mr Reyes Gonda or the Directorate General of Migration had taken any action. The Chamber informed it that on 19 May 2005, Mr Reyes Gonda filed an action for *amparo* (protection of constitutional rights) against the Ministry of the Interior, which was refused on 7 May 2009. In the absence of any appeal by Mr Reyes Gonda, the judgement became final on 6 August 2009.

667. As regards the allegations of violation of the exercise of collective bargaining, the Government indicates that it requested information from the judicial power concerning the reasons why the Conciliation Tribunal had not been convened, and was informed that on 4 March 2009, the Labour and Social Security Court of the Chiquimula Department convened the Conciliation Tribunal.

C. The Committee's conclusions

668. *The Committee regrets that, despite the length of time that has passed, the Government has not provided the requested additional information, despite having been requested to do so on many occasions, including by means of an urgent appeal to submit its observations on the case.*
669. *In these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to submit a report on this case without having the Government's information which it had hoped to receive.*
670. *The Committee reminds the Government that the purpose of any proceeding opened by the International Labour Organization to examine allegations of violations of freedom of association is to ensure respect for that freedom, both de jure and de facto. The Committee is convinced that, as the procedure protects governments against unfounded accusations, the latter should recognize, in their turn, the importance of submitting detailed replies on the substance of the alleged facts, with a view to objective examination.*
671. *With regard to paragraph (a) of the recommendations concerning the allegations relating to the dismissal of 16 members of the Union of Workers of the "José de Pineda Ibarra" National Centre for Textbooks and Educational Material and the action taken to dismiss all members of the executive committee in the context of a process of reorganization by the Minister of Education, the Committee had requested the Government to provide information, including figures, indicating whether the dismissal affected only unionized workers or whether the reorganization process and subsequent dismissal also affected other workers of the institution in question and that it should send a copy of the decision of the Constitutional Court which refused the appeal for amparo filed by the executive committee. Regretting that the Government had not sent its observations in this respect, the Committee urges the Government to do so.*
672. *As regards paragraphs (c) and (d) of the recommendations concerning the collective dispute of an economic and social nature in the Chinautla Municipal Authority, which was the subject of a complaint filed with the judicial authority, and in the course of which 14 trade union members (who according to the Government are still working) and the union leader, Mr Marlon Vinicio Avalos, were dismissed, the Committee had noted in a previous examination of the case that the judicial authority had passed judgement with regard to six of the dismissals. The Committee had requested the Government to indicate whether the six workers in respect of which a decision had been reached had been effectively reinstated in their posts, and to provide information on the other dismissed workers, including the trade union leader Mr Marlon Vinicio Avalos. The Committee regrets that despite the length of time that had passed since the alleged facts, the Committee has not received specific information whether or not the case was still pending*

or had been settled. In these circumstances, the Committee urges the Government to inform it without delay concerning the situation in the collective dispute in the Chinautla Municipal Authority, whether collective bargaining has taken place and whether the six workers with respect to whom a decision had been reached have been reinstated; and to send information on the situation of the other dismissed workers, including Mr Marlon Vinicio Avalos.

- 673.** As regards paragraph (e) of the recommendations, concerning the dismissal by the Directorate General for Migration of the trade union leader Mr Jaime Roberto Reyes Gonda, the Committee recalls that it had requested the Government to keep it informed of the outcome of the judicial proceedings relating to the dismissal of that trade union leader. In this respect, the Committee notes that the Government indicates that the Protection (amparo) and Pre-trial Investigation Chamber of the Supreme Court of Justice informed it that on 19 May 2005, Mr Reyes Gonda filed an action for amparo against the Ministry of the Interior, which was refused on 7 May 2009, and that the decision became final on 6 August 2009 because Mr Reyes Gonda did not appeal against it.
- 674.** As regards paragraph (f) of the recommendations, the Committee recalls that it had requested the Government to send its observations on the latest allegations presented by the Union of Workers of the Chinautla Municipal Authority (SITRAMUNICH), according to which: (1) the Chiquimula Municipal Authority dismissed several workers despite the existence of two judicial proceedings on a “collective dispute of a social and economic nature” (convocation of collective bargaining) before the Labour, Social Security and Family Court of First Instance, Chiquimula Department, in which the judge enjoined the parties to refrain from taking reprisals against the other party and indicated to the municipal authority that from that moment, any termination of a contract of employment must be authorized by the judge; and (2) the municipal authority had also initiated judicial proceedings requesting termination of the contracts of employment of several workers, in particular members of the union and made payment of the workers’ wages conditional on their giving up their membership or signing a fixed-term contract, which caused many workers to resign their trade union membership. The Committee notes that the Government indicates that on 4 March 2009, the Labour and Social Security Court of the Chiquimula Department convened the Conciliation Tribunal.
- 675.** In this regard, the Committee requests the Government to ensure that, while the Conciliation Tribunal is sitting, no further dismissals or terminations of workers’ contracts occur in the Chiquimula Municipal Authority and that payment of wages is not made conditional on resignation by the workers or signing of a fixed-term contract. The Committee also requests the Government to take the measures necessary to reinstate those workers who were dismissed without the authorization of the judge, in defiance of a judicial decision on a “convocation to collective bargaining” which prohibits any termination of contracts without judicial authorization, with payment of the wages due. The Committee requests the Government to keep it informed in this respect and to inform it of the decision of the Conciliation Tribunal.

The Committee’s recommendations

- 676.** In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:
- (a) *With regard to the allegations relating to the dismissal of 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material and the action taken to dismiss all the members of the executive committee in the context of a process of*

reorganization by the Minister of Education, the Committee urges the Government once again to provide information, including figures, indicating whether the dismissal affected only unionized workers or whether the reorganization process and subsequent dismissal also affected other workers of the institution in question. The Committee also requests the Government to send a copy of the decision of the Constitutional Court which refused the appeal for amparo filed by the executive committee of the union.

- (b) *With regard to the collective dispute of an economic and social nature in the Chinautla Municipal Authority, which was the subject of a complaint filed with the judicial authority, and in the course of which 14 trade union members (who according to the Government are still working) and the union leader, Mr Marlon Vinicio Avalos, were dismissed, the Committee urges the Government to inform it without delay concerning the situation in the collective dispute in Chinautla Municipality, whether collective bargaining has taken place and whether the six workers with respect to whom a decision had been reached have been reinstated, and to send information on the situation of the other dismissed workers, including Mr Marlon Vinicio Avalos.*
- (c) *With regard to the allegations of SITRAMUNICH, according to which the Chiquimula Municipal Authority dismissed or requested the termination of the contracts of employment of several workers (in particular members of the union) and made the payment of wages conditional on resignation of the workers, despite the existence of two judicial proceedings on a “collective dispute of a social and economic nature” (convocation of collective bargaining), whereby any termination of a contract of employment must be authorized by the judge, and noting the designation of a Conciliation Tribunal, the Committee requests the Government to ensure that, while the Conciliation Tribunal is sitting, no further dismissals or terminations of workers’ contracts occur in the Chiquimula Municipal Authority and that payment of wages is not made conditional on resignation by the workers or signing of a fixed-term contract. The Committee also requests the Government to take the measures necessary to reinstate those workers who were dismissed without the authorization of the judge, in defiance of a judicial decision on a “convocation to collective bargaining” which prohibits any termination of contracts without judicial authorization, with payment of the wages due. The Committee requests the Government to keep it informed in this respect and to inform it of the decision of the Conciliation Tribunal.*

CASE No. 2508

INTERIM REPORT

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

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

Allegations: The complainants allege that the authorities and the employer committed several and continued acts of repression against the local trade union at the bus company, including: harassment of trade unionists and activists; violent attacks on the union founding meeting; the violent disbanding, on two occasions, of the union general assembly; arrest and detention of large numbers of trade union members and leaders under false pretences (disturbing public order, illegal trade union activities); the mass arrest and detention of workers (more than 1,000) for planning a one-day strike. The complainant organizations also allege the repeated arrest and detention of Mansour Osanloo, Chairperson of the Union Executive Committee, as well as his ill-treatment in prison, and the arrests of several other trade union leaders and members

677. The Committee last examined this case on its merits at its June 2009 session, where it issued an interim report approved by the Governing Body at its 305th Session [see 354th Report, paras 885–927].
678. The Government transmitted partial observations in communications dated 22 and 26 May 2010.
679. The Islamic Republic of Iran has not ratified either 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

680. In its previous examination of the case, the Committee made the following recommendations [see 354th Report, para. 927]:
- (a) Noting with interest that the proposed amendments to article 131 of the Labour Law would appear to permit trade union multiplicity, including at the workplace and national levels, the Committee requests the Government to keep it informed of the progress made in adopting these amendments and firmly expects that the legislation will be brought into conformity with freedom of association principles in the very near future.
 - (b) The Committee once again urges the Government to deploy all efforts as a matter of urgency so as to allow for trade union pluralism, including through the de facto recognition of the SVATH union pending the introduction of the legislative reforms.
 - (c) The Committee requests the Government to transmit a detailed report of the findings of the State General Inspection Organization (SGIO) and the Headquarters for the Protection of Human Rights into the allegations of workplace harassment during the period of the union's founding, from March to June 2005, as soon as they are produced. It once again requests the Government, in the light of the information revealed by these investigations, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities.

- (d) The Committee once again urges the Government to take the necessary measures to ensure that the 13 trade unionists found to have been wrongfully dismissed by the Tehran Dispute Settlement Board – and all other trade unionists who have not yet been reinstated and were found to have been the subject of anti-union discrimination – are fully reinstated in their positions without loss of pay. It further requests to be kept informed of the case concerning Mr Madadi, which was referred by the State Administrative Tribunal to a parallel dispute settlement board.
- (e) The Committee once again requests the Government to immediately institute a full and independent judicial inquiry into the attacks on union meetings in May and June 2005, in order to clarify the facts, determine responsibilities, prosecute and punish those responsible and thus prevent the repetition of such acts. The Committee requests the Government to keep it informed of developments in this regard, including a copy of the court's judgement in the action initiated by the union concerning these attacks once it is handed down.
- (f) Recalling that it had previously concluded that Mr Osanloo's detention from 22 December 2005 to 9 August 2006 and the treatment received during this period constitute not only interference with his trade union activities, but a grave violation of his civil liberties as well, and observing the importance which the Government itself places on the rapid institution of independent investigations, the Committee requests the Government to ensure that the necessary independent investigation is carried out in this regard as a matter of urgency.
- (g) The Committee, while noting the efforts which the Government states it is making for Mr Osanloo's release, must once again urge the Government to take the necessary measures to ensure his immediate release and the dropping of any remaining charges. As for the allegations concerning the lack of proper medical attention, the Committee requests the Government to provide full particulars as to the current state of Mr Osanloo's health.
- (h) The Committee once again urges the Government to take the necessary measures to ensure Mr Madadi's immediate release and to institute an independent investigation into the allegations of ill-treatment to which he had been subjected while in detention.
- (i) The Committee requests the Government to inform it of the progress made concerning the finalization of the draft code of practice on the management and control of trade union and labour-related protests and its adoption and to provide full particulars on the matters referred to therein, including the rules, regulations, and criteria the various ministries are apparently required to formulate and introduce that govern the holding of demonstrations and assemblies. The Committee urges the Government to receive technical assistance from the ILO to finalize the draft code and in the formulation of the requisite rules and regulations referred to therein, so as to ensure that workers' organizations may carry out peaceful demonstrations without fear of arrest, detention or indictment by the authorities for engaging in such activity, in accordance with the principles of freedom of association.
- (j) The Committee once again urges the Government to ensure that the charges against Ata Babakhani, Naser Gholami, Abdolreza Tarazi, Golamreza Golam Hosseini, Gholamreza Mirzaee, Ali Zad Hosein, Hasan Karimi, Seyed Davoud Razavi, Yaghob Salimi, Ebrahim Noroozi Gohari, Hodayoun Jaber, Saeed Torabian, Abbas Najand Koodaki and Hayat Gheibi are immediately dropped and that, if any of them are still being detained, that they be immediately released. Furthermore the Committee once again urges the Government to provide any court judgements rendered in respect of these workers.
- (k) The Committee welcomes the Government's acceptance of a mission and expects that this mission will be able to visit the country shortly and that it will be in a position to assist the Government in achieving significant results with respect to all the serious outstanding matters and, in particular, as regards the draft labour legislation and principles relating to trade union demonstrations referred to by the Government, as well as in relation to the trade unionists remaining in detention.
- (l) The Committee calls the Governing Body's special attention to the grave situation relating to the trade union climate in the Islamic Republic of Iran.

B. The Government's partial reply

- 681.** In its communication of 22 May 2010, the Government state that, in order to enhance social dialogue and establish grounds for the implementation of fundamental ILO Conventions, the Head of the Judiciary has accepted the request of the Minister of Labour and Social Affairs to take the necessary measures to grant a pardon to Mansour Osanloo. The Government adds that this agreement with the Judiciary constitutes part of a broader effort to address the issues raised in the cases concerning the Islamic Republic of Iran before the Committee and develop sound industrial relations.
- 682.** In its communication of 26 May 2010, the Government states that the Workers Commission of the National Security Council had approved the code of practice for managing and redeveloping trade union demonstrations. The said code stipulates that the Security Council of each province or city shall dispose of instances of disorder, illegal gatherings and unrest on a case-by-case basis, and provides for the deployment of disciplinary forces for security purposes at permitted gatherings and demonstrations of workers, and requires workers' and employers' organizations to provide notice of at least 21 days prior to engaging in demonstrations. Finally, the code provides that the relevant authorities, together with the Ministry of Labour and Social Affairs, are ready to exchange experiences and use the training or international institutions in the management of trade union demonstrations.

C. The Committee's conclusions

- 683.** *The Committee recalls that the present case concerns acts of harassment against members of the Tehran Vahed Bus Company (SVATH) union, including: demotions, transfers and suspensions without pay of union members; acts of violence against trade unionists; and numerous instances of the arrest and detention of trade union leaders and members.*
- 684.** *With respect to Mansour Osanloo, the President of the SVATH, the Committee welcomes the efforts by the Minister of Labour and Social Affairs to obtain the granting of a pardon for Mr Osanloo. Noting further that the Head of the Judiciary has accepted the Minister's request for such a pardon, the Committee expects that these developments will lead to Mr Osanloo's imminent release from prison. Recalling, moreover, that it had previously concluded that Mr Osanloo's detention from 22 December 2005 to 9 August 2006 and the treatment received during this period constitute not only interference with his trade union activities, but an extremely grave violation of his civil liberties as well, the Committee once again expects the Government to carry out the necessary independent investigation in this regard as a matter of urgency. Furthermore, and recalling the allegations concerning the lack of proper medical attention, the Committee once again expects the Government to provide full particulars as to the current state of Mr Osanloo's health.*
- 685.** *As regards Mr Madadi, Vice-President of the SVATH, the Committee deeply regrets that no information has been provided as to the measures taken to ensure his immediate release. The Committee therefore requests the Government to indicate whether Mr Madadi is still in prison and, if so, to take the necessary steps to ensure his immediate release. It further requests the Government to institute without delay an independent investigation into the allegations of ill-treatment to which he had been subjected while in detention. More generally, the Committee requests the Government to take the necessary steps to ensure the safety of both Mr Osanloo and Mr Madadi and to keep it informed of the steps taken in this regard.*
- 686.** *The Committee deeply regrets that no information has been provided with respect to the charges brought against a number of other trade union activists, and once again urges the Government to ensure that the charges against Ata Babakhani, Naser Gholami, Abdolreza*

Tarazi, Golamreza Golam Hosseini, Gholamreza Mirzaee, Ali Zad Hosein, Hasan Karimi, Seyed Davoud Razavi, Yaghob Salimi, Ebrahim Noroozi Gohari, Homayoun Jaber, Saeed Torabian, Abbas Najand Koodaki and Hayat Gheibi are immediately dropped and that, if any of them are still being detained, that they be immediately released. Furthermore, the Committee once again urges the Government to provide any court judgements rendered in respect of these workers.

- 687.** *In its previous comments, the Committee had noted the proposed amendments to article 131 of the Labour Law which appeared to permit trade union multiplicity, including at the workplace and national levels, and requested the Government to keep it informed of the progress made in adopting these amendments. The Committee deeply regrets that the Government has provided no information on the progress made in this regard. It firmly expects that the legislation will be brought into conformity with freedom of association principles in the very near future and urges the Government to provide detailed information in this respect. The Committee further once again urges the Government to deploy all efforts as a matter of urgency so as to allow for trade union pluralism, including through the de facto recognition of the SVATH union pending the introduction of the legislative reforms.*
- 688.** *As concerns its previous recommendations concerning the draft code of practice on the management and control of trade union and labour-related protests, the Committee takes note of the code of practice for managing and redeveloping trade union demonstrations transmitted by the Government. The Committee observes that the said code stipulates that the Security Council of each province or city shall dispose of instances of disorder, illegal gatherings and unrest on a case-by-case basis, and provides for the deployment of disciplinary forces for security purposes at permitted gatherings and demonstrations of workers.*
- 689.** *Observing that the code stipulates that the relevant authorities and the Ministry of Labour and Social Affairs are ready to exchange experiences and use the training of international institutions in the management of trade union demonstrations, the Committee calls on the Government as a matter of urgency to fully recognize the right of public protest and expression as an integral corollary of freedom of association. The Committee expresses the firm expectation that the Government will, in the very near future, avail itself of the technical assistance of the Office to ensure that the principles in the code of practice for managing and redeveloping trade union demonstrations, as well as the rules and regulations governing the holding of demonstrations and assemblies, guarantee freedom of association rights, including the right of workers' organizations to carry out peaceful demonstrations without fear of arrest, detention or indictment by the authorities for engaging in such activity.*
- 690.** *The Committee further recalls its previous recommendations, as summarized below, and urges the Government to provide full information on their implementation:*
- *The Committee requests the Government to transmit a detailed report of the findings of the State General Inspection Organization (SGIO) and the Headquarters for the Protection of Human Rights into the allegations of workplace harassment during the period of the union's founding, from March to June 2005, as soon as they are produced. It once again requests the Government, in the light of the information revealed by these investigations, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities.*
 - *The Committee once again urges the Government to take the necessary measures to ensure that the 13 trade unionists found to have been wrongfully dismissed by the*

Tehran Dispute Settlement Board – and all other trade unionists who have not yet been reinstated and were found to have been the subject of anti-union discrimination – are fully reinstated in their positions without loss of pay.

- *The Committee once again requests the Government to immediately institute a full and independent judicial inquiry into the attacks on union meetings in May and June 2005, in order to clarify the facts, determine responsibilities, prosecute and punish those responsible and thus prevent the repetition of such acts. The Committee requests the Government to keep it informed of developments in this regard, as well as to provide a copy of the court's judgement in the action initiated by the union concerning these attacks once it is handed down.*

691. *Finally the Committee, noting that three years have elapsed since its first examination of this case, and noting furthermore the seriousness of the matters contained therein – in particular the allegations of grave violations of civil liberties against numerous individuals – calls the Governing Body's special attention to the extremely grave situation relating to the trade union climate in the Islamic Republic of Iran.*

The Committee's recommendations

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

- (a) *The Committee welcomes the efforts by the Minister of Labour and Social Affairs to obtain a pardon for SVATH President Mansour Osanloo and expresses the firm expectation that these developments will lead to Mr Osanloo's imminent release from prison. Recalling, moreover, that it had previously concluded that Mr Osanloo's detention from 22 December 2005 to 9 August 2006 and the treatment received during this period constitute not only interference with his trade union activities, but an extremely grave violation of his civil liberties as well, the Committee once again expects the Government to carry out the necessary independent investigation in this regard as a matter of urgency. Additionally, it once again expects the Government to provide full particulars as to the current state of Mr Osanloo's health.*
- (b) *The Committee requests the Government to indicate whether Mr Madadi is still in prison and, if so, to take the necessary steps to ensure his immediate release. It further requests the Government to institute an independent investigation without delay into the allegations of ill-treatment to which he had been subjected while in detention. More generally, the Committee requests the Government to take the necessary steps to ensure the safety of both Mr Osanloo and Mr Madadi and to keep it informed of the steps taken in this regard.*
- (c) *The Committee once again urges the Government to ensure that the charges against Ata Babakhani, Naser Gholami, Abdolreza Tarazi, Golamreza Golam Hosseini, Gholamreza Mirzaee, Ali Zad Hosein, Hasan Karimi, Seyed Davoud Razavi, Yaghob Salimi, Ebrahim Noroozi Gohari, Homayoun Jaberi, Saeed Torabian, Abbas Najand Koodaki and Hayat Gheibi are immediately dropped and that, if any of them are still being detained, that they be immediately released. Furthermore, the Committee once again urges*

the Government to provide any court judgements rendered in respect of these workers.

- (d) The Committee must firmly insist that the legislation be brought into conformity with freedom of association principles, particularly those concerning trade union multiplicity, in the very near future and urges the Government to provide detailed information in this respect. The Committee further once again urges the Government to deploy all efforts as a matter of urgency so as to allow for trade union pluralism, including through the de facto recognition of the SVATH union pending the introduction of the legislative reforms.*
- (e) The Committee calls on the Government as a matter of urgency to fully recognize the right of public protest and expression as an integral corollary of freedom of association. It expresses the firm expectation that the Government will, in the very near future, avail itself of the technical assistance of the Office to ensure that the principles in the code of practice for managing and redeveloping trade union demonstrations, as well as the rules and regulations governing the holding of demonstrations and assemblies, guarantee freedom of association rights, including the right of workers' organizations to carry out peaceful demonstrations without fear of arrest, detention or indictment by the authorities for engaging in such activity.*
- (f) The Committee requests the Government to transmit a detailed report of the findings of the SGIO and the Headquarters for the Protection of Human Rights into the allegations of workplace harassment during the period of the union's founding, from March to June 2005, as soon as they are produced. It once again requests the Government, in the light of the information revealed by these investigations, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities.*
- (g) The Committee once again urges the Government to take the necessary measures to ensure that the 13 trade unionists found to have been wrongfully dismissed by the Tehran Dispute Settlement Board – and all other trade unionists who have not yet been reinstated and were found to have been the subject of anti-union discrimination – are fully reinstated in their positions without loss of pay.*
- (h) The Committee once again requests the Government to immediately institute a full and independent judicial inquiry into the attacks on union meetings in May and June 2005, in order to clarify the facts, determine responsibilities, prosecute and punish those responsible and thus prevent the repetition of such acts. It further requests the Government to keep it informed of developments in this regard and provide a copy of the court's judgement in the action initiated by the union concerning these attacks once it is handed down.*
- (i) The Committee, noting that three years have elapsed since its first examination of this case, and noting furthermore the seriousness of the*

matters contained therein – in particular the allegations of grave violations of civil liberties against numerous individuals – calls the Governing Body’s special attention to the extremely grave situation relating to the trade union climate in the Islamic Republic of Iran.

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

CASE No. 2567

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

**Complaint against the Government of the Islamic Republic of Iran
presented by
the International Organisation of Employers (IOE)**

Allegations: The complainant organization alleges Government interference in the elections of the Iran Confederation of Employers’ Associations (ICEA), the subsequent dissolution of the ICEA by administrative authority and the official backing of a new and parallel employers’ confederation

- 693.** The Committee last examined this case on its merits at its June 2009 session, where it issued an interim report approved by the Governing Body at its 305th Session [see 354th Report, paras 928–950].
- 694.** The complainant submitted additional information in support of its complaint in a communication dated 4 March 2010.
- 695.** The Government transmitted its observations in a communication dated 21 April 2010.
- 696.** The Islamic Republic of Iran has not ratified either 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

- 697.** In its previous examination of the case, the Committee made the following recommendations [see 354th Report, para. 950]:
- (a) The Committee once again urges the Government to refrain from interfering in the right of employers’ organizations to elect their representatives in full freedom and to take the necessary measures to amend the existing legislation, including the Labour Law and the Council of Ministers’ Rules and Procedures on the Organization, Functions, Scope and Liabilities of Trade Unions, so as to ensure that employers’ and workers’ organizations may fully exercise their right to elect their representatives freely and without interference by the public authorities.

- (b) The Committee expects that the Government will continue to desist from any acts of favouritism and refrain from such acts in the future, and once again calls upon the Government to remedy past discriminatory acts arising out of the favouritism it had demonstrated towards the ICE.
- (c) The Committee once again requests the Government to take measures, as a matter of urgency, to amend the Labour Law so as to ensure not only the freedom of association rights of all workers but also of all employers and, in particular, the right of workers and employers to establish more than one organization, whether at enterprise, sectoral or national level, in a manner consistent with freedom of association and expects that this will be done in a manner that does not prejudice the rights formerly held by the ICEA. It further requests the Government to transmit a copy of any additional amendments proposed in this regard and firmly expects that the legislation will be brought into conformity with freedom of association principles in the very near future.
- (d) Recalling that justice delayed is justice denied, the Committee once again expresses the expectation that the appeal will, as per the ICEA's request, be heard by the Ultimate Appeals Branch of the Administrative Justice Court in the very near future, and that the latter body will take into full consideration all of the Committee's conclusions, including those set out in its previous examination of this case. The Committee once again requests the Government to keep it informed of developments in this regard and to provide a copy of the final judgement once it is handed down.
- (e) The Committee once again urges the Government, pending the final decision of the Administrative Justice Court, to immediately take the necessary measures to register and recognize the ICEA as constituted following its General Assembly of 5 March 2007 and to ensure that it can exercise its activities without hindrance. The Committee further urges the Government to adopt a position of non-interference and neutrality in the exercise of freedom of association employers must have in relation to membership of the ICEA, and to provide no formal or informal preference or favouritism to other organizations. It once again requests the Government to keep it informed of the steps taken in this regard.
- (f) The Committee welcomes the Government's acceptance of a mission and expects that this mission will be able to visit the country shortly and that it will be in a position to assist the Government in achieving significant results with respect to all the serious outstanding matters and, in particular, as regards the draft labour legislation and principles relating to the freedom of association rights of employers' organizations and non-interference.
- (g) The Committee calls the Governing Body's special attention to the grave situation relating to the trade union climate in the Islamic Republic of Iran.

B. The complainant's new allegations

698. In its communication of 4 March 2010, the complainant attaches a translated copy of a decision, issued on 29 November 2009, by Division 86 of the Tehran Public Legal Court of the Justice Administration of the Islamic Republic of Iran. The judgement concerns the appeal filed by the Iranian Confederation of Employers' Associations (ICEA) of the 2 March 2008 decision of the Administrative Justice Court's Appellate Branch, which had ruled that the ICEA had been dissolved by operation of article 42 of its Articles of Association. In the said judgement, the Public Legal Court found that the registration of the Iranian Confederation of Employers (ICE) and assignment of the ICEA's registration number to it by the Ministry of Labour and Social Affairs failed to meet the relevant laws and regulations. It further held, *inter alia*, the status of the ICE and the measures taken for its registration to be null and void.

C. The Government's reply

699. In its communication of 21 April 2010, the Government states that the Ministry of Labour and Social Affairs held a series of fruitful meetings in which the General Secretaries of the two confederations of Iranian employers and their board members, with the participation of all existing employers' associations in the country, were able to constructively address their divergent views as to the establishment of a single employers' confederation and the comprehensive composition of the employers' delegation to the International Labour Conference (ILC), and conclude an agreement respecting these matters. The Government adds that the Minister of Labour and Social Affairs played a pivotal role in the shaping of the agreement signed by the General Secretaries of the ICEA and the ICE. Attached to the Government's reply is a translated version of the agreement concluded between the two employers' confederations. The agreement stipulates that: (1) each of the employers' confederations shall designate three persons for the employers' delegation to the ILC, and the main employer delegate shall be appointed from among these six persons; and (2) the two employers' confederations shall undertake negotiations to reach a common decision with respect to the establishment of a single employers' confederation, with the participation of all existing employers' associations in the country.

D. The Committee's conclusions

700. *The Committee recalls that the present case concerns allegations of Government interference in the elections of the ICEA, the subsequent dissolution of the ICEA by administrative authority and the official backing of a new and parallel employers' confederation (ICE).*

701. *The Committee recalls that in its previous examination of the case it had referred to the 2 March 2008 decision of the Administrative Justice Court's Appellate Branch, which ruled that the ICEA had been dissolved by operation of article 42 of its Articles of Association. Noting with deep regret that, at that time, the Administrative Justice Court was still considering the ICEA's appeal of that decision, the Committee expressed the expectation that the appeal would, as per the ICEA's request, be heard by the Ultimate Appeals Branch of the Administrative Justice Court in the very near future, and that the latter body would take into full consideration all of the Committee's conclusions relating to this case, including those set out in its previous examination [see 350th Report, paras 1153–1165].*

702. *In this regard, the Committee welcomes the 29 November 2009 decision of Division 86 of the Tehran Public Legal Court of the Justice Administration of the Islamic Republic of Iran, in relation to the appeal filed by the ICEA. The Committee notes that in its judgement, the Public Legal Court found that both the registration of the ICE and the assignment of the ICEA's registration number to it by the Ministry of Labour and Social Affairs had failed to meet the relevant laws and regulations. It also held, inter alia, the status of the ICE and the measures taken for its registration to be null and void.*

703. *The Committee further notes that the Ministry of Labour and Social Affairs held consultations with the ICEA and the ICE concerning the delegation to the ILC, which the Government claims gave rise to an agreement stipulating that the two confederations are to nominate three persons each to the employers' delegation to the ILC and that they will choose among them who should be the titular representative. It further notes that the agreement is said to include an undertaking on the part of the ICEA and ICE to negotiate to reach a common decision on the establishment of a single employers' confederation with the participation of all existing employers' associations in the country.*

- 704.** *The Committee wishes to recall that the unification into a single employer's organization must be the result of the free choice of the members concerned and should not be the consequence of any eventual pressure or interference by the public authorities within the framework of a monopolistic system of industrial relations. It recalls in this regard its previous recommendations both as concerns the importance of the Government adopting a position of non-interference and neutrality in the exercise of freedom of association that employers must have in relation to membership of the ICEA and as regards the need to amend the Labour Law so as to ensure the right of all workers and employers to establish more than one organization at enterprise, sectoral and national level. The Committee once again calls on the Government as a matter of urgency to amend the Labour Law in this regard, and to do so in a manner that does not prejudice the ICEA or the freedom of association rights of its members or prospective members.*
- 705.** *In light of the public ruling of the Tehran Public Court, and given that three years have passed since the first examination of this case, the Committee expresses its expectation that the Government will immediately register and recognize the ICEA as constituted following its General Assembly of 5 March 2007 and ensure that it can exercise its activities without hindrance, until such time as its membership, in accordance with its by-laws, holds elections or makes other decisions in relation to its structure. The Committee expects the Government to adopt a position of non-interference and neutrality in the exercise of freedom of association of employers and, in this particular case, the ICEA's right to exist free of prejudice and acts of favouritism. The Committee further expects the Government to remedy any remaining effects of past discriminatory acts arising out of the favouritism it had demonstrated towards the ICE.*
- 706.** *Finally, the Committee urges the Government to amend the Labour Law and the Council of Ministers' Rules and Procedures on the Organization, Functions, Scope and Liabilities of Trade Unions, so as to ensure that employers and workers are able to freely choose the organization they wish to represent them and so that these organizations may fully exercise their right to elect their representatives freely and without interference by the public authorities. The Committee requests the Government to transmit a copy of any additional amendments proposed to the legislation and firmly expects that it will be brought into conformity with freedom of association principles in the near future.*
- 707.** *Recalling the Government's previous acceptance of a mission relating to outstanding freedom of association cases, the Committee expects that this mission will be able to visit the country shortly and have full access to all the concerned parties, so as to enable a full investigation into and dialogue on all freedom of association matters in the country, including the aspects raised in the present case.*

The Committee's recommendations

- 708.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee once again calls on the Government as a matter of urgency to amend the Labour Law in order to ensure protection against Government interference in the exercise of freedom of association by employers, and as regards the need to ensure the right of all workers and employers to establish more than one organization at the enterprise, sectoral and national levels, and to do so in a manner that does not prejudice the ICEA or the freedom of association rights of its members or prospective members.*

- (b) *In light of the public ruling of the Tehran Public Court, and given that three years have passed since the first examination of this case, the Committee expresses its expectation that the Government will immediately register and recognize the ICEA as constituted following its General Assembly of 5 March 2007 and ensure that it can exercise its activities without hindrance, until such time as its membership, in accordance with its by-laws, holds elections or makes other decisions in relation to its structure. The Committee expects the Government to adopt a position of non-interference and neutrality in the exercise of freedom of association of employers and, in this particular case, the ICEA's right to exist free of prejudice and acts of favouritism. The Committee further expects the Government to remedy any remaining effects of past discriminatory acts arising out of the favouritism it had demonstrated towards the ICE.*
- (c) *More generally, the Committee urges the Government to amend the Labour Law and the Council of Ministers' Rules and Procedures on the Organization, Functions, Scope and Liabilities of Trade Unions, so as to ensure that employers and workers are able to freely choose the organization they wish to represent them and so that these organizations may fully exercise their right to elect their representatives freely and without interference by the public authorities. It requests the Government to transmit a copy of any additional amendments proposed in this regard and firmly expects that the legislation will be brought into conformity with freedom of association principles in the very near future.*
- (d) *Recalling the Government's previous acceptance of a mission relating to outstanding freedom of association cases, the Committee expects that this mission will be able to visit the country shortly and have full access to all the concerned parties, so as to enable a full investigation into and dialogue on all freedom of association matters in the country including the aspects raised in the present case.*
- (e) *The Committee calls the Governing Body's attention to the extreme seriousness and urgent nature of this case.*

CASES NOS 2177 AND 2183

INTERIM REPORT

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

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

Allegations: The complainants allege that the upcoming reform of the public service legislation, developed without proper consultation of workers' organizations, further aggravates the existing public service legislation

and maintains the restrictions on the basic trade union rights of public employees, without adequate compensation

- 709.** The Committee examined these cases at its November 2002, June 2003, March 2006, June 2008 and June 2009 meetings, where it presented interim reports, approved by the Governing Body at its 285th, 287th, 295th, 302nd and 305th Sessions [see 329th Report, paras 567–652; 331st Report, paras 516–558; 340th Report, paras 925–999; 350th Report, paras 1167–1221; and 354th Report, paras 951–992].
- 710.** The Japanese Trade Union Confederation (JTUC–RENGO) (Case No. 2177) submitted additional information in a communication dated 13 January 2010.
- 711.** The Government submitted its observations in a communication dated 15 April 2010.
- 712.** Japan has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 713.** At its June 2009 meeting, the Committee made the following recommendations:
- (a) Noting with concern the allegation that certain proposals have apparently been unilaterally set forth for the reappraisal of the salary system of the public service before having resolved the question of public service basic rights and providing for appropriate compensatory guarantees, the Committee expects that the Government will undertake full and frank consultation with all relevant workers' organizations concerned with a view to determining mutually acceptable conditions with regard to the procedure for the reappraisal of the public service salary system and bearing in mind the need for ensuring compensatory mechanisms.
 - (b) While welcoming both the institutionalized tripartite discussions that have taken place in the context of the Employee–Employer Relations System Review Committee (the Review Committee) and the establishment of the independent Advisory Panel, the Committee strongly reiterates its previous recommendation to the Government to continue to take steps to ensure the promotion of full social dialogue aimed at effectively and without delay addressing the measures necessary for the implementation of the freedom of association principles embodied in Conventions Nos 87 and 98, ratified by Japan, in particular as regards:
 - (i) granting basic labour rights to public servants;
 - (ii) granting the right to organize to firefighters and prison staff;
 - (iii) ensuring that public employees not engaged in the administration of the State have the right to bargain collectively and to conclude collective agreements, and that those employees whose bargaining rights can be legitimately restricted enjoy adequate compensatory procedures;
 - (iv) ensuring that those public employees who are not exercising authority in the name of the State can enjoy the right to strike, in conformity with freedom of association principles, and that union members and officials who exercise legitimately this right are not subject to heavy civil or criminal penalties; and

- (v) the scope of bargaining matters in the public service.

The Committee requests the Government to keep it informed of developments on all the above issues.

- (c) The Committee expects that the Government will take into consideration the necessity of affording fair treatment to all representative organizations, with a view to restoring the confidence of all workers in the fairness of the composition of councils that exercise extremely important functions from a labour relations perspective when considering the additional members to the Review Committee. It requests the Government to keep it informed in this regard.
- (d) The Committee once again reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.
- (e) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.

B. Additional information from the complainant

714. In its communication of 13 January 2010, JTUC–RENGO states that a meeting was held on 16 October 2009 between Mr Ulf Edström, the Workers' group spokesperson on the ILO Committee on Freedom of Association, and the Minister responsible for Civil Service Reform. In the said meeting, the Minister stated that the Government would recover the basic labour rights of public employees in line with the manifesto of the ruling Democratic Party of Japan (DPJ). In response to Mr Edström's request that the relevant policy of the new government (on the recovery of basic labour rights in the public service) be reported to the Committee as soon as possible, the Minister was reported to have indicated that the timing and the content of the report will be coordinated across the ministries concerned; he added that, in his opinion, the country's deviance from the global standard for more than 40 years was nothing to be proud of and that he would really like to make up for the delay.

715. As concerns the right to organize of fire-defence personnel, the complainant indicates that at a 28 October 2009 regular conference of the All-Japan Prefectural and Municipal Workers Union (JICHIRO), the Minister of Internal Affairs and Communications, stated that the situation which the ILO has repeatedly recommended be redressed should not be left unattended, and that directions have been given to work on the issue in order to have these recommendations implemented. The Minister acknowledged that how the right to organize should be granted to fire-defence personnel remained an issue, but added that it was important to move positively forward by listening to the opinions of those concerned while gaining better understanding of the public. The complainant considers that the Minister's statements reflect a greater commitment on the part of the Government with respect to this matter.

716. Further to the Minister's statement, a panel is to be established in the Ministry to review the granting of the right to organize in the fire-defence service, which is scheduled to start its work in January 2010. The panel, which includes representatives from the National Council of Japanese Firefighters and Ambulance Workers (ZENSHOKYO), JICHIRO and the complainant, is to submit a report between August and September 2010; in this regard, the complainant states that the matter should be placed within the framework of reforming the basic labour rights issues of public employees as a whole.

717. The complainant indicates that, in an informal discussion session held after a Cabinet meeting on 15 December 2009, the Prime Minister made remarks on developing a policy-making system based on political leadership by taking power out of the hands of

bureaucrats. Specifically, he gave instructions to promptly start discussions on “reforming the civil service system” through: (1) giving the National Policy Unit and the Government Revitalization Unit legal status in the Government’s structure; (2) increasing the number of vice-ministers and parliamentary undersecretaries in each ministry and creating politically appointed positions which Diet members can hold concurrently; (3) establishing a Cabinet Bureau of Personnel Affairs in order to consolidate the management of senior officials’ personnel affairs solely under the Cabinet’s control; and (4) proceeding promptly to discussions on “new civil service system reform”, such as reviewing the basic labour rights of public employees and promoting an environment in which public employees can be employed and perform their official duties up until the official retirement age. He also issued directions to present to the ordinary session of the Diet in 2010 a bill for establishing a relevant decision-making procedure based on political leadership and a bill for reforming the civil service system, including the establishment of the Cabinet Bureau of Personnel Affairs. According to the complainant, the Prime Minister regrettably failed to provide specific information with regard to the time frame and substance of the reforms concerning basic labour rights in the public service.

- 718.** The complainant indicates that, on 15 December 2009, the Review Committee submitted a report concerning the promotion of an autonomous labour–management relations system to the Minister responsible for Civil Service Reform. The complainant indicates that the report posits the necessity of designing institutional arrangements on the basis of the premise that the right to conclude agreements is to be granted to public employees. However, the report fails to present any conclusions as to the design of the autonomous labour–management relations system as a whole. It only indicates some “alternative model cases” by listing the following as specific models: (1) one similar to a structure under the labour law applied to the private sector which places more importance on agreements between labour and management; (2) one which respects labour–management agreements based on the basic principles of the existing civil service system; and (3) one putting emphasis on the involvement of the Diet and the peculiarities of the functions of public employees. According to the complainant, the Review Committee indicated that it has no intention of recommending any particular one of these three models, nor will it exclude any other alternatives; the design of the future system therefore will be for the Government to decide. Finally, the complainant states that the Government has yet to express its commitment to implementing the recommendations set out in Case No. 2177.

C. The Government’s reply

- 719.** In its communication of 15 April 2010, the Government states that, as a result of the 30 August 2009 elections of the House of Representatives, a new administration came into power composed primarily of the DPJ, which promised sweeping reform of the national civil service system, including the recovery of basic labour rights in its campaign platform. Mr Yoshito Sengoku was appointed as the Minister responsible for Civil Service Reform. Based on its promises, the new administration will move forward on sufficiently examining the basic labour rights of public service employees and making sweeping reforms of the national civil service system.

- 720.** The Government states that the Minister responsible for Civil Service Reform received a report, entitled “Toward measures for an autonomous labour–employer relations system”, from the Review Committee on 15 December 2009. The report was compiled from the findings of the study of systems where public service employees in the non-operational sector are granted the right to conclude collective agreements, in order to provide useful guidance to the Government in its consideration of a new civil service system. The Government attaches as an appendix an outline of the chapters of the Review Committee’s report.

- 721.** On 19 February 2010 the Government submitted to the Diet the “Amendment Bill for the National Public Service Employee Law”, which provides for the establishment of central control of the personnel affairs of executive public service employees in order to enhance the personnel management function of the Cabinet, and also establishes the Cabinet Bureau of Personnel Affairs within the Cabinet Secretariat to take on such functions. In respect of labour rights, the supplementary provision of the Amendment Bill provides that the Government should establish an institution with the powers and responsibilities needed to implement a transparent and autonomous labour–employer relations system pursuant to article 12 of the Civil Service Reform Law. From this point of view, the Government should examine roles that the Cabinet Bureau of Personnel Affairs or other relevant administrative organs should play and should take any necessary legislative measures based upon those findings, thus clarifying its intention to establish an institution with the powers and responsibilities for implementing an autonomous labour–employer relations system. In the process of establishing the Amendment Bill, the Government held discussions with JTUC–RENGO and the RENG0 Public Sector Liaison Council (RENGO–PSLC) at various levels; discussions were also held with the National Confederation of Trade Unions (ZENROREN) and the National Public Service Employees’ Union (KOKKOROREN).
- 722.** As concerns the right to organize of fire-defence personnel, the Government indicates that, pursuant to directions from the Minister of Internal Affairs and Communications, a committee on the right to organize was established within the Ministry of Internal Affairs and Communications. With consideration given to the opinions of all concerned, the committee will study the right to organize of fire-defence personnel in view of both respect for basic labour rights and the assurance of reliability and safety for the people. The committee will proceed with further discussions, with visits to fire stations and hearings from relevant organizations, and will compile their findings in the fall of 2010. The Government attaches in an appendix a list of the committee members, which consists of the Vice-Minister for Internal Affairs and Communications, as chairperson, and 12 individuals, including four academics, two journalists, and three workers’ representatives (the General Secretary of the JICHIRO, the Director-General of the ZENSHOKYO; and the Director of the General Planning Department of JTUC–RENGO).
- 723.** The Government states that the Civil Service Reform Law provides that legislative measures are to be taken within approximately three years after the Law comes into force (by June 2011), except for the items concerning the Cabinet Bureau of Personnel Affairs. The Government will accelerate its examination of the granting of basic labour rights, and make its best endeavours to submit the relevant bill as early as possible. The Government maintains that it has done its utmost to hold meaningful discussions and achieve fruitful civil service reform, bearing in mind the basic idea that frank exchanges of views and coordination with relevant organizations are necessary; this approach will be continued. The Government will also continue to refer to the recommendations of the ILO Committee on Freedom of Association and provide timely and relevant information on the situation. Finally, the Government requests that the ILO understand the current situation, as well as the sincerity of its efforts respecting this matter.

D. The Committee’s conclusions

- 724.** *The Committee recalls that these cases, initially filed in March 2002, concern the current reform of the public service in Japan.*
- 725.** *The Committee notes, from the communications submitted, that on 19 February 2010 the Government submitted to the Diet the “Amendment Bill for the National Public Service Employee Law”, which provides for the establishment of central control of the personnel affairs of executive public service employees in order to enhance the personnel*

management function of the Cabinet, and also establishes the Cabinet Bureau of Personnel Affairs within the Cabinet Secretariat to take on such functions. The Government states that the process of formulating the Amendment Bill involved discussions with several unions – including JTUC–RENGO, RENGO–PSLC, ZENROREN, and KOKKOROREN – and that, as concerns the provision of labour rights in the public service, the supplementary provision of the Amendment Bill provides that the Government should establish an institution with the powers and responsibilities needed to implement a transparent and autonomous labour–employer relations system pursuant to article 12 of the Civil Service Reform Law. As regards this matter the Committee further notes that, according to JTUC–RENGO, no specific information has been provided concerning the time frame and substance of the reforms concerning basic labour rights in the public service.

- 726.** *The Committee also notes that on 15 December 2009 the Review Committee issued a report entitled “Toward measures for an autonomous labour–employer relations system”, which compiles the findings of the study of systems where public service employees in the non-operational sector are granted the right to conclude collective agreements, in order to provide guidance to the Government in its consideration of a new civil service system. JTUC–RENGO indicates that the report posits the necessity of designing institutional arrangements on the basis of the premise that the right to conclude agreements is to be granted to public employees, yet fails to put forward any conclusions as to the design of the autonomous labour–management relations system as a whole. According to JTUC–RENGO, the report only presents some “alternative model cases” by listing the following as specific models: (1) one similar to a structure under the labour law applied to the private sector, which places more importance on agreements between labour and management; (2) one which respects labour–management agreements based on the basic principles of the existing civil service system; and (3) one putting emphasis on the involvement of the Diet and the peculiarities of the functions of public employees.*
- 727.** *In respect of firefighters, the Committee notes that a committee was established, within the Ministry of Internal Affairs and Communications, to study the right to organize of fire-defence personnel in view of both respect for basic labour rights and the assurance of reliability and safety for the people. The committee, which includes representatives from JTUC–RENGO and the ZENSHOKYO, will proceed with further discussions, with visits to fire stations and hearings from relevant organizations, and will compile their findings in the fall of 2010. The Committee further notes that, according to JTUC–RENGO, the statements made by the Minister of Internal Affairs and Communications at an October 2009 JICHIRO conference reflected, on the Government’s part, a greater commitment to the right to organize of firefighters.*
- 728.** *The Committee notes the above developments and welcomes with interest that institutionalized tripartite discussions have taken place, and trusts that they will continue to take place in a continuing spirit of social dialogue and in the context of the ongoing reform process, particularly as regards the formulation of the Amendment Bill for the National Public Service Employee Law and the committee established under the Ministry of Internal Affairs and Communications to study the issue of the right to organize of firefighters. The Committee further notes that, according to the Government, it has done its utmost to hold meaningful discussions, on the premise that frank exchanges of views and coordination with relevant organizations are necessary, and will continue to refer to the Committee’s recommendations in the context of the ongoing reform of the civil service. Additionally noting, however, JTUC–RENGO’s allegation that the Government has yet to provide specific information concerning the time frame for, and substance of, the reforms regarding basic labour rights in the public service, the Committee once again strongly reiterates its previous recommendations that the Government continue to take steps to ensure the promotion of full social dialogue aimed at effectively, and without delay,*

addressing the measures necessary for the implementation of the freedom of association principles embodied in Conventions Nos 87 and 98, ratified by Japan, in particular as regards: (i) granting basic labour rights to public servants; (ii) granting the right to organize to firefighters and prison staff; (iii) ensuring that public employees not engaged in the administration of the State have the right to bargain collectively and to conclude collective agreements, and that those employees whose bargaining rights can be legitimately restricted enjoy adequate compensatory procedures; (iv) ensuring that those public employees who are not exercising authority in the name of the State can enjoy the right to strike, in conformity with freedom of association principles, and that union members and officials who exercise legitimately this right are not subject to heavy civil or criminal penalties; and (v) the scope of bargaining matters in the public service. The Committee requests the Government to keep it informed of developments on all the above issues.

729. *Finally, the Committee once again reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*

The Committee's recommendations

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

- (a) The Committee welcomes with interest the institutionalized tripartite discussions that have taken place, and trusts that they will continue to take place in a continuing spirit of social dialogue and in the context of the ongoing reform process, particularly as regards the formulation of the Amendment Bill for the National Public Service Employee Law and the committee established under the Ministry of Internal Affairs and Communications to study the issue of the right to organize of firefighters. The Committee once again strongly reiterates its previous recommendations that the Government continue to take steps to ensure the promotion of full social dialogue aimed at effectively, and without delay, addressing the measures necessary for the implementation of the freedom of association principles embodied in Conventions Nos 87 and 98, ratified by Japan, in particular as regards:*
- (i) granting basic labour rights to public servants;*
 - (ii) granting the right to organize to firefighters and prison staff;*
 - (iii) ensuring that public employees not engaged in the administration of the State have the right to bargain collectively and to conclude collective agreements, and that those employees whose bargaining rights can be legitimately restricted enjoy adequate compensatory procedures;*
 - (iv) ensuring that those public employees who are not exercising authority in the name of the State can enjoy the right to strike, in conformity with freedom of association principles, and that union members and officials who exercise legitimately this right are not subject to heavy civil or criminal penalties; and*
 - (v) the scope of bargaining matters in the public service.*

The Committee requests the Government to keep it informed of developments on all the above issues.

- (b) The Committee once again reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*
- (c) The Committee brings the information on the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

CASE NO. 2679

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

**Complaint against the Government of Mexico
presented by
the Union of General Insurance Sales Agents in the
State of Jalisco (SAVSGEJ)
supported by
the National Workers' Union (UNT)**

Allegations: The complainant alleges anti-union dismissals of its officials and members, and attempts by the employers to have their union registration cancelled, thereby intimidating the workers

- 731.** The complaint is contained in a communication from the Union of General Insurance Sales Agents in the State of Jalisco (SAVSGEJ) dated 19 November 2008. In communications dated 12 December 2008, 16 January 2009 and 8 July 2009, the complainant sent additional information and new allegations. The National Workers' Union (UNT) supported the complaint in a communication dated 5 October 2009.
- 732.** The Government sent its observations in a communication dated 22 February 2010.
- 733.** Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 734.** In its communications of 19 November and 12 December 2008 and 16 January and 8 July 2009, the SAVSGEJ alleges that since its establishment in October 2007 (registration file No. 235/2007, dated 16 October, before the Conciliation and Arbitration Board (JLCA) of Jalisco State) it has been subjected to violations of its trade union rights. The complainant states that the Board cancelled the registration requested on 6 December 2007. The union filed an application for judicial guarantee with the Third District Court for Administrative Affairs of Jalisco State. In addition, the court communicated to the Board a ruling stating that the union's representative enjoyed judicial protection, overturning its decision of December 2007, and giving a new ruling regarding the registration application. The Board

applied for a review of the ruling given by the Third District Judge for Administrative Affairs of Jalisco State on 26 February 2008, but that application was rejected by a decision dated 4 April 2008 of the Second Collegiate Court for Labour Law of the Third Circuit of Jalisco State. As a result, registration was granted under registration No. 1608 of Trade Union Registry 7 on 23 April 2008. The union in question is the country's first union for insurance agents. The complainant reports that, since the union was registered, a number of insurance companies have sought to have the registration cancelled (file No. 790/2008/5J).

- 735.** The complainant alleges that once the union obtained registration, the Allianz México SA insurance company, from 13 May onwards, blocked the operating system of employees who were union members and subsequently dismissed the following union officials: María del Socorro Guadalupe Acevez González, General Secretary; Rossana Aguirre Díaz, secretary for records and agreements and trade union organization; María Cristina Vergara Parra, spokesperson; and union members Alejandro Sandoval García, Alejandro Casarrubias Iturbide, Fernando Pérez Martínez, Jorge Rincón García and Lázaro Gabriel Téllez Santana. The company informed the dismissed employees that it would allow them to continue working if they left the union. Three of the dismissed trade unionists (Alejandro Sandoval García, Fernando Pérez Martínez and Jorge Rincón García), as a result of financial pressures, agreed to those terms and signed a letter which allowed their reinstatement. The complainant adds that the union members employed at Mapfre Tepeyac México received telephone calls in September 2008 from individuals asking them whether they belonged to the union. Subsequently the company suspended their Internet access and dismissed the following union officials: Bertha Elena Flores Flores, president of the honour and justice committee; Elodia Hernández Orendain, member of the honour and justice committee; María Cristina Vergara Parra, spokesperson; and union members Alejandro Casarrubias Iturbide, Javier Badillo Flores and Martín Ramírez Olmedo.
- 736.** The complainant states that the claims made to the local Conciliation and Arbitration Board of Jalisco, for unjustified dismissals of the trade union officials and members referred to, have not been resolved. They also allege that the process for cancelling the union's registration is being pursued, although this was, in their view, wrongly approved because there is no provision for such a procedure in the Federal Labour Law. The proceedings are having an effect on the union since other insurance agents are afraid to join.

B. The Government's reply

- 737.** In its communication of 22 February 2010, the Government states that it appears, from the documentation presented to the ILO by the SAVSGEJ, that the individuals who were supposedly victims of anti-union discrimination are all insurance agents and that, in Mexico, the case of insurance agents is covered principally by the Federal Labour Law, section 285 of which stipulates that:

Section 285. Commercial and insurance agents, salespersons, travelling sales agents, sales publicists and promoters and similar occupations, are employees of the enterprise(s) for which they provide services if their activity is permanent, unless they do not carry out the work themselves or intervene only in isolated activities.

- 738.** Section 23 of the General Law regarding mutual insurance institutions (LGISMS) defines insurance agents in the following terms:

Section 23. For the purposes of this Law, insurance agents shall be deemed to include physical or moral persons who are involved in the conclusion of insurance contracts through the exchange of proposals and acceptances thereof, and in providing advisory services on

concluding, maintaining or amending such contracts, at the convenience of the contracting parties ...

- 739.** In order to properly regulate the activities of mediation on the conclusion of insurance contracts, section 9 of the Regulations covering insurance agents (RASF) empowers the National Insurance and Surety Commission (CNSF) to grant authorization to persons wishing to act in the capacity of insurance agents. Such authorizations, under the terms of section 23 of the LGISMS, are non-transferrable and are granted, subject to certain legal and regulatory requirements, to the following: (a) physical persons attached to an insurance company by an employment relationship, under the terms of sections 20 and 285 of the Federal Labour Law and authorized to promote the conclusion of insurance policies on behalf of the institutions concerned; (b) independent persons not employed by the insurance companies who operate freely under a commercial contract; and (c) persons who form public limited companies for the purpose of carrying out such activities.
- 740.** In accordance with section 14 of the RASF, authorization for physical persons takes the form of an official card containing the agent's name, indication as to whether he or she is self-employed, or is employed by an insurance company, the particular activities or areas in which he or she may mediate, date of validity, period of validity, and a photograph.
- 741.** Physical persons or agents attached to an insurance company provide services on a personal, subordinate and permanent basis to one insurance company under an employment contract, are required to adhere to a timetable, guidelines and instructions, and have a specific place of work. Authorizations of this type must be sought from the CNSF by the insurance companies themselves, in accordance with section 11 of the RASF.
- 742.** On the other hand, independent agents (section 23 of the LGISMS) are attached to the insurance companies by commercial contracts and carry on their activities freely, with no set timetable, instructions or subordination, and are not required to broker any specific number of policies, and may even provide their services through auxiliaries. They are not subject to the authority of any one company and can indeed, without any restriction, conclude similar contracts with different insurance providers, as they have their own client portfolio. That is to say, they are subject to no more restrictions than those set out in their own commercial contracts and in the relevant laws and regulations (with the exception of pension insurance policies based on social security law).
- 743.** For this reason, the card issued by the CNSF is an administrative document by which the Mexican Government licenses and monitors persons deciding to take up brokering of insurance contracts to conclude commercial contracts with different insurance providers in which one of the parties (the company) provides products and services and the other (the insurance agent), a portfolio of potential clients.
- 744.** According to the CNSF, the persons named in the complaint (Alejandro Casarrubias Iturbide, Alejandro Sandoval García, Bertha Elena Flores Flores, Elodia Hernández Orendain, Fernando Pérez Martínez, Javier Badillo Flores, Jorge Rincón García, María Cristina Vergara Parra, María del Socorro Guadalupe Acevez González, Martín Ramírez Olmedo and Rossana Aguirre Díaz) have current authorization as independent insurance agents; Lázaro Gabriel Téllez Santana had such an authorization which has since expired. The application for union registration submitted by the insurance agents' union indicates that Alejandro Casarrubias Iturbide, Alejandro Sandoval García, Bertha Elena Flores Flores, Elodia Hernández Orendain, Fernando Pérez Martínez, María del Socorro Guadalupe Acevez González, Lázaro Gabriel Téllez Santana, Patricia de la Paz Nahoul Gutiérrez, Héctor Chávez Reyna, Guillermo Ascencio Deyra and Rossana Aguirre Díaz, among others, all members of the complainant union, have concluded more than one

commercial contract with a number of insurance companies and may therefore carry on their activities without restrictions, other than those specified in the contracts themselves.

- 745.** The Government states that the complainant has presented allegations concerning harassment and dismissals of union members by the respondents (insurance companies), on the one hand, and the application presented by a number of insurance companies to annul the registration of the complainant union on the other.
- 746.** The Government states that in all written documentation presented by the complainant, it indicates possible unjustified dismissals of insurance agents by insurance companies on grounds of their union membership. It is claimed that there has been harassment in the form of telephone threats of dismissal and demands to resign from the union. In this regard, the Government states that the allegations made by the union concerning harassment of Alejandro Sandoval García, Jorge Rincón García and Fernando Pérez Martínez to make them leave the union suggest that, although letters addressed to the General Secretariat of the union signed by those members and stating their intention to leave the union have been submitted, it is also true that those letters do not indicate that there is any pressure to make the individuals in question resign from the union, nor do they suggest that they were pressured by the insurance companies for which they work; it is considered that if it is their wish to remain in the union in question, they can join whenever they express their wish to do so.
- 747.** As regards the alleged harassment to force them to leave the union, of which a number of union members claim to have been victims, consisting of blocking Internet keys and requests to sign letters of resignation from the union, the Government notes that the union presented as evidence an unsigned written document without any seals or anything to indicate who had drawn it up, which makes it insufficient as evidence. Nor is any indication given of the particular circumstances of time and place that would lead to the conclusion that the union members at any time suffered anti-union practices or, if such practices took place, who was responsible.
- 748.** As regards the alleged dismissals of Lázaro Gabriel Téllez Santana, Javier Badillo Flores, María del Socorro Guadalupe Acevez González, María Cristina Vergara Parra and Martín Ramírez Olmedo, the Government states that the union provides letters stating the decision of some insurance companies to terminate the commercial contracts concluded with union members. Those letters do not indicate possible dismissal since, as stated previously, the independent insurance agents in question have commercial contracts with more than one company. With regard to the written documents presented, it is observed that the contractual relationship is being terminated in the interest of the company, but that does not mean that the agent is restricted in carrying on his or her activities, restricted with regard to the other commercial contracts with other insurance companies, or prevented from concluding new contracts. On the contrary, it has direct repercussions for the insurer because the agent may recommend his portfolio of clients, services and products to other companies with which he has a contract. His activity as an independent insurance agent is therefore assured, not by the commercial contracts, but through the insurance agent's card granted by the CNSF.
- 749.** It must also be noted that proceedings are currently still under way before the JLCA in connection with applications from María del Socorro Guadalupe Acevez González, María Cristina Vergara Parra and Rossana Aguirre Díaz against the Allianz de México SA insurance company, in connection with alleged unjustified dismissals (case files 1254/2008-S, 1097/2008-H and 1222/2008-F, respectively), now being examined by the Fifth Special Conciliation and Arbitration Board. These will be resolved in accordance with the Law in question.

- 750.** Article 123, section XXII, of the Political Constitution of Mexico, provides certain safeguards for workers' rights and, with the Federal Labour Law, lays down the compensation applicable, and the procedures to follow, in the event of any action by individuals involving a violation of established laws and regulations, in particular those concerning freedom of association. Trade union representatives and members may seek recourse to the courts and the competent administrative authorities within the time limits allowed, to obtain resolution of any disputes and to defend the interest of the organization they represent.
- 751.** The supplementary documentation presented by the General Secretariat of the Insurance Agents' Union, including a number of complaints before the National Commission for the Protection of Users of Financial Services (CONDUSEF), authorizations, and an email addressed to a representative of Allianz México SA, do not relate to any fact or circumstance allowing to deduce anti-union discrimination, and make clear two points, namely: (1) the insurance agents act independently as brokers between the insurance companies and the clients in their client portfolio; and (2) the insurance agents may advise their clients regarding the policies best suited to their needs, with no obligation to remain attached to any particular insurance company.
- 752.** As regards the claim presented by a number of insurance companies requesting cancellation of the union's registration, the Government states that it will pay close attention to any decision of the judicial authorities requiring adjustment in the interest of compliance with the principles of freedom of association.

C. The Committee's conclusions

- 753.** *The Committee notes that, in the present case, the complainant alleges that, since it was founded, its officials and members have been subjected to violations of their union rights and specifically refers to the dismissal of the following union officials: María del Socorro Guadalupe Acevez González, General Secretary; Rossana Aguirre Díaz, records and agreements secretary; María Cristina Vergara Parra, spokesperson; and members Alejandro Casarrubias Iturbide, Lázaro Gabriel Téllez Santana, and another three members employed by the Allianz México SA insurance company (according to the complainant, these three members resigned from the union and were subsequently reinstated at work after being subjected to pressure), as well as the dismissals of the following union officials: Bertha Elena Flores Flores, president of the honour and justice committee; Elodia Hernández Orendain, member of the honour and justice committee, María Cristina Vergara Parra (also dismissed by Allianz México SA), spokesperson, and members Alejandro Casarrubias Iturbide (also dismissed by Allianz México SA), Javier Badillo Flores and Martín Ramírez Olmedo of the Mapfre Tepeyac México insurance company. The Committee also notes that, according to the complainant, claims have been filed with the Local Conciliation and Arbitration Board of Jalisco State in connection with alleged unjustified dismissals of the union officials and members referred to here, which have yet to be resolved, and that the officials and members in question object to the continuation of proceedings to cancel union registration, given that those proceedings are not provided for in the Federal Labour Law. The complainant states, lastly, that the proceedings to cancel the union's registration are creating a climate of fear that is preventing workers from joining the union.*
- 754.** *As regards the alleged pressure put on trade unionists to make them leave their union, and allegations that, in the case of three of them, their continued employment was made conditional on their leaving the union, the Committee notes the Government's statements to the effect that: (1) the allegations presented by the union in relation to harassment suffered by union members who decided to leave the union are not such as to lead to the conclusion, on the basis of the documentation presented, that there was pressure from any*

individual to induce these individuals to leave the union, or that they were subjected to pressure by the companies for which they worked; (2) as regards the alleged harassment to induce individuals to leave the union, of which a number of union members claim to have been victims, in the form of blocking of Internet access and demands to sign letters of resignation from the union, the union has presented no adequate evidence that would lead to the conclusion that the members in question were at any time subjected to anti-union practices, or indicate who was responsible for any such practices; and (3) the national system of courts provides judicial remedies in any cases of violation of freedom of association. The Committee notes the contradiction between the allegations and the Government's reply. The Committee notes that it is not always possible to prove that there has been pressure of the type alleged in this case but, as the Government has indicated, those concerned are able to instigate legal proceedings before the courts.

- 755.** *As regards the alleged dismissals of five union officials and four union members, named previously (two of them dismissed from two insurance companies at the same time), trade union officials Ms María del Socorro Guadalupe Acevez González, Ms Rossana Aguirre Díaz, Ms María Cristina Vergara Parra, Ms Bertha Elena Flores Flores and Ms Elodia Hernández Orendain, and trade union members Messrs Alejandro Casarrubias Iturbide, Lázaro Gabriel Téllez Santana, Javier Badillo Flores and Martín Ramírez Olmedo, the Committee notes the information from the Government concerning the claims presented by María del Socorro Guadalupe Acevez, María Cristina Vergara Parra and Rossana Aguirre Díaz. The Committee also notes the Government's statement to the effect that the allegations do not prove that there have been any dismissals as such, since independent insurance agents (like the persons named by the complainant, except for Lázaro Gabriel Téllez Santana, whose authorization has expired) have commercial contracts with a number of insurance providers, that is, they are not subordinate to the company and have no fixed working hours, so there is no employment relationship, since the contracts in question are commercial in nature, not contracts of employment, as has been claimed. According to the Government, it is clear from the communications presented that the company is terminating the contractual relationships in its own interest, but this fact does not imply any restriction in the agents' professional activities nor does it limit them in respect of other commercial contracts with other insurance providers or prevent them from concluding other contracts; their activities as independent insurance agents are safeguarded not by their commercial commission-based contracts but by the authorization card issued by the CNSF. The Government states that the supplementary documentation provided by the complainant, comprising a number of complaints before the CONDUSEF, authorizations, and an email addressed to a representative of Allianz México SA, is unrelated to any particular fact or circumstance that could lead to the conclusion that there has been anti-union discrimination against the complainant, and indeed highlights two points: (1) the insurance agents act independently as brokers between the insurance companies and the clients in their client portfolio; and (2) the insurance agents may advise their clients regarding the policies best suited to their needs, with no obligation to remain attached to any particular insurance company. The Committee notes the Government's statement to the effect that there were claims before the courts filed by María del Socorro Guadalupe Acevez González, María Cristina Vergara Parra and Rossana Aguirre Díaz, but notes that the Government has sent no information on the judicial claims filed by the other trade unionists named in the complaint (Alejandro Casarrubias, Lázaro Gabriel Téllez, Bertha Elena Flores Flores, Elodia Hernández Orendain, Javier Badillo Flores and Martín Ramírez Olmedo). The Committee concludes that, with the exception of the case of Mr Téllez Santana, the allegations made by the complainant refer to the termination of the commercial contractual relationship between a number of union members and two insurance companies. Given the time that has elapsed since the presentation of the complaint, the Committee expects that the Local Conciliation and Arbitration Board of Jalisco State will give a ruling swiftly on the claims made in connection with the alleged unjustified and anti-union dismissals (or, as the Government*

states, cessation of a commercial contractual relationship), and requests the Government to keep it informed of the outcome of those claims.

756. *As regards the allegation that the insurance companies named in the complaint sought the cancellation of the registration of the complainant before the Local Conciliation and Arbitration Board in Jalisco State – a request that, in the complainant’s view, was not legitimate – the Committee notes that according to the complainant, the request to deregister the union has created a climate of fear which prevents workers from joining. The Committee takes careful note of the Government’s statement to the effect that it will consider very attentively any decision of the judicial authorities requiring adjustments in the interest of compliance with the principles of freedom of association, and requests the Government to communicate any ruling handed down in this regard by the judicial authorities.*

757. *The Committee notes that it is clear from the present case that the complainant has faced a number of difficulties, for example, in becoming established when the commercial relationship between two of the companies concerned and a number of union officials was terminated, and when it has had to defend itself against a request to cancel its registration. The Committee recalls that Convention No. 87 applies to all workers, with the sole possible exception of the armed forces and police, and requests the Government to monitor closely issues relating to the observance of the complainant’s trade union rights.*

The Committee’s recommendations

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

(a) *With regard to the alleged dismissals of five union officials and four union members named in the complaint, Ms María del Socorro Guadalupe Acevez González, Ms Rossana Aguirre Díaz, Ms María Cristina Vergara Parra, Ms Bertha Elena Flores Flores, Ms Elodia Hernández Orendain, Messrs Alejandro Casarrubias Iturbide, Lázaro Gabriel Téllez Santana, Javier Badillo Flores and Martín Ramírez Olmedo, the Committee expects that the Local Conciliation and Arbitration Board of Jalisco State will give a ruling quickly on the claims made by the dismissed union officials and members in connection with the alleged unjustified and anti-union dismissals (or, to use the Government’s term, terminations of a commercial contractual relationship), and requests the Government to keep it informed of the results of those claims.*

(b) *With regard to the allegation that the insurance companies in question have sought the cancellation of the complainant’s union registration before the Local Conciliation and Arbitration Board in Jalisco State – wrongly, in the complainant’s view – the Committee requests the Government to communicate the ruling handed down by the judicial authority.*

(c) *The Committee requests the Government to monitor closely any issues relating to the observance of the complainant’s trade union rights.*

CASE NO. 2638

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

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

- **the General Confederation of Workers of Peru (CGTP)**
- **the National Federation of Miners, Metalworkers and Steelworkers of Peru (FNTMMSP) and**
- **the Trade Union of Miners of Shougang Hierro Peru SAA (SOMSHP)**

Allegations: Violation of the principle of good faith in collective bargaining and of the right to strike by the Shougang Hierro Peru SAA company; refusal of the Ministry of Labour to take a decision on all items on the list of demands except those imposed by the company; dismissal of 25 workers of the municipality of Surquillo for forming a trade union and demanding the payment of their wages for December 2007

- 759.** The complaint is contained in a communication from the General Confederation of Workers of Peru (CGTP), the National Federation of Miners, Metalworkers and Steelworkers of Peru (FNTMMSP) and the Trade Union of Miners of Shougang Hierro Peru (SOMSHP) dated 17 April 2008. These organizations sent additional information and new allegations in communications dated 2 and 5 June and 7 November 2008. The FNTMMSP sent new allegations in a communication dated 2 June 2008 and the SOMSHP did so in a communication dated 21 September 2009.
- 760.** The Government sent its observations in communications dated 13 August, 11 September and 22 October 2008, 2 March, 5 May, 29 October, 3, 12 and 24 November and 14 December 2009, and 25 May 2010.
- 761.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 762.** In its communications dated 17 April, 5 June and 7 November 2008, the CGTP, the FNTMMSP and the SOMSHP explain that Shougang Corporation is a Chinese state enterprise with iron industry operations generating an annual turnover of US\$7,460 million. On 30 December 1992, Shougang Corporation acquired the Empresa Minera del Hierro del Peru – Hierro Peru, and Shougang Hierro Peru SAA was formed. The company is in good economic shape and has planned investments up to 2011 in excess of \$500 million.
- 763.** The complainant organizations claim that the SOMSHP workers were confident that through unionization and collective bargaining, i.e. through democratic dialogue between workers and employers, it would be possible to improve their conditions of work. Since

2002, the trade union has been submitting annual lists of demands to the company with a view to reaching constructive agreements in order to avoid confrontations which are costly for both parties. However, the company has systematically denied the possibility of dialogue, merely dealing with just two items: a derisory increase in wages and a bonus for concluding the agreement in question. These two items are also the only ones on which the Ministry of Labour and Promotion of Employment (Ministry of Labour) has made a decision, rejecting the other aspects of the various lists of demands (2002–03, 2003–04, 2004–05, 2005–06, 2006–07, 2007–08 and 2008–09).

- 764.** With regard to the list of demands for 2006–07, the complainants point out that on 27 February 2006 the trade union presented its list of demands for the period 1 April 2006 to 31 March 2007. On 9 March, the first collective bargaining memorandum was signed, marking the start of the direct negotiation phase. This continued until 30 March, when negotiations were discontinued owing to the company's usual unwillingness to negotiate in good faith. On 26 April, the memorandum for launching the conciliation phase was signed. After four meetings (26 April, 3, 10 and 15 May) the conciliation boards came to an end, with the company's delaying tactics and lack of clear will to negotiate hampering the dialogue as on previous occasions. Nevertheless, the union requested informal meetings between the parties. On 15 June, in the midst of those meetings, the union presented its revised list of demands for the third time without obtaining positive results from the company, which refused to make any substantial changes to its position.
- 765.** Under these circumstances, the decision to strike was approved at the extraordinary general meeting of 1 June by 484 out of a total of 879 workers. On 14 June, before the strike began, the union resubmitted its list of demands for the fourth time in an effort to close the gap between the positions of the parties but did not receive a favourable reply from the company. In fact, the company's response was to lodge a complaint with the Ministry of Labour against the union alleging violent actions during the strike. This led to intervention by the Ministry of Labour on 19 June in the form of an inspection relating to the strike. The inspection provided no evidence that the actions alleged by the company had actually occurred.
- 766.** As it has done repeatedly in past years, the company refused to discuss any of the demands apart from the pay rise and the bonus for conclusion of the agreement. Once again, the demands relating to better conditions of work (uniforms, water supplies in the workplace, etc.) and the requested incorporation of workers subcontracted from other companies were vetoed. Nonetheless, the union presented its revised set of demands more than once, dropping a number of its initial demands with a view to achieving an agreed solution. The company's attitude was reinforced by the Ministry of Labour's decision for resolving the dispute since the decision issued covered only the items which the company had agreed to negotiate.
- 767.** On 21 June, the union requested the intervention of the Ministry of Labour so that the dispute would be resolved definitively. One day later the company subscribed to the request.
- 768.** On 26 June, the Ministry of Labour, by means of Directorate Decision No. 011-2006-DPSC-ICA, ordered the resumption of work and a general increase of 3.30 nuevos soles (PEN) in the basic daily wage from 1 April 2006 and also a special bonus of PEN1,000 for all workers. The Ministry declared the other points in the draft collective agreement null and void. All points in the above decision were confirmed on 3 July by means of Directorate Decision No. 040-2006-GORE-ICA-DRTPE.
- 769.** With regard to the list of demands for 2007–08, the complainants allege that on 27 February 2007 the union presented the demands to the employer. On 8 March collective

bargaining and the direct negotiation phase began. After four meetings at which the company showed little inclination to promote fruitful dialogue and negotiations in good faith, the union was obliged to inform the Ministry of Labour on 28 March that the direct negotiation phase had been broken off.

- 770.** On 19 April, the conciliation boards were launched with the intervention of the Ministry of Labour. This phase ended without the company accepting any of the proposals which had been constantly reformulated by the union in order to reach an agreement. The fourth and final conciliation meeting was held on 27 June, followed by three informal meetings at which the union again showed its readiness to exhaust all the necessary mechanisms before making use of its right to strike, without being able to obtain any reply from the company that showed a real willingness to negotiate.
- 771.** On 29 August 2007, at an extraordinary general meeting, the union voted for an indefinite general strike (424 votes in favour, of a total of 447 persons attending the meeting), and it was announced that the statutory notice period for the strike would be from 10 to 17 September 2007. However, the company restricted the right to strike. Indeed, the company replaced the striking workers with other workers specially contracted for the occasion, including staff from other categories (employees, workers occupying positions of trust). Moreover, the company proceeded to remove goods and raw materials without the authorization of the Ministry of Labour, loading iron ore while the strike was in full progress.
- 772.** After the strike had taken place, the Ministry of Labour resolved the dispute, as in previous years, through decisions issued in September and October which covered only a general pay rise and an agreement conclusion bonus.
- 773.** In the complainants' view, the company has violated the principle of bargaining in good faith, given that, from 2002 to 2008, it has systematically sought to unduly obstruct negotiations and adopted an extremely uncompromising attitude, refusing to discuss any of the workers' demands apart from a requested pay rise, where it has offered amounts which bear no relation to the economic growth which it has experienced.
- 774.** Furthermore, since no solution was reached between the parties owing to the company's intransigence, the workers were obliged to exhaust the phases of direct negotiation and conciliation. Nevertheless, in exercising its right to strike, the union has been boycotted by the company and, with its actions proving ineffective, it has been obliged to request the intervention of the labour administrative authority to find a solution to the dispute, a situation which has been planned and caused to recur since 2002. The company's interference in the exercise of the right to strike renders this measure ineffective, leaving the union with no alternative but to request the intervention of the Ministry of Labour (arbitration with respect to the items agreed by the employer), culminating in a vicious circle in which the union's rights are affected. The right to collective bargaining thus becomes meaningless, with the State imposing a settlement on the list of demands which excludes almost all the bargaining items put forward by the union, apart from a general pay rise determined by the Ministry of Labour, preventing the union from achieving improvements through collective bargaining on other economic issues, conditions of work, health and safety, etc. The complainants consider that the Ministry of Labour should issue a more comprehensive ruling on the presented list of demands.
- 775.** With regard to the list of demands for 2008–09, the phase of direct negotiations was launched on 7 March 2008, the conciliation stage starting with the presence of the Regional Labour Directorate of Ica on 9 May 2008 and ending on 28 May 2008, followed by various informal meetings held in Lima at the Ministry of Labour's National Directorate for Collective Labour Relations. Throughout the discussions of the demands,

the company categorically refused to deal fully with all the items on the new list of demands, with the exception of two, namely the pay rise and the agreement conclusion bonus, showing that it had no intention of finding a solution to the demands but, on the contrary, intended to impose its conditions as it had done in previous negotiations. This attitude on the part of the company was not observed at any time by the Ministry of Labour, which issued no reprimand to the company with a view to finding a solution to the list of demands. On the contrary, the Ministry of Labour, via the Ica Regional Labour Directorate, unilaterally settled the demands by issuing Regional Directorate decision No. 053-2008-GORE-ICA-DRTPE of 10 August 2008, ruling that the company shall grant a general pay rise of PEN3.70 in the minimum category, to serve as a basis for the other categories, and also a special agreement conclusion bonus of PEN1,200, following the practice systematically by the company since 2002 and endorsed by the Ministry of Labour.

776. In its communication of 21 September 2009, the complainant trade union alleged that the Shougang Hierro Peru SAA company refused to comply with the Ministry of Labour's decisions regarding the lists of demands of 2009–10 and, as on previous occasions, uses dilatory means and practices the consequence of which is the declaration of new strikes by the trade union.

777. Moreover, in their communication of 2 June 2008, the CGTP and the FNTMMSP allege the arbitrary dismissal of 25 municipal workers of the municipality of Surquillo on 31 December 2007 for forming the Union of Municipal Workers of the Municipality of Surquillo and demanding the payment of their wages for December 2007. According to the complainants, the municipality did not observe the terms of section 48 of Supreme Decree No. 003-97-TR concerning the termination of employment contracts on objective grounds. Specifically, the municipality disregarded and failed to implement various procedures, as follows: (i) the municipality of Surquillo was supposed to send the union detailed information indicating the reasons for termination of the contracts and the payroll to which the workers belonged, notifying the labour authority with a view to the opening of the respective file; (ii) the municipality was supposed to launch negotiations with the union to agree on conditions for the termination of employment contracts or possible measures for avoiding or limiting staff losses; and (iii) at the same time, the employer was supposed to present a sworn declaration to the labour authority to the effect that there were objective grounds for termination of the employment relationship, together with an expert report accrediting the legitimacy thereof to be undertaken by an auditing company, authorized by the Office of the Controller-General.

B. The Government's reply

778. In its communications of 13 August, 11 September and 22 October 2008, and 2 March 2009, the Government declares that constitutionally the State recognizes the right to collective bargaining and is thus obliged to promote it. Accordingly, on the basis of the principle of free bargaining, the legislation accepts that the parties have full freedom to decide on the matters for negotiation and, consequently, on the content of the collective agreement in question. The Peruvian legal system thus establishes the right of parties to freely regulate their labour relations, defining the issues and subjects to be covered during the bargaining process. The regulatory power of collective entities thus lies in the constitutional recognition of collective bargaining as a mechanism or process whereby the parties to the labour relationship can establish legal standards for governing their labour relations. With regard to this matter, the Committee on Freedom of Association has established as follows:

The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through

collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes (*Digest of decisions and principles*, para. 881).

Both employers and trade unions should bargain in good faith and make every effort to come to an agreement, and satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence (*Digest*, op. cit., para. 936).

- 779.** Collective bargaining, previously governed by the 1979 Constitution, is now regulated by the Constitution of 1993. The two texts differ with regard to three elements: the role of the State in relation to the right to collective bargaining, the means used to resolve labour disputes, and the results of collective bargaining.
- 780.** With regard to the resolution of labour disputes (defined as comprising various types, including collective bargaining), the function of the State has also been redefined. According to the 1979 text, its function was to regulate bargaining procedures by law and find definitive solutions to disagreements between the parties; under the 1993 version, its sole responsibility is to promote peaceful settlements while accepting the solutions decided upon by the parties themselves.
- 781.** The collective bargaining procedure unfolds in stages, including that of direct negotiation, at the end of which the parties may use various means of reaching a solution, such as conciliation, mediation or (voluntary) arbitration. This means that an outcome will be reached by means of collective agreement or arbitration award and the dispute will be closed. However, in exceptional cases the outcome may take the form of an administrative settlement: where a strike continues for an excessive length of time, the Ministry of Labour and Promotion of Employment may provide a definitive settlement to the dispute, and this ruling will essentially be based on the report deriving from the technical appraisal of the workers' demands involving an examination of the economic and financial situation of the company and its capacity for meeting such demands.
- 782.** The report issued by a specialized department of the Ministry of Labour during the bargaining procedures at the request of one of the parties or as an automatic result of the appraisal of the workers' demands, necessarily involves an examination of the company's economic and financial situation and its capacity for meeting such demands. This takes account of levels that exist in similar companies and in the same economic activity or region, as well as generally analyses the facts and circumstances involved in the bargaining.
- 783.** The parties are notified of the specialist report so that they can make any comments. The report is purely informative in nature so that the parties involved in the collective bargaining process can use it as a point of reference for making improvements in pay and other rights and benefits.
- 784.** Should the collective bargaining process entail a strike declaration and the strike continue for an excessive length of time, seriously jeopardizing a company or sector of production or leading to acts of violence or in any way becoming more serious because of its scope or consequences, the administrative authority will seek to secure a direct settlement or some other peaceful solution to the dispute. If this fails, the dispute will be settled definitively by the Ministry of Labour.
- 785.** As described above, the Government, through the Ministry of Labour and Promotion of Employment, may only intervene in the formulation of the economic report for the appraisal of the workers' demands and in the examination of the economic and financial

situation and the capacity of the company involved in the collective bargaining process to meet the demands, and when a strike becomes serious enough to harm the rights of third parties. It therefore has no competence to interfere in the autonomy of the parties, who are strictly entitled to reach a settlement by consensus with regard to the various items in the draft collective agreement.

- 786.** It may be concluded that the State may not undermine collective autonomy because the latter continues to be recognized and upheld by the Constitution of 1993. Accordingly, the object of collective bargaining is constituted by the sum total of issues which may be raised by the negotiating parties without interference from the State.
- 787.** The delaying tactics and intransigent attitudes, at odds with the principle of democratic dialogue, which, according to the complainants, have restricted for years any possibility of signing collective agreements on other conditions of work, health and safety raised in the various lists of demands submitted, are not things that can be attributed to the Peruvian Government, inasmuch as its participation in the abovementioned processes is limited strictly to the report on the technical appraisal of the workers' demands involving an examination of the company's economic and financial situation and its capacity to meet such demands. The Government therefore has no competence to make decisions with regard to the set of demands as a whole.
- 788.** With regard to the allegations relating to the arbitrary dismissal of 25 workers of the municipality of Surquillo, the Government points out that it has been verified through various inspections that 23 out of the 25 complainant workers have been dismissed arbitrarily. Apart from this, a number of complainant workers have invoked jurisdictional protection and the related judicial proceedings are pending. The Government further states that, according to the provisions of the consolidated text of the Organic Act on the Judiciary, where proceedings are pending resolution by the judiciary, the labour administrative authority must refrain from issuing any ruling on the matter in question, otherwise criminal liability would be incurred on the part of any officials contravening the Act. This provision is in conformity with article 139(2) of the Political Constitution of Peru.
- 789.** In its communications of 5 May, 29 October, 3, 12 and 24 November and 14 December 2009, the Government indicates that the judicial authorities have held in favour of the reintegration of Mrs Atilia Cecilia Alcaraz along with the payment of remunerations and indemnities. The other judicial proceedings are still pending. A coordinator from the Supreme Court has been appointed to the Ministry of Labour concerning the application of the ILO Conventions in order to process up to date information concerning court cases. In a communication dated 25 May 2010, the Government reiterated its previous observations.

C. The Committee's conclusions

- 790.** *The Committee observes that the complainants in the present case allege: (1) a lack of good faith on the part of the Shougang Hierro Peru SAA company in the successive rounds of collective bargaining since 2002, with the company delaying negotiations and refusing to agree on conditions of work apart from derisory increases in pay and bonuses for the conclusion of agreements; (2) violation of the right to strike by the company during the 2007–08 bargaining process; and (3) inactivity by the Government, which has confined itself to resolving the items relating to wage increases and agreement conclusion bonuses from the various lists of demands. In addition, the complainant trade union alleges dilatory practices, recourse by the company to the lists of demands of 2009–10, as well as the lack of compliance with the decisions of the Ministry of Labour. Furthermore, the complainants allege the dismissal of 25 workers from the municipality of Surquillo for forming a union and demanding the payment of their wages for December 2007.*

- 791.** *With regard to the allegations concerning a lack of good faith in the successive rounds of collective bargaining since 2002 between mining enterprises and the trade union, and also with regard to the attitude of the Ministry of Labour towards this situation, the Committee notes the complainants' allegations to the effect that: (1) since 2002 the union has been presenting its demands to the company with the aim of reaching constructive agreements, thereby avoiding confrontations which are costly for both parties, but the company has systematically blocked the possibility of dialogue, restricting its proposal to just two items: a pay rise and an agreement conclusion bonus. These are the only two items on which the Ministry of Labour has also issued a decision, rejecting the other demands on the list; (2) the company has used delaying tactics and failed to show any real willingness to negotiate, repeatedly hampering the dialogue through a refusal to make any fundamental changes to its proposals and thus limiting the material content of the collective bargaining, an attitude which has been reinforced in recent years with the ruling on the dispute from the Ministry of Labour, which, far from dealing with the substance of the draft collective agreement, has only issued a decision regarding the items on which the company has agreed to negotiate; (3) with no solution reached between the parties owing to the company's intransigence, the workers have been obliged to exhaust the stages of direct negotiation and conciliation; furthermore, having exercised their right to strike, that right has also been boycotted by the company against a background of accusations of violence, hiring of other workers during the strike and fraudulent continuation of work; consequently, with its actions proving ineffective, the union has been obliged to request the intervention of the Ministry of Labour, resulting in a vicious circle in which the union's rights have been affected; and (4) intervention by the State should not be limited to resolving just the two items not vetoed by the company in all the negotiations but entail a more comprehensive ruling on the list of demands presented.*
- 792.** *The Committee notes the Government's statements to the effect that: (1) the legislation entitles the parties to freely regulate their labour relations by defining the issues and subjects to be dealt with in collective bargaining, in accordance with the principles of freedom of association, promoting peaceful settlements of disputes but respecting the means of solution decided upon by the parties; (2) in the collective bargaining process, the State may not violate the autonomy of the parties; however, the parties may use different means of reaching a solution provided for in the legislation, such as conciliation, mediation or (voluntary) arbitration; (3) the issues to be dealt with during the bargaining process are to be agreed upon by the parties themselves without any interference from the Government, and the company's alleged delaying tactics or intransigence, at odds with the principle of dialogue, regarding the negotiation of certain issues are not things that can be attributed to the Government, nor does the latter have competence to make decisions with regard to the union's set of demands as a whole; and (4) the Government only has competence, through the Ministry of Labour and Promotion of Employment, to intervene in the formulation of the economic report (of an informative nature) for the appraisal of the workers' demands and the examination of the economic and financial situation and the capacity of the company involved in the collective bargaining process to meet the demands (the Government transmits the economic report issued with respect to the collective negotiations referred to in the present case); should the collective bargaining process entail a strike declaration and the strike continue for an excessive length of time, seriously jeopardizing a company or sector of production or leading to acts of violence or in any way becoming more serious because of its scope or consequences, the administrative authority will seek to secure a direct settlement or some other peaceful solution to the dispute; if this fails, the dispute will be settled definitively by the Ministry of Labour on the basis of the abovementioned economic report.*
- 793.** *The Committee understands the Government's arguments and emphasizes the importance of respecting the autonomy of the parties in the collective bargaining process so that the free and voluntary character thereof, established in Article 4 of Convention No. 98, is*

ensured. The Committee also agrees that it is for the parties concerned to decide on the subjects for negotiation.

794. In the present case, the Committee observes that the legislation permits to both parties jointly the use of conciliation, mediation and (voluntary) arbitration in cases where negotiations are blocked and also of the right to strike (which was exercised on various occasions by the union at the company, albeit allegedly with restrictions, which are examined below). The Committee observes, however, that despite the exercise of the right to strike by the union, the company has obtained that, in the successive rounds of bargaining since 2002, negotiations have only covered a pay rise and an agreement conclusion bonus, and even these two items have been decided upon by the administrative authority further to a request for arbitration from the parties, according to the documentation sent by the complainants and the appraisal of the workers demands by a specialized department of the Ministry of Labour and an analysis of the company's economic and financial situation. The Committee observes that the complainant organizations have not questioned the economic appraisal.
795. The Committee observes that the complainants reproach the Government for failing to adopt decisions settling all the matters contained in the union's list of demands. However, the Committee is bound to recall that, according to the principles of free and voluntary collective bargaining and the autonomy of the parties, the imposition of compulsory arbitration when it has not been requested by both parties is, in general, contrary to and incompatible with Article 4 of Convention No. 98. The Committee has repeatedly indicated that the imposition of arbitration would only be permissible, in the public service, in the context of essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, safety or health of the population) or in cases involving an acute national crisis. However, the company concerned does not provide essential services in the strict sense of the term and so the union's claim that the administrative authority should make use of arbitration without the agreement of both parties must be dismissed. The Committee cannot therefore conclude that there has been a formal violation of the terms of Convention No. 98, particularly in view of the fact that the union has been able, in principle, to exercise its right to strike when it has wished to do so (although, in one case, other workers were used to replace the strikers, a point which is examined below).
796. However, the Committee emphasizes that the fact that the successive rounds of bargaining since 2002 have, at the company's wish, systematically excluded conditions of work, apart from settling the previously mentioned wage increases and agreement conclusion bonuses, would seem to show that the objective of Convention No. 98 – namely, to promote regulation of the conditions of work by the parties themselves without interference from the authorities – is apparently not being achieved in full. The Committee therefore requests the Government to promote collective bargaining and to examine with the parties how to extend collective bargaining in practice to all subjects relating to conditions of work and employment and to other matters in which cooperation and dialogue between the parties can be beneficial. In this regard, the Committee wishes to recall the principle that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 935]. The Committee invites the Government and the social partners to examine the possibility of having the authorities undertake measures of conciliation or mediation with the parties concerned in case of an impasse in collective negotiations, including when a strike has not yet been declared.

- 797.** Furthermore, observing that the Government has not replied specifically to the allegation that the company replaced strikers with other workers during negotiations relating to the union's list of demands for 2007–08, the Committee underlines the principle according to which “the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association”. The Committee also recalls that, “if a strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights” [see *Digest*, *op. cit.*, paras 632–633].
- 798.** The Committee requests the Government to ensure that these principles are respected, if the union has recourse to strike action in the context of future negotiations between the company and the union.
- 799.** Finally, with regard to the allegation concerning the dismissal of 25 workers of the municipality of Surquillo for forming a union and demanding the payment of their wages for December 2007, the Committee notes with regret the Government's statement to the effect that the labour inspectorate established that 23 of the 25 workers in question had been dismissed arbitrarily. The Committee notes that various judicial proceedings brought by a number of workers are pending and that only the case of Mrs Atilia Cecilia Alcaraz has been concluded, which held that the worker should be reinstated and paid wages and benefits.
- 800.** The Committee requests the Government to keep it informed of the outcome of these proceedings and, if the dismissals are proven to have been of an anti-union nature, to take steps to ensure that the dismissed workers are reinstated in their posts, without loss of pay or benefits. In the event that the reinstatement of the dismissed workers concerned is not possible for objective and compelling reasons, the Committee requests the Government to ensure that they are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals.

The Committee's recommendations

- 801.** 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 promote collective bargaining and to examine with the parties how collective bargaining can be extended in practice to conditions of work and employment of a non-economic nature and to other matters in which cooperation and dialogue between the parties may be beneficial. The Committee invites the Government and the social partners to examine the possibility of having the authorities undertake measures of conciliation or mediation with the parties concerned in case of an impasse in collective negotiations, including when a strike has not yet been declared.*
 - (b) *The Committee recalls the importance it attaches to the duty to bargain collectively in good faith.*
 - (c) *Observing that the Government has not replied specifically to the allegation that the company used other workers to replace strikers during negotiations relating to the list of demands for 2007–08, the Committee requests the Government to ensure that the principles relating to the replacement of*

strikers are respected if the trade union has recourse to strike action in the context of future negotiations between the company and the union.

- (d) *Finally, with regard to the allegation concerning the dismissal of 25 workers of the municipality of Surquillo for forming a trade union and demanding the payment of their wages for December 2007, the Committee notes with regret the Government's statement to the effect that the labour inspectorate established that 23 of the 25 workers in question had been dismissed arbitrarily. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings instituted by a number of workers (one worker has been reintegrated and compensated) and, if the dismissals prove to have been of an anti-union nature, to take steps to ensure that the dismissed workers are reinstated in their posts, without loss of pay or benefits. In the event that the reinstatement of the dismissed workers concerned is not possible for objective and compelling reasons, the Committee requests the Government to ensure that they are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals.*

CASE NO. 2664

INTERIM REPORT

**Complaint against the Government of Peru
presented by
the National Federation of Miners, Metalworkers
and Steelworkers of Peru (FNTMMSP)**

Allegations: The complainant organization alleges that, as a result of the declaration by the administrative authority that a strike was illegal, numerous trade union leaders and members in the mining sector were dismissed; it also alleges that, against this backdrop, two trade union members were murdered

- 802.** The Committee last examined this complaint at its November 2009 meeting and on that occasion presented an interim report to the Governing Body [see 355th Report, approved by the Governing Body at its 306th Session, paragraphs 1068 to 1092].
- 803.** The Government sent its observations in communications dated 2 and 17 November 2009, and 25 May 2010.
- 804.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

805. In its previous examination of the case, the Committee made the following recommendations [see 355th Report, para. 1092]:

- (a) The Committee requests the Government to take measures to ensure that, in the future, responsibility for declaring a strike illegal will not lie with the Government but with a body independent of the parties in which they have confidence, and to indicate the basis upon which the Ministry of Labour declared the strike illegal.
- (b) With regard to the dismissal of several union leaders and many trade union members (named in the complaint) in the mining sector following their participation in strikes that were declared illegal by the administrative labour authority, the Committee requests the Government to carry out an investigation without delay to determine the reasons for the dismissals, and, if it is found that they took place as a result of legitimate trade union activities, to take the necessary measures to reinstate the workers in their jobs. The Committee requests the Government to keep it informed in this regard.
- (c) With regard to the alleged murder of trade union members Mr Manuel Yupanqui and Mr Jorge Huanaco Cutipa on 9 and 22 July 2008, the Committee notes that, according to the complainant organization, the Public Prosecutor of Tayabamba Province, in the Department of La Libertad, is carrying out an investigation, and trusts that this investigation will make it possible to shed light, at the earliest date, on the facts and the circumstances in which such murders occurred and in this way determine where responsibilities lie, punish the guilty parties and prevent the recurrence of similar acts. The Committee requests the Government to keep it informed in this regard.
- (d) The Committee requests the Government to provide its observations on the complainant organization's new allegations of 29 September 2009.

In its communication of 29 September 2009, the complainant organization alleges the arrest and detention of trade union officials Pedro Candori and Claudio Boza Huanhuayo and of union member Eloy Poma Canchari on the grounds of their suspected involvement in the death of a police officer on 24 November 2008 during a roadblock operated by workers of the mining company Casapalca.

B. The Government's reply

806. In its communications of 2 and 17 November 2009, and 25 May 2010, the Government sent the following observations.

807. As regards the declaration that the strikes were illegal, the Government refers to the circumstances in which the strikes were held and the various administrative authority decisions to the effect that they were illegal.

808. As regards the dismissals of a number of trade union officials and many union members in the mining sector following their participation in strikes that were declared illegal by the labour administrative authority, the Government states that with regard to the dismissal of 17 workers by the Southern Peru Copper Corporation and the dismissal of nine workers by Minera Barrick Misquichilca SA, despite the various out of court meetings convened by the National Labour Relations Directorate, the parties failed to come to an agreement, and it will thus be for the judicial authorities to rule on the measures adopted. As regards the dismissal of four trade union officials by the mining company Los Quenuales SA, the company voluntarily agreed to re-hire the four dismissed workers.

809. As regards the alleged murders of union members Manuel Yupanqui and Jorge Huanaco Cutipa on 9 and 22 July 2008, the Government states that according to information provided by the National Police, Manuel Jesús Yupanqui Ramos died on 12 July 2008,

while Jorge Luis Huanaco Cutipa was seriously injured, during a confrontation between mine workers and the police. A number of police officers were also injured. According to the police it has not been possible to date to identify those responsible for these acts.

C. The Committee's conclusions

810. *The Committee takes note of the Government's observations.*

811. *As regards recommendation (a) the Committee observes that the Government, while referring to a number of different rulings that the strikes were illegal, sends no information on the legal basis on which the Ministry of Labour may declare a strike illegal. In this regard, the Committee recalls once again that responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties involved [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 628]. Under these circumstances, the Committee requests the Government to adopt measures to ensure that in future an independent body which has the confidence of the parties involved, rather than the administrative authority, is responsible for declaring strikes illegal. The Committee requests the Government to keep it informed of any measures adopted in this regard.*

812. *As regards recommendation (b) concerning the dismissal of several union leaders and many trade union members (named in the complaint) in the mining sector following their participation in strikes that were declared illegal by the administrative labour authority, the Committee notes the Government's statements to the effect that as regards the dismissal of 17 workers by the Southern Peru Copper Corporation and the dismissal of nine workers by the mining company Barrick Misquichilca SA, a number of meetings were convened by the National Labour Relations Directorate but the parties failed to come to an agreement and it will thus be for the judicial authorities to rule on issues relating to the measures adopted. As regards the dismissal of four trade union officials by the mining company Los Quenuales SA, the company voluntarily agreed to re-hire the four dismissed workers. In this regard, the Committee observes that, according to the allegations and the Government's reply, the dismissals were due to the absence of the workers from their workplaces as a result of their participation in the strikes of 30 April and 5 November 2007 and 30 June 2008, which were declared illegal by the administrative authority. The Committee has in the past considered that when trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against [see **Digest**, op. cit., para. 662]. Under these circumstances, the Committee requests the Government to take the necessary measures to ensure that an investigation is conducted without delay into these allegations and, if it is found that the workers were dismissed solely because of their participation in the strikes referred to, to take the necessary measures to reinstate the 17 workers dismissed by the Southern Peru Copper Corporation and the nine workers dismissed by the mining company Barrick Misquichilca SA, with payment of the wages owed to them, or, if reinstatement is not possible, to take the necessary measures to ensure that they receive full compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests the Government to keep it informed in this regard.*

813. *As regards recommendation (c), concerning the alleged murder of trade union members Manuel Yupanqui and Jorge Huanaco Cutipa, the Committee notes the Government's statements to the effect that according to the information provided by the National Police, Manuel Jesús Yupanqui Ramos lost his life in a confrontation between mine workers and the police on 12 July 2008, while Jorge Luis Huanaco Cutipa suffered serious injury. According to the available information, Mr Cutipa died on 24 July in the clinic. The police adds that to date it has not been possible to identify the person(s) responsible for this act.*

*In this regard, the Committee recalls that in the event of assaults on the physical or moral integrity of individuals, the Committee has considered that an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts [see **Digest**, *op cit.*, para. 50]. Under these circumstances, noting that in its previous examination of the case, the Committee noted also that the Public Prosecutor of Tayabamba Province had begun an investigation into this affair, the Committee expects that the investigations currently under way will yield specific results without delay and make it possible to identify those responsible for these acts. The Committee requests the Government to keep it informed in that regard.*

- 814.** *As regards the most recent allegations concerning the detention of trade union officials Pedro Candori and Claudio Boza Huanhuayo and union member Eloy Poma Canchari for their presumed involvement in the death of a police officer on 24 November 2008 during a roadblock operated by workers of the mining company Casapalca, the Committee, noting that the Government has not sent its observations on the matter, requests it to do so without delay.*

The Committee's recommendations

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

- (a) *The Committee requests the Government to take steps to ensure that in future an independent body with the confidence of the parties involved, rather than the administrative authority, is responsible for declaring strikes illegal. The Committee requests the Government to keep it informed of any measures adopted in this regard.*
- (b) *As regards the allegations regarding the dismissal of several union leaders and many trade union members in the mining sector following their participation in strikes that were declared illegal by the administrative labour authority, the Committee requests the Government to take the necessary measures to ensure that an investigation into those allegations is conducted without delay and, if it is found that the workers were dismissed solely because of their participation in the aforementioned strikes, to take the necessary measures to reinstate the 17 workers dismissed by the Southern Peru Copper Corporation and the nine workers dismissed by the mining company Barrik Misquichilca SA, with payment of the wages owed to them, or, if reinstatement is not possible, to take steps to ensure they receive full compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests the Government to keep it informed in this regard.*
- (c) *As regards the murders of Manuel Yupanqui and Jorge Huanaco Cutipa, the Committee expects that the investigation currently under way before the national police and the Public Prosecutor will yield specific results without delay and make it possible to identify those responsible. The Committee requests the Government to keep it informed in this regard.*
- (d) *As regards the allegations regarding the arrest of trade union officials Pedro Candori and Claudio Boza Huanhuayo and trade union member Eloy Poma*

Canchari for their presumed involvement in the death of a police officer on 24 November 2008 during a roadblock operated by workers of the mining company Casapalca, the Committee requests the Government to send its observations on the matter without delay.

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

CASE NO. 2671

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

**Complaint against the Government of Peru
presented by
the General Confederation of Workers of Peru (CGTP)**

Allegations: The complainant organization alleges the dismissal of a trade union leader and failure by the employer to recognize the union

- 816.** The complaint is contained in a communication from the General Confederation of Workers of Peru (CGTP) dated 22 September 2008.
- 817.** The Government sent its observations in communications dated 2 November 2009, and 25 February and 25 May 2010.
- 818.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 819.** In its communication dated 22 September 2008, the CGTP alleges that the Single Union of Contract Workers of UNHEVAL–Huánuco (SUTCUNHEVAL) was established at Hermilio Valdizán de Huánuco National University (UNHEVAL). The union obtained recognition from the Regional Directorate of Labour and Social Promotion by means of a decision of 25 January 2008 granting registration of the union.
- 820.** The CGTP adds that the union, through its General Secretary, has made complaints of anti-labour practices in the form of discrimination against unionized contract workers by excluding them from consideration for permanent posts since the allocation of such posts was not conducted in an open manner by the University, that is, no public competition was held. This matter was raised with the University rector in a document dated 11 March 2008, but no reply was received.
- 821.** According to the CGTP, it was because of the above situation that the union, through its General Secretary, made a series of complaints (attached by the complainant) to public institutions having a supervisory function, including that of 2 May 2008 to the Office of the Comptroller-General of the Republic, which gave rise to the unfair dismissal on 5 May 2008 of the union's General Secretary, Mr Franklin Reategui Valladolid, by order of the rector. This union official was also barred from entering his workplace.

822. According to the complainant, the University has denied any possibility of recognition for the union, as shown by Decision No. 0337-2008-UNHEVAL-R of 1 April 2008, dismissing as baseless the application for recognition of the union and its executive committee.
823. Finally, the complainant sends a copy of an application for *amparo* (protection of civil rights) filed with the Combined Court of Huánuco on 12 May 2008, which requests that the dismissal of the union's General Secretary, in retaliation for his union activity reporting abuses, be declared illegal. The *amparo* application also refers to the University's failure to recognize the union.

B. The Government's reply

824. In its communications of 2 November 2009, and 25 February and 25 May 2010, the Government states that it requested information from UNHEVAL concerning the allegations.
825. In this regard, the University states that it is untrue that Mr Franklin Reategui Valladolid was unfairly dismissed and points out that he was reinstated in his work further to a judicial injunction (Case No. 283-2007-25). The University adds that, in the final instance in these proceedings, a decision was issued in which the exception proposed by the University was upheld, quashing the previous proceedings and declaring the application in question to be inadmissible. Consequently, in accordance with section 630 of the Code of Civil Proceedings – applicable to the issuing of the decision – admittance was denied to Mr Reategui since there was no judicial order or legal obligation requiring the University to continue to employ him. It should be pointed out that the administrative authority established the criteria to be applied when carrying out inspections in the public administration, through National Directive No. 009-2008-MTPE/2/11.4 of 12 December 2008, which provides that the scope of labour inspection covers all workers subject to private sector labour law and its remit does not extend to other types of employment. The misrepresentation referred to in the allegation should be submitted to an internal procedure, and, if the complaint is maintained, the case should then be brought before the judiciary by instituting administrative proceedings. This is therefore not a matter for intervention by the administrative authority, especially if the complainant has brought an action before the courts for restoration of his rights. Without prejudice to the foregoing, a further request has been sent, in communication No. 093-2010-MTPE/9.1 to the Office of the President of the Superior Court of Huánuco, for information on the current state of the judicial proceedings brought by the complainant, so that the ILO may be kept informed in due time of the action taken. The information requested will be forwarded to the ILO as soon as it is received.
826. The University points out that, in January, Mr Reategui founded a workers' union comprising staff who worked on the basis of service provider contracts governed by civil, rather than labour legislation and had himself elected as General Secretary, even though he was no longer employed owing to the abovementioned court action which was declared inadmissible. Under service provider contracts, services are not provided according to fixed working hours; as a result, Mr Reategui came to the University at any time to provide his services and, despite being absent even for periods of several days, he never faced administrative proceedings because of the nature of his contract, which is governed by the Civil Code.
827. The University indicates that section 12 of Legislative Decree No. 276 (Administrative Service and Public Sector Remuneration Act) states that admission to the administrative service depends on successful participation in the entrance competition and therefore the workers seeking recognition (of the union) do not have the status of public servants. It

affirms that the right to freedom of association has never gone unrecognized inasmuch as the Single Union of Administrative Workers, a union established by workers under Legislative Decree No. 276 in conjunction with Act No. 27556 establishing the register of public service trade unions, exists at the University. Hence the administrative body is in a position to recognize the right to organize with respect to public servants, but not with respect to persons working on the basis of service provider contracts. The University considers that the application for recognition of the union and its legal personality by the University is baseless.

- 828.** Finally, the Government indicates that it should be made clear that, since SUTCUNHEVAL filed an application for *tutela* (protection of constitutional rights) with the courts and proceedings are pending before the judicial authority with regard to recognition of the union (case No. 2008-02366-O-1201-JM-CI-1), the labour administrative authority is obliged to refrain from making any pronouncement on this matter, otherwise the officials concerned would incur criminal liability under the terms of article 139 of the Political Constitution of Peru, which seeks to protect the independence of the judiciary. The judicial authority has therefore been requested, in communication No. 093-2010-MTPE/91, to supply information on the current status of the judicial proceedings relating to the complaint, and this information will be sent to the ILO.

C. The Committee's conclusions

- 829.** *The Committee observes that the complainant organization alleges that Mr Franklin Reategui Valladolid, General Secretary of SUTCUNHEVAL, was dismissed on 5 May 2008 and has since been barred from entering his workplace, and also alleges failure by the University to recognize the union and its executive committee. The Committee observes that the complainant considers this to be an anti-union dismissal resulting from written reports of irregularities to the competent authorities (attached by the complainant).*
- 830.** *As regards the failure to recognize SUTCUNHEVAL, the Committee notes that the Government sent a report from the University indicating that: (1) according to section 12 of Legislative Decree No. 276 (Administrative Service and Public Sector Remuneration Act), admission to the administrative service depends on successful participation in the entrance competition and therefore the workers seeking recognition (of the union) do not have the status of public servants; (2) the right to freedom of association has never gone unrecognized in view of the existence of the Single Union of Administrative Workers; and (3) accordingly, the administrative body is in a position to recognize the right to organize with respect to public servants but not with respect to persons working on the basis of service provider contracts, and the University therefore considers that the application for recognition of the union and its legal personality by the University is baseless. The Committee notes the Government's added statement that, since SUTCUNHEVAL filed an application for tutela with the courts and proceedings are pending before the judicial authority in regard to recognition of the union, the labour administrative authority is obliged to refrain from making any pronouncement on this matter.*
- 831.** *The Committee recalls that, under the terms of Article 2 of Convention No. 87, all workers, without distinction whatsoever, shall have the right to freely establish and join organizations of their own choosing and, under the terms of Article 9, only the armed forces and the police may be excluded from the scope of application of the Convention. The Committee, taking into account the fact that the issue of recognition of the trade union in question is currently pending before the judicial authority, expects that a decision will be handed down in the very near future and that account will be taken of the principle referred to above. The Committee requests the Government to keep it informed in this regard.*

- 832.** *As regards the alleged dismissal on 5 May 2008 of Mr Franklin Reategui Valladolid, General Secretary of SUTCUNHEVAL, the Committee notes that the Government sent a report from the University indicating that: (1) it is untrue that Mr Reategui was unfairly dismissed; (2) he was reinstated in his work further to a judicial injunction (Case No. 283-2007-25). The University adds that, in the final instance in these proceedings, a decision was issued in which the exception proposed by the University was upheld, quashing the previous proceedings and declaring the application in question to be inadmissible; (3) admittance to the workplace was denied to Mr Reategui (who was no longer working at the University when he was appointed General Secretary) since there was no judicial order or legal obligation requiring the University to continue to employ him, given that he had been working on the basis of a service provider contract; (4) under the terms of service provider contracts, services are not provided according to fixed working hours, and consequently Mr Reategui came to the University at any time to provide his services and never faced administrative proceedings, owing to the nature of his contract; (5) National Directive No. 009-2008-MTPE/2/11.4 of 2008 provides that the scope of labour inspection covers all workers subject to private sector labour law and its remit does not extend to other types of employment; (6) the misrepresentation referred to in the allegation should be submitted to an internal procedure, and if the complaint is maintained, the case should then be brought before the judiciary by instituting administrative proceedings; (7) this is not a matter for intervention by the administrative authority, especially if the complainant has brought an action before the courts for restoration of his rights; and (8) a further request has been sent, in communication No. 093-2010-MTPE/9.1 to the Office of the President of the Superior Court of Huánuco, for information on the current state of the judicial proceedings brought by Mr Reategui. The Committee observes that the Government does not supply any information concerning the reasons for non-renewal of the service provider contract of Mr Reategui by the University and attaches to its reply several service provider contracts which he held for work at the University for various months in 2008.*
- 833.** *Moreover, the Committee recalls that the adequate protection of trade union officials in the case of anti-union discrimination is 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.*
- 834.** *In these circumstances, the Committee expects that the judicial authority will hand down a decision in the very near future in regard to the non-renewal of Mr Reategui's contract, and, in the case that it is found that the non-renewal was based on anti-union grounds, that measures for compensation and sanction are taken as provided by national law. The Committee requests the Government to keep it informed in this regard and to send a copy of the decision as soon as it is handed down.*

The Committee's recommendations

- 835.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee expects that the judicial authority will hand down a decision in the very near future with regard to the recognition of SUTCUNHEVAL and requests the Government to keep it informed in this regard.*
 - (b) The Committee expects that the judicial authority will hand down a decision in the very near future in regard to the non-renewal of the service provider contract of the trade union leader, Mr Franklin Reategui and, in the case that it is found that the non-renewal was based on anti-union grounds, that*

measures for compensation and sanction are taken as provided by national law. The Committee requests the Government to keep it informed in this regard and to send it a copy of the decision as soon as it is handed down.

CASE NO. 2675

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

**Complaint against the Government of Peru
presented by
the General Confederation of Workers of Peru (CGTP)**

*Allegations: Prejudicial consequences of
short-term contracts on trade union rights in
industrial companies subject to the
non-traditional exports scheme*

- 836.** The complaint is contained in a communication of the General Confederation of Workers of Peru (CGTP) dated 16 October 2008.
- 837.** The Government sent its observations in communications dated 12 February and 25 May 2010.
- 838.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Allegations of the complainant

- 839.** In its communication of 16 October 2008, the CGTP explains that industrial companies subject to the non-traditional exports scheme (which export 40 per cent of their domestic output actually sold) are authorized by article 32 of Decree Law No. 22342 to conclude casual contracts with workers whenever necessary. These are chiefly textiles and dressmaking factories which keep their workers on fixed-term contracts averaging three months (sometimes 15 days), which in practice restricts the right to organize, collective bargaining and strike because workers are afraid that their contracts will not be renewed. Some workers have been employed in the same company on these contracts for 25 years. According to the complainant, this anachronistic contractual system allows wages, working hours and conditions of safety and health which are extremely inadequate.
- 840.** The CGTP refers to several examples of dismissals without notice of trade union officials and members who have been employed for as much as 15 years on short-term contracts, in a way which is an abuse of the legal framework for workers in such companies, since it keeps them indefinitely in the position of casual workers.
- 841.** The complainant organization states that on 30 November 2007, the ICADIE Company announced without warning that it was not going to renew the contracts of some 1,200 workers. Trade union officials whose contracts were expiring on that date were offered a two-week contract on the basis that the company had not received sufficient orders, although that was never proved, nor was it discussed with the trade union. The

trade union leaders initially refused to sign, as they wished to press for more stable contracts.

- 842.** In total, over 1,200 workers were dismissed on that day, including 500 trade union members and seven officials of the union. Those who remained employed in the company were offered two-week contracts. One of the company's chief international customers intervened calling the company's attention to the fact that respect for freedom of association was a contractual requirement. The management recognized the need to provide special protection to certain groups of workers, including pregnant women and trade union leaders, and offered to reinstate them, but with two-week contracts. This time, the trade union leaders accepted this but, despite repeated meetings and conversations over the following weeks, the company never honoured its offer to renew the trade union officials' contracts, claiming that there were no vacancies.
- 843.** Finally, on 24 January 2008, the company and trade union signed a letter in the Ministry of Labour whereby the workers, whose contracts had not been renewed, including the seven trade union officials, would have priority of employment when new vacancies occurred.
- 844.** However, on 30 January 2008, the trade union received a letter from the company in which it said that the trade union officials had opted not to renew their contracts and, consequently, were no longer members of the executive committee of the union and were not in a position to reach any kind of agreement with the company. The trade union wrote to the company expressing its surprise at the content of the notarized letter, noting that the intention of the letter seemed to be to invalidate an agreement signed on 24 January 2008. If that were the case, it was obviously an act of bad faith.
- 845.** It should be pointed out that a little before 24 January 2008, a report of the Labour Inspectorate indicated that ICADIE was not listed in the national register of non-traditional exporters and, consequently, it was not permitted to use casual contracts, and should therefore inform its workers that they had been employed on permanent contracts since their date of entry. The report also identified infringements in the payment of family allowances, length of service and family benefits. On identifying these infringements, the inspectors imposed a fine and carried out an inspection to ensure compliance with the legislation, but the company did not comply.
- 846.** As regards the textile companies of the Topy Top SA Group, in June 2007, the CGTP indicates that the International Textile, Garment and Leather Workers' Federation (ITGLWF) facilitated an agreement designed to put an end to a major dispute in the factory. The agreement provided for the reinstatement of 93 workers whose contracts had been terminated by the company because of their participation in trade union activities, as well as the introduction of industrial relations management systems to accompany recognition of the trade union. The situation later deteriorated:
- In Topy Top SA, the management sent a letter to the trade union on 11 January 2007 in which it indicated that one of its chief customers had considerably reduced its orders during the last few months and the company was going to have to "downsize", which would mean that many of the contracts would not be renewed from 31 January 2007. The trade union tried to request a meeting with the company, in accordance with an agreement signed in June 2007 with the ITGLWF, which includes mechanisms for regular communication, dialogue and bargaining, but the management refused to meet with the union, saying that the decision to reduce the workforce had already been taken. This runs counter to good industrial relations, which require that any restructuring must be the subject of bargaining with the trade union before a final decision is taken. Just prior to the complaint to the Committee on Freedom of Association, 70 workers were dismissed from Topy Top SA on a

selective basis. The majority of the dismissed workers were members of the trade union.

- In Star Print SA, 55 workers have been dismissed since the formation of the trade union in January 2008, all of them trade union members. The company argued that the workers were dismissed as a result of its “workforce reduction”. However, only trade union members were dismissed and many of them have since been replaced by new workers.
- In the Sur Color Star SA company, the recently formed trade union obtained legal recognition in December 2007, but 20 of its officials and members have since been dismissed. There have been many reports of unfair and arbitrary practices relating to conditions of work (wages, safety, etc.).

847. In conclusion, the CGTP requests that article 32 of Decree Law No. 22342 should be amended or revoked.

B. The Government’s reply

848. In its communications of 12 February and 25 May 2010, the Government states, with regard to the various complaints of anti-trade union and collective bargaining practices, various inspections were carried out in the Topy Top SA, Star Print SA, and Sur Color Star SA companies, in which serious infringements of trade union and labour rights were found, and the companies were fined. The Government also provides detailed information on the various inspections carried out and the fines imposed for contravention of trade union and labour legislation.

849. With regard to Topy Top SA, the company was fined 103,500 nuevos soles (PEN) in 2007 for anti-trade union practices and, in 2008, for failure to provide copies of the contract of employment within the legal time limit (fine of PEN2,835) and failure to fulfil the formalities in non-traditional export contracts (fine of PEN1,435).

850. With regard to Star Print SA, the company was fined PEN51,030 in 2008 for failure to provide payslips, non-compliance with provisions relating to fixed-term contracts and acts against freedom of association. In 2009 (under an inspection report 1971–2008) it was fined PEN17,010 for failure to pay and issue vouchers for payment of profit shares.

851. With regard to Sur Color Star SA, the company was fined PEN685,300 in 2008 for failure to comply with the provisions on fixed-term contracts, the Act on the promotion of non-traditional exports, acts against freedom of association and obstruction of labour inspections, and a prosecution was instigated for anti-trade union acts and obstruction of labour inspections but that was subsequently annulled and the proposed fine was cancelled. In addition, in 2008, the company was fined PEN17,010 for interference with freedom of association, acts of hostility, failure to provide personal protective equipment and obstruction of labour inspections.

852. With regard to Industria de Confecciones Artes Diseños y Estampados, ICADIE/Diseño y Color, that company was fined PEN66,745 in 2008 for failure to deposit and issue certificates of length of service, payment of family allowance, bonuses and obstruction of labour inspections (it did not comply with the requirement to rectify non-traditional export contracts).

853. The Government adds that the National Directorate of Industrial Relations of the Ministry of Labour and Employment Promotion convened several extra-judicial meetings in 2008 and 2009 relating to the complaint before the Committee on Freedom of Association but,

on some occasions due to the failure of both parties to attend, on other occasions due to the attendance of only one of the parties, and on others despite ample discussion, it was not possible to reach any agreement or find a formula to resolve the problem.

- 854.** The Government indicates that it requested information on judicial proceedings for cancellation of dismissals related to the companies in question, from the Coordinator of the Supreme Court of Justice in Lima with the Ministry of Labour and Employment Promotion, who is responsible for questions related to the judicial application of the Conventions of the International Labour Organization and matters concerning the right to organize.
- 855.** The Government also indicates that the position of Topy Top SA on the complaint is as follows; the company states that the complaint prepared by the trade union confederation refers to the month of October 2008, prior to the global financial crisis at the end of that year, which affected international trade between the developed and developing countries and thus the employment situation in the region throughout 2009. Exports in the sector fell by up to 30 per cent in the period 2008–09. It argues in this regard that what the trade union confederation called “mass dismissals” of workers were nothing more than the non-renewal of contracts of employment concluded in the special labour scheme for non-traditional exports regulated by Decree Law No. 22342 of 21 November 1978. The company explains that this Act did not institute a perverse labour regime, as the trade union confederation argues tendentiously, but is simply a legal provision which formed part of the labour project to grant and promote rights which was promulgated at that time and continues in effect in the present. The defendant company also mentions, among other things, that in the case of Topy Top SA, trade union membership was known before the expiry of the contract of employment. Those contracts could not be renewed due to the company’s economic situation at the time.
- 856.** With regard to Star Print SA, the termination of the contracted workers, according to the employer, was due to the economic situation at the time. The termination took effect at a time when the employer was unaware of the formation of a trade union. There are management decisions taken at the time which confirm the employer’s position.
- 857.** As regards the case of Sur Color Star SA, the employer’s side explains that the employer’s decision to terminate employees on fixed-term contracts was also due to the same economic situation. The employer was forced to make use of the legal option agreed in the contract of employment to terminate the employment relationship before the end of the three-month probationary period. That decision was applied to both unionized and non-union workers, as shown in the employment records of the Ministry of Labour. In addition, the employees of that company received different and better economic benefits than other companies in the sector.
- 858.** According to the employers’ side, since the events which gave rise to the complaint, each of the companies have continued to maintain relations with the trade unions. For example, the Topy Top trade union now has 260 members. With regard to the 2008 economic situation mentioned in the complaint, a significant number of former workers have received payment of their social benefits. The remainder are the subject of court action as decided by the former workers. The employers are represented in these proceedings in accordance with the rules of due process before the competent authorities, whose decisions are not yet final.
- 859.** According to the employers’ side, the employment policies of Topy Top SA and related companies have been recognized by representative institutions which ensure compliance with good industrial practices. The group of companies has been accepted as a member of the Good Employers’ Association (ABE) with the participation of the American Chamber

of Commerce of Peru (AMCHAM). They are also constantly audited by the social compliance departments of its major customers, including GAP Inc., Abercrombie and Fitch, Inditex SA and Life is Good. The employers' side annexes a chart which shows the start of the recession in 2008, the fall in exports in 2009 and the projections for 2010–11. In 2011, export levels will reach those of 2007.

- 860.** The Government reports that the Supreme Court has indicated the criteria that must be observed in the case of non-traditional export contracts, determining that contracts of employment under the export scheme for non-traditional products regulated by Decree Law No. 22340 [sic] are not fundamentally altered if they are extended for over ten years. The application was filed by workers of a textile company who had been working on fixed-term contracts for over ten years, subject to the non-traditional products export scheme, and whose contracts were not renewed. They indicated that, due to the time elapsed, their contracts had been fundamentally altered and had been converted into indefinite-term contracts and, therefore, they were claiming compensation for unfair or arbitrary dismissal. In that circumstance, the Supreme Court clarified that Decree Law No. 22342 does not limit employment contracts under the non-traditional export products scheme to a maximum period of time and, therefore, their termination, after a period exceeding ten years was not an act of arbitrary dismissal. It further indicated that, in analysing those cases, the following circumstances must be analysed to determine whether or not the form of contracting was valid: (1) the number of workers in the company employed under article 32 of Decree Law No. 22342; (2) the volume and percentage of its production destined for the export and domestic market; (3) the number of workers at the site subject to the ordinary private activity labour regime; and (4) changes in the contracts of the company's workers subject to the provisions of Decree Law No. 22342.
- 861.** The Government also declares that, faced with the problem of the abuse of contracts by companies in the textile sector, the workers' side, through the National Directorate of Labour Inspection, formulated Guideline No. 002-2008-MTPE/2/11.4 of 4 February 2008, on "Conduct of labour inspections in the textiles sector". By means of these guidelines, it was sought to establish a degree of compliance with the requirements of social and labour legislation, as well as safety and health in companies in the textiles sector. Under this Guideline, criteria were laid down to be followed in validating non-traditional export contracts, i.e. verification in accordance with the provisions of article 32 of Decree Law No. 22342, the Act on promotion of non-traditional exports, and its regulations approved by Supreme Decree No. 001-79-ICTE-CO-CE, to the effect that employment contracts must include the work to be performed and the export contract which generates the employment, the purchase order or originating document, and evidence of registration in the national register of non-traditional industrial export companies.
- 862.** Another initiative of the Ministry of Labour to regulate non-traditional export contracts was the submission to the 87th regular plenary session of the National Council of Labour and Employment Promotion, on 29 May 2008, of the draft bill to establish a temporary contract scheme for the promotion of non-traditional exports. The object of the bill was to amend the contractual regime applicable to non-traditional export activities. The Technical Labour Commission (CTT) was charged with the analysis, debate and revision of the bill. The Commission held meetings to discuss the subject, but consensus between the parties was not achieved, as the workers' position was simply to abolish the employment regime under Decree Law No. 22342, the Act on promotion of non-traditional exports, while the employers' side, contrary to the workers' approach, maintained that its abolition would damage the current framework of export promotion and would affect domestic and foreign investment. The employers' organization held that it was not possible to eliminate from current legislation a system of temporary contracts which, in its opinion, had generated decent work. Nor, in its view, could a framework of export promotion which had had, and would continue to have, a positive effect on the country's economic growth, be cast aside.

They also maintained that it was not possible to demand stability of employment in the promotion of non-traditional exports when there was volatility in the market, a factor which had a negative impact on the permanence and continuity of the exporting companies. The employers' side asserted, finally, that the only difference between that system of contracting and the general regime was its "temporary" nature because the enjoyment and assertion of all individual rights was similar to the regime established by the general legislation.

- 863.** Two bills concerning the problem in the present case had been debated in the National Congress. Through these two bills, national congressmen Freddy Serna of the parliamentary group "Union for Peru" and Victor Mayorga of the Nationalist Party, respectively, raised the repeal of Decree Law No. 22342, the Act on promotion of non-traditional exports.
- 864.** Both bills were approved in the Labour Committee for the legislative period 2007–08, establishing the repeal of articles 32, 33 and 34 (Chapter IX of the Labour Regime) of Decree Law No. 22342, and the repeal of article 80 of Legislative Decree No. 728, approved by Supreme Decree No. 003-98-TR, which provided that any company covered by the non-traditional export scheme could contract employees under that scheme. However, the Foreign Trade and Tourism Committee issued a negative opinion on 14 October 2008, indicating that it was not appropriate to repeal the contested articles of Decree Law No. 22342 (Act on the promotion of non-traditional exports), because it was not a problem of the law itself, but its unsatisfactory application, therefore it would be desirable to consider mechanisms to improve its application. The need was also pointed out to bear in mind the importance of this form of fixed-term contract in the growth of exports, the development of productive activities and, ultimately, employment promotion. In conclusion, there is still no consensus among the members of the National Congress on taking steps to repeal and/or amend the Act on promotion of non-traditional exports, and the matter is still pending.
- 865.** The Government goes on to describe its position. The non-traditional export scheme has been in effect since 1978 under Decree Law No. 22342, Act on promotion of non-traditional exports, which came into force on 23 November 1978. The Act was passed with the aim of promoting investment and economic growth (by reducing business risk) in a business sector which, at the end of the 1970s, was beginning to become more export-oriented, limited access to the markets of developed countries and small and unstable foreign demand.
- 866.** These characteristics changed significantly, as nowadays demand for national textile, agricultural and livestock products globally have increased considerably. Exports of these products rose, respectively, by an average of 12 per cent and 16 per cent annually from 1997 to 2007. Destination markets expanded so that over 50 per cent of non-traditional exports are concentrated in these sectors, assisted by the fact that this process was greatly facilitated by the exceptional waiver of duty granted unilaterally by the United States of America to the Andean countries, and then extended or improved with the signing of the free trade agreement with Peru.
- 867.** Almost 30 years having passed since the entry into force of Decree Law No. 22342, the policy of promoting temporary employment has almost become permanent, but without any monitoring of the effects of the law questioned by the complainant organization on the labour market. This has still not allowed the introduction of changes in this legislation to remedy in some way the counterproductive effects mentioned by the complainants.
- 868.** In the Government's opinion, the temporary needs of the textile exporting companies at the present time, irrespective of the temporary contracting scheme under Decree Law

No. 22342, could be satisfied by flexible contracts, such as the so-called market needs contract, which is a type of fixed-term contract which can mitigate the risk arising from unforeseen variations in market demand. In this regard, it should be mentioned that the Ministry of Labour has expressed its position in report No. 111-2008-MTPE/5 of 13 October 2008, issued by the Office of the High-Level Technical Adviser, a position which was ratified by the Office of the Legal Adviser in report No. 232-2009-MTPE/9.110 of 21 April 2009, in which it stated the following:

- The promotion of temporary employment, which by its nature introduces an exception to the effect of the principle of causality (which indicates that business needs of a permanent character must be covered by indefinite-term contracts, while needs of a temporary character must be covered by fixed-term contracts), must be justified by the satisfaction of interests of an equal or higher importance than the interests affected through its implementation in the labour market, without causing serious or greater harm than the benefits which may be generated. In this regard, in the light of the detailed statistical data set out in report No. 111-2008-MTPE/5, it is apparent that temporary contracts have been used repeatedly as a means of discouraging trade union membership and have had prejudicial effects, such as the low average remuneration in the textiles–dressmaking sector, even though, in the last 14 years, exports in the sector have increased five-fold, while labour turnover has led to a lower average duration of employment and poor skill levels.
- As a consequence of the excessive use of temporary contracts, negative effects arise on the level of social protection of workers, given that with short periods of employment, contributions to pension and health insurance schemes cannot achieve the desired continuity and thus prejudice their future quality of life. The result is that over time, this promotion policy has fundamentally changed, as, in almost 30 years since Decree Law 22342 came into force, there has been no proper study of the negative effects of the law on the labour market. We believe this to be an overriding necessity, since it will allow us to promote or propose changes to restore the necessary balances and offset the harmful effects on the exercise of labour rights generated by the differential treatment which workers in the textiles export sector could be suffering as a result.

869. It should be added that the policy of promoting traditional exports must lead to the promotion of investment in physical capital, innovation, technology, human capital and an improvement in the organization of work, so as to generate increased added value and sustained growth in productivity which lead to long-term economic growth. The goal is to promote greater competitiveness and not merely reduce labour costs, which only helps to increase the inequality of income distribution in the country. The Government indicates that it hopes to issue, in due course, the recommendations and measures to ensure the correct application of the exceptional contracting scheme mentioned above.

870. With respect to the alleged anti-trade union acts, mass dismissals of trade union officials and other practices in 2008, the Government reiterates that, having attempted several extra-judicial measures without reaching concrete solutions or agreements, it is currently taking legal proceedings against the companies Topy Top SA, Star Print SA, Sur Color Star SA and ICADIE/Diseño y Color. As regards the economic situation in 2008 mentioned in the complaint, a significant number of former workers have received payment of social benefits, while many cases were the subject of court action as decided by the former workers, therefore the employers are represented in these proceedings in accordance with the rules of due process before the competent authorities, whose decisions are not yet final.

C. The Committee's conclusions

- 871.** *The Committee observes that in the present complaint, the complainant organization objects to article 32 of Act No. 22342, applicable to industrial companies subject to the non-traditional export scheme, which authorizes them to conclude very short-term casual contracts which are renewed indefinitely for years and which have prejudicial effects on the exercise of trade union rights (because workers are afraid that their contracts will not be renewed) and on conditions of work. The complainant organization gives four companies as an example: in the first, there were mass dismissals of workers in 2007, among them many trade union members and some officials; in the second company, 93 workers were dismissed in 2007 for participating in trade union activities, the majority of them trade union members, and 70 workers were dismissed for reasons of downsizing; in the third company, 50 workers were dismissed, all trade union members, allegedly on the grounds of workforce reduction (according to the complainant, many of the dismissed workers were replaced by other workers); in the fourth company, 20 workers who were trade union officials or members were dismissed in 2008. The Committee notes the statements of the employers' side concerning those dismissals, denying the anti-trade union characters of the dismissals, emphasizing the financial crisis and its repercussions with the decline in exports of up to 30 per cent, and indicating that they were not dismissals but "non-renewal" of contracts. According to the employers, the specific employment system in non-traditional exports is not perverse as indicated in the complaint but is appropriate to the economic situation of the sector and the non-renewals were the result of economic circumstances. The employers' side further indicates that the non-renewals affected both unionized and non-union workers, and that in any case, in one of the companies where the complaint alleges anti-trade union dismissals, the company was unaware of the formation of a trade union.*
- 872.** *The Committee observes that the Government took steps, which were unsuccessful, to get the parties to reach an agreement and that, from the statements of the Government and the employers' side, it emerges that the dismissed workers, or workers whose contract was not renewed in the companies concerned, had either accepted payment of their statutory social benefits or had decided to initiate legal proceedings which had not yet been the subject of a final decision. The Committee understands that the complainant organization seeks to focus the complaint not on the examples relating to the aforementioned companies (which are at the judicial stage or have lapsed because the workers have accepted payment of the statutory benefits) but on the amendment or repeal of article 32 of Act No. 22342, as it considers that casual contracts which are renewed indefinitely in the non-traditional exports sector have harmful effects on the exercise of trade union rights.*
- 873.** *In this respect, the Committee wishes to point out that its powers are confined to verifying that national law and practice respect the exercise of the trade union rights enshrined in the Conventions on freedom of association and do not include examination of the regime and duration of employment contracts or the level of conditions of work. Therefore, it can only concern itself with the problem raised by the complainant organization from a very restricted standpoint: the impact in practice of these short-term contracts which are renewed indefinitely on the exercise of trade union rights. The Committee cannot help but observe in this regard that in practice, as the Government points out, the labour inspections carried out in some of the companies mentioned by the complainant led to fines for anti-trade union practices. The Government also states in general, in the sector in question that "temporary contracts have been used repeatedly as a means of discouraging trade union membership" and that it had generated "negative effects on the level of social protection". The Committee observes that the problem raised in this complaint is a matter of concern in the country, since the Government informs that various bills were submitted to the National Congress to amend or repeal article 32 of Act No. 22342 which failed for lack of consensus, and that the Supreme Court of Justice had established certain criteria*

on the problem. Lastly, the Committee notes the Government's position, according to which: (1) it takes into account the temporary and fluctuating needs of non-traditional textile export companies, namely that these needs could be satisfied by forms of fixed-term contracts such as the "market needs contract", which would mitigate the risk of unforeseen variations in market demand; and (2) it hopes to issue, in due course, the recommendations and measures to ensure the correct application of the exceptional contracting scheme mentioned above.

874. *Bearing in mind these statements, the Committee invites the Government to examine with the most representative workers' and employers' organizations, a way of ensuring that the systematic use of short-term temporary contracts in the non-traditional export sector does not become in practice an obstacle to the exercise of trade union rights. The Committee requests the Government to keep it informed in that respect.*

The Committee's recommendation

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

The Committee invites the Government to examine, with the most representative workers' and employers' organizations, a way of ensuring that the systematic use of short-term temporary contracts in the non-traditional export sector does not become in practice an obstacle to the exercise of trade union rights. The Committee requests the Government to keep it informed in that respect.

CASE NO. 2687

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

Complaint against the Government of Peru presented by the Autonomous Confederation of Peruvian Workers (CATP)

***Allegations: Refusal to register a trade union of
public cleaning workers***

876. The complaint is contained in a communication from the Autonomous Confederation of Peruvian Workers (CATP) dated 13 November 2008.

877. The Government sent its observations in a communication dated 20 November 2009.

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

A. The complainant's allegations

879. In its communication dated 13 November 2008, the CATP alleges that its affiliate, the Coronel Portillo Municipal Services Workers' Trade Union (SMSER-MPCP), was

established on 27 January 2008 at a meeting held in Pucallpa and attended by 72 public cleaners (42 men and 32 women) of Coronel Portillo Municipality.

- 880.** On 18 March 2008, the general secretary of the trade union filed an application for trade union registration with the Ucayali Regional Directorate for Labour and Employment Promotion (DRTPE), attaching the documents required under Supreme Decree No. 003-2004-TR, although section 2(3) of the Decree provides that registration is a purely formal act which is automatically carried out on submission of the required documents (a copy of the founding document, a list of the members of the elected executive committee, a copy of the by-laws approved by the assembly, and a complete list of members, duly identified). Despite this, the DRTPE refused registration of the union by Subdirector Order No. 013-2008-DRTPE-SD-NC-RG-UC of 24 March 2008, essentially on the following grounds: (a) the application did not specify whether the workers were subject to public or private sector labour law (Legislative Decree No. 276 or Legislative Decree No. 728); and (b) the members of the trade union were recruited by Coronel Portillo Municipality under non-personal service contracts (SNP), which are governed by the Civil Code (service provision), and are not subject to either public or private sector labour law.
- 881.** On 31 March 2008, the general secretary of the SMSER-MPCP lodged an appeal against Subdirector Order No. 013-2008-DRTPE-SD-NC-RG-UC. By Directorate Decision No. 025-2008-DRTPE-DPSC-D of 29 April 2008, the next hierarchical level revoked the appealed decision and ordered the Subdirector for General Registration to register and recognize the appellant trade union. Subsequently, by regional Directorate Decision No. 029-2008-GRU-DRTPE-UCAYALI-D of 4 June 2008, the Regional Director for Labour and Employment Promotion, citing section 202 of Act No. 27444, decided *ex officio* to declare Directorate Decision No. 025-2008-DRTPE-DPSC-D null and void, in violation of the constitutional right to organize and impairing freedom of association, which is enshrined in the Constitution and ILO Conventions Nos 87 and 98, ratified by the State of Peru.
- 882.** The complainant states that the head of the Subdirector for General Registration and Certification failed to take account of the fact that the union members include workers with over three, five and seven years' continuous employment, who are subject to fixed working hours and are subordinate to and dependent on their employer (Coronel Portillo Municipality). According to the complainant, the abovementioned official did not take into account the inspection carried out by the Subdirector for Inspections (attached to the complaint) which recognized the existence of an employment relationship between the union members and Coronel Portillo Municipality. This is thus an attempt by the Regional Labour Directorate of the Ucayali regional government to fraudulently conceal the employment nature of the union members' relationship. Moreover, the non-personal service contracts between Coronel Portillo Municipality and the union members were converted as of 29 June 2008 to administrative service contracts, a contractual arrangement governed by Legislative Decree No. 1057. This is a special contractual arrangement applicable to any public body that is subject to Legislative Decree No. 276, the Framework Act on the civil service and remuneration in the public sector (which is the case of Coronel Portillo Municipality) and other regulations governing special branches of the civil service.
- 883.** The complainant states further that the restriction on freedom of association described above violates the provisions of Convention No. 87 and article 28 of the Constitution, which provides that the State guarantees freedom of association and promotes collective bargaining; article 42 of the Constitution recognizes the right of public servants to organize. In addition, article 23 of the Constitution states that "no employment relationship may limit the exercise of constitutional rights, or disregard or degrade the worker's dignity", and article 2(2) recognizes the right to equality before the law, specifying that

“no one shall be discriminated against on grounds of origin, race, sex, language, religion, opinion, economic status or any other grounds”.

B. The Government's reply

- 884.** In its communication of 20 November 2009, the Government states that, in order to formulate the Government's position on the request considering the possibility, feasibility and effects of recognition of the right to freedom of association for persons employed under the administrative service contract system, the Ministry of Labour and Employment Promotion sent communication No. 254-2009-MTPE/9.1 of 30 March 2009, requesting information from the Secretariat for Public Administration of the Prime Minister's Office, and communication No. 953-2009-MTPE/9.1 of 23 October 2009 to the National Civil Service Authority, asking for its opinion on the matter. It should be pointed out that special rules governing administrative service contracts were issued by Legislative Decree No. 1057 of 28 June 2008. This is a contractual arrangement used by the public administration, which falls exclusively within the remit of the State, between a public body and an individual providing services in a non-autonomous manner. This form of contract is governed by public law and provides only for the benefits and obligations stipulated in that legislation and the regulations made under it by Supreme Decree No. 075-2008-PCM.
- 885.** The Government states that the Secretariat for Public Administration of the Prime Minister's Office is the body tasked with coordinating and managing the process of modernization of the public administration, and is competent to deal with the functioning and organization of the State. The National Civil Service Authority enjoys full autonomy, within the powers conferred on it by the Organic Act on the Executive Branch, in regulating, supervising and advising public bodies in their human resource management and in promoting long-term reform of the civil service; the technical opinion of both bodies is thus of vital importance.
- 886.** Lastly, the Government states that once it has received the information requested from the bodies mentioned above, it will state its position on the matter, of which the ILO will be informed in due time.
- 887.** The Government attaches a copy of a communication from the Ministry of Labour and Employment Promotion addressed to the executive president of the National Civil Service Authority requesting information on the problem of the right to organize of persons employed under non-personal service contracts (currently called “administrative service contracts”). In another communication, the Secretariat for Public Administration of the Prime Minister's Office requested the president of the National Civil Service Authority to appoint a representative to discuss the possibility, feasibility and effects of recognition of the right to freedom of association for persons employed under administrative service contracts, given that, from a strictly legal standpoint and according to the definition contained in Legislative Decree No. 1057, the administrative service contract is a special arrangement under administrative law which falls within the exclusive remit of the State and is not subject to the Framework Act on the civil service, private sector labour law or other provisions on special branches of the civil service, as freedom of association is a right which only workers enjoy, under the Political Constitution of Peru itself. The communication also states that, considering that Legislative Decree No. 1057 was drafted and submitted by the Ministry of Labour and Employment Promotion, that is the body which is tasked with collective labour law, and that there is now a National Civil Service Authority, and bearing in mind that the reply that should be sent to the ILO will be the position of the State of Peru, a coordination meeting should be held before issuing any opinion on the matter. The communication states that the meeting will accordingly be held on Tuesday 21 April 2009 in the Prime Minister's Office.

C. The Committee's conclusions

888. *The Committee observes that in the present complaint the complainant objects to the decision of the Ministry of Labour of 24 March 2008 refusing to register the SMSE-MPCP, an organization of public cleaners, on grounds that the application for registration did not specify the labour law system to which the workers belonged (public or private) and that the members of the trade union were recruited by the municipality under non-personal service contracts governed by the provisions of the Civil Code on service provision. According to the complainant, in an inspection report attached to the complaint the Directorate for Labour Inspection recognized the existence of an employment relationship between these workers and the municipality, and confirmed that the workers had been continuously employed for three, five or seven years, were subject to fixed working hours and were dependent on the municipality; since June 2008 these unionized workers' contracts had been converted into administrative service contracts of public bodies, governed by Legislative Decree No. 1057. The complainant alleges that this is a case of attempted concealment of the employment nature of the relationship between the union members and the municipality.*
889. *The Committee notes the Government's reply to the effect that in March and October 2009 it requested the Secretariat for Public Administration of the Prime Minister's Office and the National Civil Service Authority to give an opinion on the possibility and feasibility of recognizing the right to freedom of association for individuals employed under the administrative service contract system. The Committee notes that according to the Government, the authorities convened a meeting on this matter for 21 April 2009 between representatives of the Secretariat for Public Administration of the Prime Minister's Office, the National Civil Service Authority and the Ministry of Labour and Employment Promotion. The Committee observes that the Government does not state whether this meeting took place and if so, what the outcome was.*
890. *The Committee regrets that the examination of the question of the right to organize for persons employed under the administrative service contract system has not been resolved to date, despite the fact that the complaint was presented in November 2008. The Committee also notes with regret that the Government has not replied to the allegation that the decision of the Ministry of Labour refusing to register the union was an attempt to conceal the employment nature of the relationship between its members and the municipality. In this regard, the Committee takes note of a labour inspection report dated 25 April 2008, attached to the complaint, indicating that the public cleaners have fixed working hours and between one and ten years' service; the same report states that "each worker carries out public cleaning tasks as a worker".*
891. *The Committee recalls that Convention No. 87 and, specifically, the right to establish organizations applies to all workers "without distinction whatsoever", the only possible exception being the armed forces and the police, and that it therefore considers that the cleaners of Coronel Portillo Municipality should enjoy the guarantees provided for in the Convention. All workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 255]. The Committee therefore expects that the authorities will take full account of this principle in their ongoing examination of the right to organize of employees of public bodies employed under the administrative service contract system, and that the Government's decision will be taken without delay and will enable the SMSE-MPCP to obtain registration. The Committee urges the Government to keep it informed in this regard.*

The Committee's recommendation

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

Recalling that the cleaners of Coronel Portillo Municipality should enjoy the guarantees provided for in Convention No. 87, and in particular the right to establish organizations, the Committee expects that the authorities will take full account of this principle in their ongoing examination of the right to organize of employees of public bodies employed under the administrative service contract system, and that the Government's decision will be taken without delay and will enable the SMSER-MPCP to obtain registration. The Committee urges the Government to keep it informed in this regard.

CASE NO. 2688

DEFINITIVE REPORT

**Complaint against the Government of Peru
presented by
the National Federation of Judicial Employees
of Peru (CEN-FNTPJ)**

Allegations: The National Federation of Judicial Employees of Peru (CEN-FNTPJ) alleges that: (1) the judicial authority, as the employer, refused to bargain with it; (2) despite having signed a settlement on 4 December 2007 (after a strike that had begun on 27 November), the judicial authority signed another settlement on 7 January 2008 with a group of unions which, although they are affiliated to the Federation, had decided to continue the strike; and (3) the judicial authority interfered in internal affairs of the union

893. The complaint is contained in a communication from the National Federation of Judicial Employees of Peru (CEN-FNTPJ) dated 29 October 2008.

894. The Government sent its observations in communications dated 25 February and 25 May 2010.

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

A. The complainant's allegations

- 896.** The CEN–FNTPJ alleges that the judicial authority refused to set up a joint committee to hold formal discussions on the lists of demands presented in 2007 and 2008, but that after the national strike that lasted from 27 November to 4 December 2007, a settlement was signed between the union and the judicial authority, ending the strike and settling some of the complainant's demands. The complainant adds, however, that on 7 January 2008, the director of human resources development of the judicial authority interfered in the internal affairs of the Federation by signing a second settlement, which also provided for benefits, with certain affiliates of the Federation that had decided to go on with the strike, despite the fact that they did not have trade union status, and disregarding the representativity of the complainant Federation.
- 897.** The complainant further alleges that the judicial authority interfered in the federation's internal affairs by attempting to influence the appointment of the worker members of the joint committee approved by Decision No. 268-2007-P/PJ (according to the complainant, the judicial authority is trying to get a member of the Single Trade Union of Judiciary Employees, Lima Section (SUTRAPOJ–LIMA) on the committee) and, by appointing a parallel joint committee by Decision No. 197-2008-P/PJ of 19 September 2008, to negotiate a list of demands for 2008–09 presented by the SUTRAPOJ–LIMA, a primary organization affiliated to the Federation, despite the existence of the other joint committee approved by Decision No. 268-2007-P/PJ.

B. The Government's reply

- 898.** The Government in its communications states that the judiciary has been asked to provide information on the allegations, but has not sent its observations.
- 899.** As regards the alleged refusal to bargain collectively, the Government states that the Federation presented the collective agreement for 2007–08, signed on 20 December 2007 with the judicial authority, which was registered on 10 January 2008 under No. 006-2008. As regards the list of demands for 2008–09, the Government states that the Subdirectorate for Collective Bargaining, by Subdirectorate Decision No. 023-2008-MTPE/12.210 of 2 April 2008, disqualified itself from handling the list of demands on the grounds that it related to workers who were subject to public and private sector labour law. The decision was upheld by the administrative authority in the second instance, and the procedure was shelved. The Government explains that, although previously there was no regulation on the possibility of the administrative authority handling procedures involving collective bargaining by mixed trade unions (whose members are subject to both public and private sector labour law), it can no longer refuse to examine lists of demands presented by mixed unions, pursuant to national Directive No. 002-2009-MTPE/211.1 of 17 February 2009, issued by the National Directorate for Labour Relations. In order to guarantee the right to collective bargaining, the administrative authority will have to request the applicant trade union to limit the scope of bargaining to workers subject to private sector labour law. The Federation is currently negotiating the list of demands for 2009–10.
- 900.** As regards the allegation that the judicial authority had signed a second settlement, equivalent to a collective agreement, with a group of workers who did not have representative status, the Government points out that this was in fact a dispute settlement agreement signed with the members of primary organizations affiliated to the Federation which were continuing the strike despite the fact that a settlement had been signed by the Federation on 4 December 2007. The Government explains that if it were indeed a collective agreement, it would have had to be registered with the competent administrative authority, which was not the case.

901. As regards the allegations relating to interference by the judicial authority in the composition of the joint committee, by requesting that it include a member of a primary organization, and to the establishment of a parallel joint committee by Decision No. 197-2008-P/PJ to negotiate a list of demands for 2008–09, with the aim of undermining the Federation, the Government states that the State of Peru does not allow acts detrimental to trade union autonomy and freedom of association, and adds that the administrative authority disqualified itself from handling the list of demands for 2008–09 presented by the SUTRAPOJ–LIMA and that no appeal had been lodged against that decision. The Government further states that the judicial authority did not negotiate any collective agreement with that primary organization, and that no procedure was initiated for the presentation of a list of demands.

C. The Committee's conclusions

902. *The Committee observes that, in this case, the CEN-FNTPJ alleges that: (1) the judicial authority, as the employer, refused to bargain with it; (2) despite having signed a settlement with the Federation on 4 December 2007 (after a strike that began on 27 November), the judicial authority signed another settlement on 7 January 2008 with a group of unions which, although they are affiliated to the Federation, had decided to continue the strike; and (3) the judicial authority interfered by: (a) responding favourably to efforts by a trade union (SUTRAPOJ–LIMA) to include a representative of that union on the joint committee between the judicial authority and the CEN–FNTPJ approved by Decision No. 268-2007-P/PJ of 3 December 2007 (specifically, by requesting that a member of SUTRAPOJ–LIMA be included in the joint committee, which the Federation refused); and (b) appointing a parallel joint committee by Decision No. 197-2008-P/PJ of 19 September 2008 to negotiate a list of demands presented by SUTRAPOJ–LIMA, despite the existence of the other joint committee. In this regard, the Committee observes, first, that it may be inferred from the allegations and the Government's reply that the allegations refer to an existing internal dispute between the Federation and a primary organization affiliated to it.*

903. *As regards the alleged refusal to bargain collectively, the Government reports on the setting up of joint committees and that: (1) the collective agreement for 2007–08 signed on 20 December 2007 between the Federation and the judicial authority was registered on 10 January 2008 under No. 006-2008; (2) as regards the list of demands for 2008–09, the Subdirector for Collective Bargaining disqualified itself from handling that list as it referred to workers who were subject to public and private sector labour law and it was not competent to issue an opinion on the matter; that decision was upheld by the administrative authority in the second instance, and the procedure was shelved; and (3) the Federation is currently negotiating the list of demands for 2009–10, at the direct bargaining stage. The Committee takes due note of this information.*

904. *As regards the allegation that a dispute settlement agreement was signed on 7 January 2008, with primary trade unions affiliated to the Federation, despite the existence of a settlement signed on 4 December 2007 with the Federation, the Committee notes that the Government states that this was, in fact, an agreement to end the dispute, signed by the primary organizations affiliated to the Federation, which had continued the strike despite its having been suspended by the Federation, and was not registered with the administrative authority as a collective agreement. In this regard, the Committee considers that the authorities cannot be blamed for taking steps to reach agreements to end a strike in an essential service such as the judiciary, although the signatory trade union – as in the present case – did not follow the instructions of its Federation and decided to continue the strike. In these circumstances, given that the Federation has not provided information indicating that internal procedures have been initiated against the primary organization pursuant to the trade union by-laws or that legal action for damages has been brought,*

and considering that the situation is one of conflict between trade unions, the Committee will not continue its examination of these allegations.

- 905.** *As regards the allegations of interference by the judicial authority in the internal affairs of the Federation by appointing a joint committee between the judicial authority and SUTRAPOJ–LIMA in addition to the joint committee between the authority and the CEN–FNTPJ, the Committee notes that the Government states that: (1) the State of Peru does not allow acts detrimental to trade union autonomy and freedom of association; (2) the administrative authority disqualified itself from handling the list of demands for 2008–09 presented by SUTRAPOJ–LIMA and no appeal was lodged against that decision; and (3) the judicial authority did not negotiate a collective agreement with that primary organization, and no procedure has been initiated for the presentation of a list of demands.*
- 906.** *The Committee observes that it appears from the documentation sent by the complainant that another joint committee was indeed set up by Decision No. 197-2008-P/PJ and that the reasons given in the decision for appointing the new committee are the Federation’s refusal to allow the inclusion in the previous joint committee (Decision No. 268-2007-P/PJ) of a member of SUTRAPOJ–LIMA (whose membership, according to the decision, comprises a majority of workers in the judicial authority). According to the decision, in the light of the internal dispute between the Federation and the primary organization, explicitly recognized in the decision, a joint committee was set up to negotiate the list of demands presented by the primary organization, which, according to the Government, was never signed.*
- 907.** *The Committee considers that the measures adopted by the authorities – namely, setting up two joint committees as two lists of demands were presented (although the one presented by SUTRAPOJ–LIMA was not negotiated in the end, and did not lead to the signing of a collective agreement) by two trade union organizations at different levels, belonging to a sector providing an essential service – were taken in the context of an inter-union conflict between the CEN–FNTPJ and SUTRAPOJ–LIMA, but were obviously motivated by the authorities’ desire to maintain social peace and ensure the provision of that essential service. The Committee, therefore, considers that this does not constitute reproachable conduct by the employer, as SUTRAPOJ–LIMA does not appear to be dependent on the employer but rather to be taking a strong stance in defence of its demands. In these circumstances, again in view of the fact that these allegations arose in the context of an internal dispute between trade unions, the Committee will not pursue its examination of these allegations.*

The Committee’s recommendation

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

CASE NO. 2689

DEFINITIVE REPORT

**Complaint against the Government of Peru
presented by
the Peruvian Unitary Confederation of Workers (CUT)**

***Allegations: Refusal of companies to recognize
union representation by a federation in the***

telephone sector for the purpose of collective bargaining

- 909.** The complaint is contained in a communication from the Peruvian Unitary Confederation of Workers (CUT) dated 2 December 2008.
- 910.** The Government sent its observations in communications dated 17 November 2009 and 25 May 2010.
- 911.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 912.** In its communication dated 2 December 2008, the CUT alleges that its organization affiliated to the National Federation of Telephone Workers in Peru (FETRATEL) represents unions and workers employed in companies of the Telefónica Group in Peru, including Telefónica Centro de Cobro SAC, Telefónica Multimedia SAC, Teletanto del Perú SAC, Telefónica Servicios Comerciales SAC and Telefónica Móviles SA.
- 913.** The CUT adds that unions affiliated to FETRATEL authorized it in 2007 to conduct collective bargaining within each company. FETRATEL thus, through five written communications dated 31 October 2008, requested the Administrative Labour Authority to initiate collective talks with the companies concerned.
- 914.** The CUT states that the five companies in question opposed the start of collective talks as promoted by FETRATEL on the grounds that it was a branch organization and talks should be held in each undertaking by the appropriate union at the enterprise level; the Department for Prevention and Settlement of Disputes of the Lima–Callao Regional Directorate for Labour and Employment Promotion endorsed FETRATEL's stance and ruled that the companies had no grounds to oppose FETRATEL's involvement in collective talks. The five companies lodged an administrative appeal against the decision.
- 915.** The Lima–Callao Regional Directorate for Labour and Employment Promotion formally endorsed FETRATEL's bargaining mandate at the company level. The five companies then sought a review of the decisions. Those appeals were upheld by the National Directorate for Managerial Resolutions in September and October 2008, thereby setting aside the previous decisions in favour of FETRATEL. The CUT considers that this is contrary to Convention No. 98 and to the principles espoused by the ILO's supervisory bodies, specifically the right of federations to engage in collective bargaining.

B. The Government's reply

- 916.** In its communications of 17 November 2009 and 25 May 2010, the Government states that in principle, article 28 of the Political Constitution provides that the State recognizes the rights of association, collective bargaining and strike action, guaranteeing freedom of association, promoting collective bargaining and regulating the right to strike to ensure that it is exercised in a manner consistent with the public interest. The right of freedom of association has two aspects, one organic, the other functional. The first consists in the right of all individuals to establish organizations for the purpose of defending their collective interests. The second consists in the right to join or not to join such organizations, which in turn implies the protection of the worker who is a member against any actions that might jeopardize his or her rights. Consequently, any act aimed at arbitrarily and in an unjustified

manner obstructing or restricting the possibilities of such action or the capacity of a union to operate violates the right of freedom of association.

917. With regard to the current provisions of legislation that guarantee and protect the right of workers subject to private sector labour law, the following provisions are applicable:

- the Single Ordained Text of Legislative Decree No. 728 (the Act concerning labour productivity and competitiveness);
- the Single Ordained Text of the Act concerning collective labour relations, Supreme Decree No. 010-2003-TR dated 5 October 2003;
- Regulations under the Act concerning collective labour relations, Supreme Decree No. 011-92-TR dated 14 October 1992.

918. The Government states that in a context similar to the one of the CUT complaint, the ILO's Committee on the Application of Conventions and Recommendations stated that:

... the right to bargain collectively should also be granted to federations and confederations; any restriction or prohibition in this respect hinders the development of industrial relations and, in particular, prevents organizations with insufficient means from receiving assistance from higher level organizations, which are in principle better equipped in terms of staff, funds and experience to succeed in such bargaining.

919. The Government explains that, in the light of these considerations, the ministerial decisions criticized by the CUT have been declared null and void by the Office of the Deputy-Minister of Labour on the grounds that the reasons given for those decisions have infringed freedom of association in failing to recognize FETRATEL's bargaining capacity.

920. The Government attaches copies of the decisions issued by the Office of the Deputy-Minister of Labour dated 5 December 2008 and 2 March 2009, which annul the decisions against which the CUT appealed, and also attach copies of national directorate decisions stating that applications for review lodged by the companies concerned (Telefónica Centro de Cobro SAC, Telefónica Multimedia SAC, Teleatento del Perú SAC, Telefónica Servicios Comerciales SAC, and Telefónica Móviles SA) are without foundation.

C. The Committee's conclusions

921. *The Committee notes that, in the present complaint, the complainant organization objects to certain decisions adopted in 2008 by the Ministry of Labour which, at the third administrative level (request for review) and revising previous decisions that had upheld the right of FETRATEL to negotiate on behalf of its affiliated unions, supports the stance of the five companies concerned, in contravention of the standards and principles of the ILO which guarantee the right of federations to bargain collectively.*

922. *The Committee notes that, according to the Government, the administrative decisions that had favoured the five companies concerned were set aside, in accordance with national legislation and the ILO Conventions, by decisions of 5 December 2008 and 2 March 2009, acknowledging thereby the right of FETRATEL to negotiate on behalf of its affiliated unions.*

923. *Under these circumstances, given that the issue raised in the complaint has been resolved, the Committee considers that this case does not call for further examination.*

The Committee's recommendation

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

CASE No. 2690

REPORT IN WHICH THE COMMITTEE REQUESTS
TO BE KEPT INFORMED OF DEVELOPMENTS**Complaint against the Government of Peru
presented by
the Autonomous Confederation of Peruvian Workers (CATP)**

Allegations: The complainant organization objects to Legislative Decree No. 1022 classifying port services as essential public services; the complainant also alleges that, in the context of collective bargaining, the Office of the National Superintendent of the Tax Administration has refused to refer the dispute to arbitration and classified the activities performed in it as an essential service

925. The complaint is contained in a communication from the Autonomous Confederation of Peruvian Workers (CATP) dated 11 November 2008. The CATP sent new allegations in a communication dated 21 December 2009.

926. The Government sent partial observations in communications dated 1 March and 25 May 2010.

927. Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainant's allegations

928. In its communication dated 11 November 2008, the CATP states that, by Legislative Decree No. 29157, the Congress of the Republic delegated to the executive branch (section 1) the authority to legislate on various matters relating to the implementation of the United States–Peru Trade Promotion Agreement and its Protocol of amendment. In addition, section 2 lays down an 180-day time frame and provides for the authority to legislate in the following areas: (1) trade facilitation; (2) improvement of the regulatory framework, institution building and streamlining of administrative procedures, and modernization of the State; (3) improvement of the administration of justice with regard to the commercial and administrative jurisdictions, for which the opinion of the judiciary shall be requested; (4) promotion of private investment; (5) promotion of technological innovation, quality enhancement and capacity building; (6) promotion of employment and micro-, small and medium-sized enterprises; (7) environmental management institution building; and (8) raising the competitiveness of agricultural and livestock production.

- 929.** The CATP states that Legislative Decree No. 1022, promulgated on 30 July 2008, modifies the National Port System Act, No. 27943. Section 2 incorporates a number of transitional and final provisions into Act No. 27943, the 30th of which classifies the administration, operation, equipping and maintenance of publicly owned and used port infrastructure as an essential public service, as well as the performance of port services in such infrastructure, which are guaranteed by the State. According to the CATP, the matters delegated to the executive branch do not expressly include the authority to legislate on the exercise of fundamental rights, including the right to strike, laid down in article 28 of the Constitution and in ILO Conventions Nos 87 and 98.
- 930.** The CATP adds that the exercise of the fundamental right to strike may be legally limited in order to ensure that it is exercised in a manner compatible with other constitutional rights (such as the life, health or personal safety of the population); one such limitation permitted by the international standards is the classification of certain public services as essential. This was affirmed and recognized by the Constitutional Court which stated “it must be accepted that the right to strike is not absolute, but controlled. Therefore, it must be effectuated in harmony with the other rights” in a ruling handed down in Case No. 008-2005-AI/TC, ground c.4.6.
- 931.** The CATP recalls that according to the Committee of Experts, the term “essential services” refers only to services the interruption of which would endanger the life, personal safety or health of the whole or part of the population, and in which the right to strike may be restricted or even prohibited, provided that compensatory guarantees are in place. The CATP therefore considers that port work cannot be classified as an essential public service, as its interruption would not endanger the life, personal safety or health of the population. This is corroborated by section 83 of the consolidated text of Legislative Decree No. 25593, the Labour Relations Act, approved by Supreme Decree No. 010-2003-TR – which does not classify port work as an essential public service, in line with the provisions of the international labour standards and ILO doctrine. A close look at the stringency of the restriction placed on the exercise of the right to strike by the 30th final and transitional provision reveals that it is disproportionate, covering not only port work but also related activities such as the administration, operation, equipping and maintenance of publicly owned and used port infrastructure, and the restriction thus affects the exercise of the right to strike disproportionately.
- 932.** In its communication dated 21 December 2009, the CATP states that its affiliate, the United Trade Union of the Office of the National Superintendent of the Tax Administration (SUNAT) Employees (SINAUT–SUNAT) showed genuine commitment to a “culture of dialogue and direct negotiation” by waiting for over five months for its employer (the State of Peru) to agree to meet to start the direct negotiation process which, according to the law, should have begun ten calendar days after the list of demands was presented on 31 July 2008. The complainant adds that on 3 November 2008 a notarized letter was sent stating that this stage of the process would be broken off if a bargaining session was not set up within three working days. In response, the SUNAT appointed a new negotiating committee, but did not set up a bargaining session. During the conciliation stage before the labour authority, although the SUNAT attended the meetings, it never made a proposal or agreed to start bargaining on the items on the list of demands. As a result, several sessions went by without achieving lifting the stalemate, wasting time unnecessarily. Even at the informal meetings convened by the labour authority, first by the regional authority, then by the national authority of the Ministry of Labour and Employment Promotion, the SUNAT bargaining committee failed to put forward a single proposal, confining itself at the last meeting to refusing to bargain on the economic items and mentioning its proposed “policies” with regard to the others. Neither the conciliation stage nor the informal meetings held by the labour authority led to any agreement, owing

to the SUNAT's intransigence. The employer also turned down the trade union's request to refer the dispute to arbitration.

933. The CATP states that during the conciliation stage (14 January–2 March 2009), the SUNAT committee failed to appear at the first meeting before the labour authority. Subsequently, at the second and third meetings, successive changes were made to the membership of the SUNAT bargaining committee. At the third meeting, the employer's representatives stated that it would draft an alternative proposal to the list of demands. At a meeting held on the employer's premises with the National Human Resources Manager, it was announced that there was no alternative proposal from the SUNAT, and only now would a meeting be held with the National Superintendent of the Tax Administration to state the institution's policy with regard to the trade union's demands. He was informed that that was not what had been said by the members of the SUNAT bargaining committee at the third meeting, that the union's goal was to propose a peaceful settlement and forestall any conflicts, but that if they did not leave us any alternative and delayed our constitutional right to bargain collectively, we would exercise our constitutional right to strike. Later, on 2 March 2009, the fourth conciliation meeting was held in the Ministry of Labour. Again, the employer failed to notify the union in advance of the new membership of its bargaining committee, of which it was informed only at the hearing itself. The conciliator of the Ministry of Labour and Employment Promotion asked the employer's representatives to submit their proposal as agreed at the last conciliation meeting. They were also reminded that, if there were no proposals, negotiation would begin item by item, starting with the non-economic items.

934. The CATP states that the new members of this committee announced outright that there was no proposal and that they were unable to negotiate on any economic item, as this was prohibited by the budgetary laws. They said that they hoped that the union representatives would "recognize" this situation so that they could start bargaining on the non-economic items. The union representatives suggested that they indicate which non-economic items they would be prepared to negotiate. However, the employer's representatives said that they could not reply on that point until the workers' representatives expressly recognized the bargaining restriction in regard to economic items, so that no economic item would be raised later on. The employer's side thus made any further negotiations conditional on leaving out the entire "economic" aspect, including the item on a technical assessment of posts, which was closely linked to career development (a non-economic aspect). The employer's attitude left no doubt as to its position with regard to collective bargaining and its firm refusal to initiate it. The complainant states that pursuant to the SUNAT's Decisions Nos 044-2009/SUNAT and 063-2009/SUNAT, the employer's representatives are fully authorized to take part in negotiation and conciliation and to sign any agreement and the collective labour agreement, should one be concluded, in accordance with section 49 of the Labour Relations Act approved by Supreme Decree No. 010-2003-TR, and therefore the employer's proposal was unreasonable.

935. Concerning the non-economic items, the employer's side said that some of the topics under this heading (such as uniforms and infrastructure) were already covered by its policies, and therefore could not be negotiated only with a trade union, as they would have to be applicable to all the workers. This further bears out the argument that it would make sense to sign an agreement that would clearly express its commitment to complying with the stated policy. The trade union committee pointed out that the items on the list of demands had been agreed to at a national assembly and represented the views of all the members, and the employer's proposal was thus tantamount to giving up bargaining on all the economic items, without any concrete proposal being put forward by the employer on the non-economic items (working conditions – career development, auxiliary workers, training, trade union facilities). In these circumstances, and citing the principle of good faith, the union insisted on starting to negotiate item by item, and if they considered that

there was a legal restriction, that could be brought up under the item concerned. This suggestion was not accepted by the employer's side, which maintained that it was impossible to negotiate on the economic items, insisting that this should be "recognized" and that no item under that heading be discussed throughout the bargaining process. A deadlock was thus reached between the two positions, faced with which the trade union committee opted to declare the conciliation phase over. Accordingly, in accordance with the established legal procedure, the process had to move on to the next stage: arbitration or strike action.

- 936.** The CATP states that five informal meetings were held, without any results, at the initiative of the National Directorate for Labour Relations, which convened the union and the employer in order to reach an alternative settlement to the dispute that had arisen in regard to collective bargaining on the list of demands for 2008. The first meeting was held on 24 April 2009, the second on 4 May (on that occasion the employer's representative appeared without the required certification and the meeting was therefore cancelled), the third on 12 May, the fourth on 20 May and the last on 28 May 2009. It should be pointed out that at the third meeting, the conciliator focused on economic conditions and asked the employer to report on action (specific steps) taken with regard to the Ministry of Economy and Finance (MEF). The employer stated that no recent steps had been taken but that it was preparing reports for the MEF on human resources issues which would be submitted at the end of June or July 2009, prior to approval of the Budget Act for 2010. The union requested that, once that step was taken, the MEF hold prompt consultations on the list of demands, and that a report be submitted on the following: (1) the loss of benefits such as the Christmas basket, education bonus and productivity bonus; (2) arrears in wages: no wage increases had been awarded for the past ten years despite the loss of purchasing power in excess of 24 per cent; (3) proposals be submitted to the MEF for improvements for the occupational categories whose certification had been postponed (technicians, secretaries, etc.); (4) consideration be given to the employment situation of the workers undergoing the tax administration training course 40-41; and (5) the issue of recognition be definitively resolved in regard to the demands to which a response had not been received. On the demands that had been declared receivable, the adjustment should be made and the workers paid accordingly. The other meetings did not yield any progress towards settlement of the list of demands, and no agreement was reached.
- 937.** The CATP adds that on 31 March 2009, the SUNAT sent the union a copy of letter No. 09-2009-SUNAT/2F0000, indicating the number and occupation of the workers required to maintain essential services in the event of a strike. The union replied in letter No. 036-2009/SINAUT-SUNAT, stating that the content of the original letter did not comply with the law, since under section 83 of the consolidated Labour Relations Act, tax collection and administration were not included in the restrictive list laid down in that provision, and therefore the activities carried out by the SUNAT were not classified as essential services. In addition, it was pointed out that the date set by the Ministry of Labour and Employment Promotion to communicate the minimum staffing levels required to operate was January of each year, and it was too late for the SUNAT to meet this deadline; moreover, the number of employees indicated should be established by mutual agreement with the trade unions. Therefore, in the event of a strike affecting the SUNAT, the workers were not obliged to provide essential services or to accept the statement of the number and occupation of the workers required to provide minimum essential services.
- 938.** According to the CATP, it should be pointed out that this attempt by the employer to classify itself as an essential service is illegal from any standpoint and constitutes an anti-union practice, since it was done with the sole aim of obstructing the process of collective bargaining on the lists of demands presented before 2009 by SINTRADUANAS, SINTRASUR and SINAUT-SUNAT, which still remain to be settled. Accordingly, the trade union has contested the self-classification as an essential service before the Ministry

of Labour. Lastly, the CATP states that the union asked the SUNAT to refer the case to arbitration, again with a view to exhausting peaceful means of settling the dispute as provided in the legislation, but the employer regrettably refused.

B. The Government's reply

939. In its communication of 1 March 2010, the Government states that, as regards the 30th provision of Legislative Decree No. 1022, the Ministry of Labour and Employment Promotion sent letter No. 025-2010-MTPE/9.1 to the National Port Authority and letter No. 026-2010-MTPE/9.1 to the Ministry of Transport and Communications asking them to state their position on the matter. It should be pointed out that the Ministry of Transport and Communications is the lead body responsible for designing sectoral policies and drafting the regulations applicable to transport, communications and the national ports system, under section 18 of Act No. 27943, the National Ports System Law. The National Port Authority has exclusive authority in regard to technical regulations, as well as other executive powers in accordance with the National Ports Development Plan. The technical opinion of both bodies is thus vitally important. The Government points out that the Ministry of Labour and Employment Promotion, as the ILO's interlocutor representing the State, is currently awaiting the technical opinions requested from the Ministry of Transport and Communications and the National Port Authority before taking a decision, of which the ILO will be informed. Nonetheless, it should be borne in mind that domestic legislation provides for the possibility of bringing an action for *acción de garantía* (enforcement of constitutional rights) under the Political Constitution of Peru, and the complainants may do so to seek restoration of their rights. Article 200(4) of the Political Constitution of Peru refers to the remedy of unconstitutionality, the procedure for which is governed by Title VIII of the Code of Constitutional Procedure, Act No. 28237. The purpose of the action for enforcement of constitutional rights is to defend the Constitution against infractions against its normative rank.

940. In its communication of 25 May 2010, the Government sent additional observations as well as observations from the SUNAT, according to which the SINAUT union called the strike without the authorization of the administrative authority determining the minimum service to be maintained. The union subsequently rectified this omission, and the strike was thus considered legal. The Government and the SUNAT confirm that the negotiation of certain economic conditions could not take place for budgetary reasons.

C. The Committee's conclusions

941. *The Committee observes that in the present case the complainant objects to the 30th provision of Legislative Decree No. 1022, which provides that the administration, operation, equipping and maintenance of publicly owned and used port infrastructure are classified as essential public services, as is the performance of port services in such infrastructure, which are guaranteed by the State; the complainant also alleges that in the context of collective bargaining the Office of the National Superintendent of the Tax Administration (SUNAT) has refused to refer the dispute to arbitration and has classified the activities carried out in that institution as essential services.*

942. *As regards the disputed thirtieth provision of Legislative Decree No. 1022 classifying port services guaranteed by the State as essential public services (the provision also provides that the executive branch, in exceptional cases of interruption in the performance of such port services, shall take the necessary measures to ensure the ongoing, continuous, safe and competitive provision of services), the Committee notes that the Government states that: (1) the Ministry of Transport and Communications is the lead body responsible for designing sectoral policy and drafting general regulations applicable to activities relating*

to transport, communications and the National Ports System; (2) the National Port Authority has exclusive authority in regard to technical regulations, as well as other executive powers under the National Ports Development Plan; (3) as the technical opinion of the two bodies is vitally important, the Ministry of Labour and Employment Promotion sent letters asking them to state their views on the matter, and is currently awaiting the requested information; and (4) domestic legislation provides for the possibility of bringing an action for enforcement of constitutional rights under the Political Constitution, and the complainants may do so to seek restoration of their rights.

943. The Committee recalls that ports do not constitute essential services in the strict sense of the term [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 587]. The Committee also recalls that the services provided by the National Ports Enterprise and ports themselves do not constitute essential services, although they are an important public service in which a minimum service could be required in case of a strike [see **Digest**, *op. cit.*, para. 616]. In this case, the Committee requests the Government, after consulting the social partners concerned, to take the necessary steps, including legislative steps if necessary, to ensure that the classification of port activities as essential services serves only to impose a minimum service in the event of a strike, and that such a minimum service is determined not only by the public authorities, but in consultation with the workers' and employers' organizations concerned. The Committee draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.
944. As regards the allegation that, in the context of collective bargaining between SINAUT–SUNAT and SUNAT, the SUNAT refuses to refer the dispute to arbitration on the grounds that it is impossible to negotiate on economic items as this is prohibited by the budget laws, the Committee regrets that the Government has not communicated its observations in this regard. The Committee recalls that when it examined allegations on obstacles placed in the way of collective bargaining in the public sector it stated that it “is aware that collective bargaining in the public sector calls for verification of the available resources in the various public bodies or undertakings, that such resources are dependent upon state budgets and that the period of duration of collective agreements in the public sector does not always coincide with the duration of budgetary laws – a situation which can give rise to difficulties” [see 287th report, Case No. 1617 (Ecuador), paras 63–64]. The Committee also points out that it has stated on numerous occasions that “if, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards”. [See **Digest**, *op. cit.*, para. 1024.]
945. The Committee further recalls that it has endorsed the point of view expressed by the Committee of Experts on the Application of Conventions and Recommendations in its 1994 General Survey: legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall “budgetary package” within which the parties may negotiate monetary or standard-setting clauses (for example, reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer, are compatible with the Convention, provided they leave a significant role to collective bargaining, and the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants; where the circumstances rule this out, measures of this kind should be limited in time and protect the standard of living of the workers who are the most affected. In other words, a fair and reasonable compromise should be sought between

*the need to preserve as far as possible the autonomy of the parties to bargaining, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other [see **Digest**, op. cit., para. 1038].*

- 946.** *In these circumstances, while it observes that, according to the complainant and as confirmed by the Government and the SUNAT invoking budgetary reasons, the representatives of the SUNAT have refused to negotiate only on economic terms having an influence on the budget, but not other terms of employment, the Committee emphasizes that the impossibility of negotiating wage increases on an ongoing basis is contrary to the principle of free and voluntary collective bargaining enshrined in Convention No. 98 and requests the Government to promote appropriate mechanisms so that the parties may conclude a collective agreement in the near future. The Committee requests the Government to keep it informed in this regard.*
- 947.** *As regards the allegation that the SUNAT classified the activities performed in it as essential services, the Committee observes that, according to its founding Act No. 24829, and its general law approved by Legislative Decree No. 501, the SUNAT is a decentralized public institution of the economic and financial sector, with legal personality under public law and its own property, and enjoying economic, administrative, functional, technical and financial autonomy, and, pursuant to Supreme Decree No. 061-2002-PCM, has merged with the Office of the National Superintendent for Customs, taking over the functions' faculties and powers conferred by law on that body (in addition to the functions of the customs authority, the SUNAT administers, audits and collects internal revenues). In this regard, the Committee recalls that "the prohibition of the right to strike of customs officers, who are public servants exercising authority in the name of the State, is not contrary to the principles of freedom of association" [see **Digest**, op. cit., para. 579]. The Committee also considers that the SUNAT employees performing tasks related to the administration, audit and collection of internal revenues also exercise authority in the name of the State. The Committee notes, however, that according to the Government and the SUNAT, the union called the strike without authorization from the administrative authority determining the minimum service to be maintained and that it subsequently rectified this omission, thus ensuring that the strike was considered legal.*

The Committee's recommendations

- 948.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Recalling that ports do not constitute essential services in the strict sense of the term, the Committee requests the Government, after consulting the social partners concerned, to take the necessary steps, including legislative steps if necessary, to ensure that the classification of port activities as essential services serves only to impose a minimum service in the event of a strike, and that such a minimum service is determined not only by the public authorities, but also with the participation of the workers' and employers' organizations concerned. The Committee draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*
- (b) *The Committee emphasizes that the impossibility of negotiating wage increases on an ongoing basis is contrary to the principle of free and voluntary collective bargaining enshrined in Convention No. 98 and requests the Government to promote appropriate mechanisms so that*

SINAUT–SUNAT and the SUNAT may conclude a collective agreement in the near future. The Committee requests the Government to keep it informed in this regard.

CASE NO. 2697

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

**Complaint against the Government of Peru
presented by
the Autonomous Confederation of Peruvian Workers (CATP)**

Allegations: The complainant organization alleges obstacles to the collective bargaining process between the Union of Workers of Registry Zone No. IX, Lima Office (Office of the National Superintendent of Public Registries – SUNARP), and the bargaining committee of Registry Zone No. IX, Lima Office; in addition, it objects to the decision by the authorities of Registry Zone No. IX, Lima Office, to hire workers to replace the strikers and alleges the dismissal of trade union leaders for participating in a strike declared legal by the authorities of the Ministry of Labour and Employment Promotion; the complainant organization further objects to national legislation on strikes

- 949.** The present complaint is contained in communications from the Autonomous Confederation of Peruvian Workers (CATP) dated 17, 18 and 23 December 2008. The CATP sent new allegations in a communication of December 2008.
- 950.** The Government sent its observations in communications dated 19 January and 25 May 2010.
- 951.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 952.** In communications of 17 and 18 December 2008, the CATP alleges obstacles to the collective bargaining process between the Union of Workers of Registry Zone No. IX, Lima Office of the Office of the National Superintendent of Public Registries – SUNARP (which represents public sector workers hired under the private sector regime) and the bargaining committee of Registry Zone No. IX, Lima Office. In particular, the complainant organization states that: (1) after several weeks of direct negotiation with the bargaining committee appointed by the authorities of Registry Zone No. IX, agreements were reached

on working conditions, but no agreements could be reached on remuneration and other financial benefits since the committee stated that it would be legally impossible to formulate proposals on such points owing to austerity provisions under the Budget Act; (2) during negotiations on economic points, the trade union organization proposed that the number of economic points should be reduced from 13 to five in order to use arbitration, but the employer did not accept the proposal, citing budgetary restrictions, and refused to have the dispute submitted for decision by an arbitration tribunal; (3) in response to that position, in official letter No. 67-2007-SITRA No. IX, Lima Office, of 17 May 2007, the trade union organization decided to declare the direct negotiation stage over and submit the dispute to arbitration, in exercise of its legal power under the Collective Labour Relations Act; and (4) the zone authorities replied, in official letter No. 700-2007-SUNARP-Z.R. No. IX/JEF, that the Collective Labour Relations Act provided for several mechanisms for settling lists of demands, including conciliation, and that, accordingly, it had already been requested that a date should be set for that purpose; and that, given that they had to adhere to budgetary rules, the authorities could scarcely undergo an arbitration process in which they would have to offer a proposal for negotiation, which was not possible. Consequently, they confirmed in their communication of 15 June 2007 that, for the reasons given, they would not sign the arbitration agreement. The complainant organization indicates that the negotiation process remains incomplete to date.

- 953.** The CATP adds that members of the Union of Workers of Registry Zone No. IX, Lima Office of the SUNARP, in a meeting of 13 August 2008, agreed to go on strike on 15, 16 and 17 April 2008 and, through a subdirectorial order of 31 March 2008, legal recognition of the strike by the Ministry of Labour and Employment Promotion (hereafter “Ministry of Labour”) was obtained. The CATP states that it acted in accordance with the law by strictly respecting the provisions of the Collective Labour Relations Act and that it adhered to the additional requirements of officials of the Ministry of Labour. It also requested the current management of the SUNARP and Registry Zone No. IX, Lima Office, to reconsider and to recognize the effective exercise of the fundamental and constitutional right to collective bargaining by referring the dispute to arbitration.
- 954.** The CATP states that the fundamental reasons for declaring the strike were: (a) to defend the institutional nature of the public registries: qualified staff members were required, not persons who joined for party political interests, and the administration must undertake a comprehensive project to improve service; (b) to ensure the provision of all the necessary tools for carrying out the work in question and, among other urgent requirements, better service for the community; and (c) to safeguard the fundamental labour rights of collective bargaining and freedom of association, since the employer is currently refusing to comply with the law and sign an arbitration agreement, obliging resort to the only legal option available, that of strike action.
- 955.** According to the CATP, the workers were driven to go on strike and sole responsibility for that action lies with the current management of Registry Zone No. IX, Lima Office, and of the National Superintendent of Public Registries. The complainant organization alleges that, in a blatant violation of the fundamental right to strike, the workers on strike (which had been declared legal by the administrative labour authority) were replaced, as stated in inspection report No. 1343-2008-MTPE/2/12.3, which even asserts that the inspection process was obstructed. Fines were imposed in this respect, in accordance with subdirectorial decision No. 1307-2008-MTPE/2/12.330, dated 16 October 2008. This decision therefore proves that the constitutional right to strike was violated.
- 956.** The CATP adds that, in further proof of the intimidating, anti-union conduct and the ongoing violation by the SUNARP of the right to freedom of association, seven workers were dismissed, two of whom were trade union leaders, on the pretext that they had claimed that unionized workers who had attended an event organized by the SUNARP had

suffered ill-treatment. The dismissed workers were as follows: Ms Adriana Delgado Angulo, Secretary of the organization; Ms María Yolanda Zaplana Briceño, Deputy Secretary-General; Ms Rosemary Almeyda Bedoya, member; Ms Elizabeth Mujica Valencia, member; Ms Mirian Reyes Candela, member; Ms Nelly Marimón Lino Montes, member; and Ms Rocío del Carmen Rojas Castellares, member. In addition, the CATP alleges that the Secretary-General of the National Federation of Workers of the National Public Registries System, Mr Elías Vilcahuamán, was dismissed in July 2008 and, after having obtained a protective order for his reinstatement, was dismissed again, involving other grounds for dismissal without legal basis.

957. In its communication of 23 December 2008, the CATP states that national legislation still does not include all the Committee's recommendations from Cases Nos 1648 and 1650 (291st Report) concerning the need to amend the Collective Labour Relations Act in relation to the power of the Ministry of Labour to suspend strike action unilaterally, the Ministry's power to determine minimum services in the event of disagreement and the restriction of certain forms of strike action (such as wild-cat, work-to-rule and go-slow strikes). The CATP further objects to the legislative provisions (articles 71, 74 and 84 of the Collective Labour Relations Act and directive No. 003-2004-DNRT) that give the Ministry of Labour the power to declare a strike illegal and maintains that the criteria applied by the labour authorities severely restrict the right of public and private workers to strike (the CATP states that, according to statistics of the Ministry of Labour, 90 per cent of strikes are declared illegal).

B. The Government's reply

958. In its communications of 19 January and 25 May 2010, the Government, in relation to the complaint submitted by the Union of Workers of Registry Zone No. IX, Lima Office, on the refusal by the employer to settle the list of demands for the period 2007–08, and on the dismissal of trade union leaders and unionized workers, states that it is important to emphasize that article 28 of the Political Constitution of Peru enshrines the rights to freedom of association and to collective bargaining. In addition, given that the Peruvian State ratified Conventions Nos 87 and 98 in 1964, compliance with the provisions of these international instruments is obligatory in the national territory.

959. In relation to the allegations, the Government states that Registry Zone No. IX, Lima Office, through official letter No. 648-2009-SUNARP-Z.R. No. IX/OL-JEF, indicated that the version of events given by the CATP does not correspond to reality because, since the beginning of the present collective bargaining process, the trade union has been made aware of the austerity provisions established by Act No. 28927 (Act on the Public Sector Budget for the 2007 financial year), which make it impossible for Registry Zone No. IX, Lima Office, to meet the economic increases demanded in the list. This position is confirmed by report No. 103-2007-EF/76.16 issued by the Ministry of Economy and Finance, which stated the following:

- Article 4, paragraph (1), of Act No. 28927 (Act on the Public Sector Budget for the 2007 financial year), has established as an austerity provision for public bodies a ban on adjustments to or increases in remuneration, bonuses, expenses, allowances, payments and benefits of any nature and the conclusion is that the ban constitutes a restriction on the benefits established in the amended consolidated text of the Collective Labour Relations Act; it is therefore impossible to undergo collective bargaining on adjusting or increasing payments of any nature.
- In addition, in report No. 001-2009-EF/76.16 of 7 January 2009, the National Public Budget Department of the Ministry of Economy and Finance stated, in relation to the request by the trade union organization to settle a list of demands by signing an arbitration agreement, that it must be understood that the conclusion of arbitration

agreements is related to settling lists of demands in connection with which no agreement has been reached during direct negotiation or conciliation with regard to working conditions, productivity and other aspects of labour relations, but not with regard to salary increases.

- Similarly, article 5, paragraph 5.1, of Act No. 29142 (Act on the Public Sector Budget for 2008), establishes that it remained prohibited for public bodies to readjust or increase remuneration, bonuses, expenses or allowances and that lists containing demands for salary increases and others of an economic nature may not be referred to arbitration.
- In conclusion, it is noted that the collective bargaining process, the subject of the complaint, has been undertaken in accordance with the law and has been restricted by the austerity provisions established in the budgetary regulations, which should not be interpreted as a refusal to recognize the right to freedom of association and the right to strike, enshrined in article 42 of the Constitution.

960. With regard to the collective bargaining process and domestic regulations thereon, the Government indicates that the amended consolidated text of the Collective Labour Relations Act, Decree-Law No. 25593, adopted through Supreme Decree No. 010-2003-TR and its regulations adopted through Supreme Decree No. 011-92-TR, is the legal provision that regulates freedom of association, effective recognition of the right to collective bargaining and the right to strike of workers under the private sector labour regime. Collective bargaining can be seen as the means by which trade unions and employers address matters of labour relations with a view to reaching a collective agreement. It begins with the submission of a list of demands by the trade union organization or worker representatives, which must contain a draft collective agreement including the following information: (a) the trade union's name and registration number; (b) a list of the members nominated for the bargaining committee in accordance with the requirements established in article 49 of the Act; (c) the name or legal name and address of each of the companies or employers' organizations involved; (d) the demands being made with respect to issues such as salary, working conditions and productivity, which must take the form of a clause and be included appropriately within a single draft agreement; and (e) the signatures of the trade union leaders appointed for that purpose by the assembly, or of authorized representatives if no trade union exists. The list must be submitted no earlier than 60 calendar days before, and no later than 30 calendar days, after the expiry date of the current agreement. It is submitted directly to the enterprise, and a copy sent to the labour authorities. In agreements on the branch or occupational level, the demands are always submitted through the labour authorities. Collective bargaining is undertaken during the periods agreed upon by the parties, during or outside working hours, and must begin within ten calendar days of the submission of the list. This period is known as the direct negotiation stage.

961. If in the direct negotiation stage the parties do not reach agreement on how to settle the list of demands, they inform the administrative labour authority of the termination of the negotiation stage and may simultaneously request the initiation of the conciliation stage. The conciliation stage is undertaken before the administrative labour authority on the premises of the Ministry of Labour, which has a body of specialized and qualified technical staff. The conciliation process must be flexible and simple, with the conciliator playing an active role in promoting agreement between the parties. There is no set time frame for the direct negotiation and conciliation processes; as many direct negotiation and conciliation meetings are held as are necessary and as the parties consider appropriate. If no agreement is reached during the conciliation stage, any party may request that the list of demands should be settled through arbitration, for which the consent of all parties and a written arbitration agreement is required. In such cases, when neither direct negotiation nor conciliation has been successful, the trade union organization has the option to exercise the right to strike, in accordance with the legal requirements established by the administrative labour authority.

- 962.** A strike is defined as collective suspension of work as agreed by a majority of workers and carried out voluntarily and peacefully away from their place of work. In order to declare a strike, the following circumstances are required: the objective must be to defend the socio-economic or professional rights and interests of the workers involved; the decision must be taken strictly in accordance with the union's constitution and must, in all circumstances, represent the will of the majority of workers involved; the minutes of the assembly must be endorsed by a public notary or, failing that, by a local Justice of the Peace; the minutes must be transmitted to the employer and to the administrative labour authority with at least five working days' notice, or ten working days' notice for essential public services, together with a copy of the vote record; and the collective negotiation must not have been referred to arbitration.
- 963.** Within three working days of receipt of the communication, the administrative labour authority must declare its inadmissibility if it does not meet the above requirements. The decision declaring the inadmissibility of a strike must precisely indicate which requirement or requirements have not been met. Under this type of procedure, administrative silence signifies tacit agreement. The strike may apply to an enterprise, to one or several of its establishments, to one branch or one occupation, and the length of the strike may or may not be declared; if prior notice is not given of its length, it is taken to be for an indefinite period. A strike declared in accordance with the requirements has the following impact: it leads to the total cessation of work by the workers involved, and the employer may not hire replacement staff to undertake the work of those on strike; all individual work contracts are suspended, including the obligation to pay wages, without affecting the continuation of the employment relationship; no machinery, raw materials or other goods may be removed from the place of work, except under exceptional circumstances with the prior knowledge of the administrative labour authority; tasks that are indispensable to the enterprise and whose standstill would pose a threat to people, security or the storage of goods or prevent the enterprise's immediate resumption of ordinary activity after the strike is over are excluded from suspension; and when the strike affects essential public services or when indispensable activities must be guaranteed, the workers involved in the dispute must guarantee the presence of the staff necessary to prevent a total standstill and ensure continuity of services and activities as required.
- 964.** The Government indicates that the strike will be declared illegal: (a) if it takes place despite having been declared inadmissible; (b) if acts of violence against goods or persons occur during the course of the strike; (c) if it involves unscheduled stoppages or stoppages in central areas or sections of the enterprise, go-slows or any kind of stoppage in which the workers remain at or obstruct the entrance to the place of work; and (d) if it is not called off after notification of the arbitration award or final ruling ending the dispute.
- 965.** The ruling shall be issued, ex officio or at the request of a party, within two days of the events, and may be contested. The appeal ruling must be issued within two days. The strike ends by agreement between the conflicting parties, following a decision by the workers or upon being declared illegal. A decision by workers to call off the strike must be transmitted to the employer and the administrative labour authority with 24 hours' notice. When a strike is declared illegal by approved or enforceable ruling, the workers must return to work the following day. A ruling handed down at second or final instance becomes enforceable the day following the date of notification.
- 966.** The Government states that in this context and in relation to the process of collective bargaining referred to by the complainant organization, it must be borne in mind that three lists of demands were being processed by the Subdirectorate for Collective Bargaining, corresponding to the three periods. The first concerns file No. 78627-2007-MTPE/2/12.210 (list of demands 2007-08). The Union of Workers of Registry Zone No. IX, Lima Office, submitted its list of demands for 2007-08 on 3 April 2007, stating that the list applied to

all workers in Registry Zone No. IX. The points to be negotiated included salary increases, benefits (for example education and seniority benefits and a bonus for closing the agreement), subsistence allowance, mobility allowance, training, uniform provision, remuneration for responsibility and additional pay for night work. The Subdirectorate for Collective Bargaining ruled that the file should be opened and the parties notified in order to begin the direct negotiation stage of the collective bargaining process. On 15 June 2007, the trade union organization informed the administrative labour authority that the direct negotiation stage had ended and requested the launch of the conciliation stage. Conciliation meetings were held on 2 and 7 July 2007, with the attendance of both parties; however, since no agreement was reached, the trade union declared the conciliation stage over. The union's final proposal was that the dispute over the settling of the list of demands should be resolved by an arbitration tribunal by conclusion of a written arbitration agreement, a proposal that was not accepted by the representatives of Registry Zone No. IX.

- 967.** The trade union, through official letter No. 55-2008-SITRA Z.R. No. IX, Lima Office, dated 18 March 2008, gave the administrative labour authority notice of strike action, which would be held on 15, 16 and 17 April 2008, in relation to the list of demands for 2007. The trade union had indicated that its employer, Registry Zone No. IX, had been unwilling to sign a written arbitration agreement, on the grounds that it was prevented from doing so since the arbitration award would contain proposals on the economic points in the list of demands, which was prohibited under the austerity measures established in Act No. 28927 (Act on the Public Sector Budget for the 2007 financial year). The union's communication was declared inadmissible by the Subdirectorate for Collective Bargaining through subdirectorial order No. 017-2008-MTPE/2/12.1, dated 18 March 2008, in which, among other points, it stated that the trade union had not complied with article 73(c) of Supreme Decree No. 010-2003-TR and paragraph (e) of Supreme Decree No. 011-92-TR, since it had not sent a copy of the communication of the strike to the employer and had advised that the sworn statement enclosed had not been signed by all of the members of the executive committee. The union did not appeal against that ruling.
- 968.** However, the trade union, through official letter No. 72-2008-SITRA Z.R. No. IX, Lima/JD Office, dated 28 March 2008, resubmitted its communication giving general notice of a strike, which was held on the days indicated in the first communication. The Subdirectorate for Collective Bargaining, through a subdirectorial order of 31 March 2008, declared that the communication successfully met all the requirements of established legislation. That ruling was not appealed by Registry Zone No. IX.
- 969.** The Ministry of Labour, through the Regional Directorate of Labour and Employment Promotion of Lima-Callao, in relation to the above conflict, summoned the parties to an out-of-court meeting on 4 April 2008, with the aim of assisting in the solution of the problem. During the meeting and on the basis of what both parties said, it was possible to identify five points of disagreement arising from the 2007 list of demands, which related to economic increases requested by the union. After some deliberation, the union indicated that negotiations should be held on only three of the five points. Registry Zone No. IX stated that it was impossible for it to sign a written arbitration agreement, given that the Act on the Public Sector Budget for the 2007 financial year prohibited remuneration increases or adjustments, a situation that would be reflected in its exchanging the unionized workers' meal vouchers for a direct payment. As a way of settling this list of demands, Registry Zone No. IX proposed a closure bonus of 3,000 nuevos soles (PEN). That proposal was not accepted by the trade union, which stated that the amount did not compensate for the time that had passed since the beginning of the present negotiations. With a view to finding a solution to the conflict, the Regional Directorate summoned the parties to further out-of-court meetings, on 9 and 11 April 2008, during which both parties maintained their initial positions.

- 970.** The second period of negotiation concerns file No. 92640-2008-MTPE/2/12.210 (list of demands 2008–09). The Union of Workers of Registry Zone No. IX, Lima Office, submitted its list of demands for the period 2008–09 to the administrative labour authority on 27 March 2008, stating that the list applied to all workers in Registry Zone No. IX. The aspects to be negotiated cover the same points requested in the previous list. The Subdirectorate for Collective Bargaining ruled that the file should be opened and the parties notified in order to begin collective bargaining at the direct negotiation stage, the latest development of the present collective bargaining process.
- 971.** The third period of negotiation concerns file No. 50148-2009-MTPE/2/12.210 (list of demands 2009–10). The Union of Workers of Registry Zone No. IX, Lima Office, submitted its list of demands for the period 2009–10 to the administrative labour authority on 20 April 2009, stating that the list applied to all workers in Registry Zone No. IX. The aspects to be negotiated cover the same points requested in the previous lists. The Subdirectorate for Collective Bargaining ruled that the file should be opened and the parties notified in order to begin collective bargaining at the direct negotiation stage. On 1 October 2009, the trade union organization declared the direct negotiation stage over and requested that the conciliation stage be launched, which was carried out on 9 and 17 November 2009 with meetings that resulted in no agreement. Registry Zone No. IX, Lima Office, once again indicated that it would be impossible to grant economic increases, as these were prohibited under the Public Budget Act of 2009. It further ruled out any possibility of resolving the present dispute by signing an arbitration agreement.
- 972.** With respect to the communication regarding the 72-hour strike and the dismissal of trade union leaders and staff members of the Union of Workers of Registry Zone No. IX, the Labour Inspection Directorate undertook inspections, the results of which were as follows: (1) inspection order No. 5356-2008: strike verification. Following inspections on 15, 16 and 17 April 2008, the commissioned labour inspector stated that work would be suspended in the following manner, of a total of 668 workers: on 15 April 2008, 347 would go on strike and 321 would not; on 16 April 2008, 357 would strike and 311 would not; and, on 17 April 2008, 332 would strike and 336 would not; (2) inspection order No. 4794-2008: violation of freedom of association and the right to strike. The labour inspector confirmed that while the trade union was carrying out the industrial action, the employer, Registry Zone No. IX, Lima Office, adopted measures that contravened the right to freedom of association and the right to strike and made the aim of the strike impossible, as follows: (a) Registry Zone No. IX replaced the unionized workers, while they were exercising their right to strike, by staff linked to the institution through vocational training schemes, affecting 441 unionized workers; (b) the representative of Registry Zone No. IX did not allow the visit by the labour inspector to be carried out together with trade union representatives, a point which the inspector advised amounted to a form of obstruction of the labour inspection; (c) consequently, the labour inspector, through contravention notice No. 1343-2008-MTPE/2/12.3, proposed a fine of PEN105,000 for contravention of social and labour regulations; (d) the Third Subdirectorate for Labour Inspection, through subdirectorial decision No. 13017-2008-MTPE/2/12.330, fined Registry Zone No. IX PEN105,000. That ruling was upheld by the Labour Inspection Directorate through subdirectorial decision No. 927-2009-MTPE/2/12.3, dated 28 October 2009, the administrative channels having been exhausted; (3) inspection order No. 18471-2008: violation of freedom of association. The Union of Workers of Registry Zone No. IX alleged that its right to freedom of association had been violated when the employer dismissed trade union leaders and five unionized workers in view of the strike action of 15, 16 and 17 April 2008; according to the commissioned labour inspector, the employer's representative argues that the dismissed staff members were guilty of serious misconduct, including loss of good faith in the working relationship, acts of violence, serious lack of discipline, insults and abuse of the employer, the employer's representatives and the workers' supervisors during the opening ceremony of the XXI Meeting of the Latin

American Committee of Registry Offices on 22 September 2008 at the Hotel Los Delfines. The employer's representative supports that claim with pre-dismissal and dismissal letters sent to the workers involved, in accordance with the dismissal procedure established in the Labour Productivity and Competitiveness Act. Lastly, it was stated that there had been no contravention of the cited social and labour regulations, in particular those on freedom of association, and that affected workers have the right to initiate legal proceedings in order to demand their rights.

- 973.** The Office of the Legal Adviser of the Sector, through official letter No. 1039-2009-MTPE/2/9.1, dated 2 December 2009, requested the coordinator of the Supreme Court of Lima for information on the legal application of the ILO Conventions and on whether the dismissed workers have initiated legal proceedings and, if so, on the current status of the proceedings in order to duly inform the ILO. No reply has been received to date.
- 974.** Having undertaken the appropriate analysis, and in relation to the complaint submitted by the Union of Workers of Registry Zone No. IX against the Peruvian State for alleged violations of trade union rights through infringement of the right to freedom of association and the right to strike and the unfair dismissal of the leaders of that trade union, the Government states that Peruvian labour legislation that regulates freedom of association complies with the rules and principles of the ILO. In accordance with Convention No. 98, the legislation protects the right to organize and to bargain collectively and recommends that the employer should refrain from all acts that could obstruct, restrict or undermine those rights. The Ministry of Labour, through the Office of the Legal Adviser, issued a legal ruling through reports Nos 308-2009-MTPE/9.110 and 391-2008-MTPE/9.110, dated 30 May and 25 June 2008 respectively. Following analysis of the issue, the Office of the Legal Adviser concluded that the absence of provisions on increases in remuneration within the budgetary regulations cited by Registry Zone No. IX led to the conclusion that the constitutional right to collective bargaining (and any other fundamental right) could be only be restricted expressly, and that the budgetary regulations do not expressly restrict increases agreed through collective bargaining.
- 975.** In this respect, having observed that the budgetary regulations are worded in a generic manner that could lead to infringement of the constitutional right to collective bargaining, it has been decided to attribute to it the meaning which preserves that right, setting aside the meaning that could violate it. The general theory of law recognizes that between one reading that suggests that an act is incompatible with the Constitution and another that interprets it as compatible, the latter should be given preference. Similarly, if it is possible to interpret that the act and the Constitution are compatible and if such compatibility is reasonable, that interpretation should be given preference. Lastly, it should be noted that the reports issued have been clear in stating that the parameter for undertaking collective bargaining with bodies that are subject to the Budget Act is set at their available budget, which, within negotiations, could range from zero to the maximum budget available. In these circumstances, the legality of any eventual agreements depends on observance of the limit set for the body's available budget.
- 976.** Given the above, the Government considers it appropriate to note that it was established through the inspection process that Registry Zone No. IX violated the constitutional right to strike of the workers involved by replacing them with staff hired through vocational training schemes. The Ministry of Labour fined Registry Zone No. IX a sum of PEN105,000 for violation of the rights cited in the present complaint.
- 977.** With respect to addressing the lists of demands submitted to the administrative labour authority, it should be noted that, despite efforts by the Ministry of Labour, to date there has been no specific resolution of the present collective bargaining process, and such

resolution depends on the will of the parties, as established in national legislation. It is therefore important to note that the State cannot interfere in any final decision on an agreement, since that would constitute intervention in the settlement of a conflict that involves the parties only. However, it will, through the relevant departments, promote the appropriate mechanisms in order that the parties might arrive at a satisfactory agreement.

978. Lastly, in relation to the dismissals alleged by strikers, it should be stated that the Government is awaiting a response from the judiciary as to whether the persons affected have initiated legal proceedings, and that information will be forwarded to the ILO in due course.

C. The Committee's conclusions

979. *The Committee observes that in the present case the complainant organization alleges that, within the framework of the collective bargaining process with the Union of Workers of Registry Zone No. IX, Lima Office of the SUNARP (which represents public sector workers hired under the private sector regime), the bargaining committee of Registry Zone No. IX, Lima Office, refuses to refer the dispute to arbitration, and also alleges the dismissal of trade union leaders and members who participated in a strike and the replacement of strikers. In addition, the Committee observes that the complainant organization objects to legislative provisions on strikes.*
980. *With respect to the allegation that, within the framework of the collective bargaining process with the Union of Workers of Registry Zone No. IX, Lima Office of the SUNARP (which represents public sector workers hired under the private sector regime), the bargaining committee of Registry Zone No. IX, Lima Office, refuses to refer the dispute to arbitration, the Committee takes note of the fact that the Government refers to legal provisions that regulate the collective bargaining process and, in relation to the allegations specifically, indicates that: (1) three lists of demands have been addressed by the Subdirectorate for Collective Bargaining (for the periods 2007–08, 2008–09 and 2009–10); (2) within the framework of negotiations on the lists of demands for 2007–08 and 2009–10, Registry Zone No. IX, Lima Office, indicated that it was impossible for it to grant economic increases given that the Public Budget Act for the corresponding year prohibited such increases; (3) the Ministry of Labour, through the Office of the Legal Adviser, issued a legal ruling in reports of 30 May and 25 June 2008 in which it concluded that the budgetary regulations cited by Registry Zone No. IX do not expressly restrict salary increases through collective bargaining, and any restriction of the constitutional right to collective bargaining could be undertaken only expressly; (4) the reports clearly indicated that the parameter for undertaking collective bargaining with bodies subject to the Budget Act is set by their available budget; (5) despite efforts by the Ministry of Labour, to date there has been no specific resolution of the present collective bargaining process, and such resolution depends on the will of the parties, as established in national legislation; and (6) the State cannot interfere in any final decision on a collective agreement, since that would constitute intervention in the settlement of a conflict that involves the parties only, although it will, through the relevant departments, promote the appropriate mechanisms in order that the parties might arrive at a satisfactory agreement.*
981. *In this respect, while observing that, according to the administrative labour authority, the Public Budget Act cited by Registry Zone No. IX, Lima Office, as grounds for not granting economic increases does not expressly restrict increases through collective bargaining and that, according to the complainant organization, agreements were reached on working conditions but no agreements could be reached on remuneration, the Committee expects that, with the Government's proposed promotion of the appropriate mechanisms, the parties will be able finally to conclude a collective agreement determining working conditions. The Committee requests the Government to keep it informed in this respect.*

982. *With respect to the dismissal, after the strike (which, according to the complainant organization, was declared legal by the administrative labour authority) in the context of the collective bargaining process, of trade union leaders, Mr Elías Vilcahuamán, Secretary-General of the National Federation of Workers of the National Public Registries System, Ms Adriana Delgado Angulo, Secretary of the organization and Ms María Yolanda Zaplana Briceño, Deputy Secretary-General and union members Ms Rosemary Almeida Bedoya, Ms Elizabeth Mujica Valencia, Ms Miriam Reyes Candela, Ms Nelly Marimón Lino Montes and Ms Rocío del Carmen Rojas Castellares, the Committee takes note that the Government indicates that the SUNARP trade union organization alleged violation of freedom of association by indicating that the employer dismissed trade union leaders and members in relation to the events that occurred during the strike of 15, 16 and 17 April 2008. The Committee further notes that the Government indicates that, in investigating the allegation, an inspection was conducted (inspection order No. 18471-2008) and that the labour inspector stated that: (1) the employer's representative argues that the dismissed staff members are guilty of serious misconduct, including loss of good faith in the working relationship, acts of violence, serious lack of discipline, insults and abuse of the employer, the employer's representatives and the workers' supervisors during the opening ceremony of the XXI Meeting of the Latin American Committee of Registry Offices on 22 September 2008 at the Hotel Los Delfines; (2) the employer's representative supports that claim with pre-dismissal and dismissal letters sent to the workers involved, in accordance with the dismissal procedure established in the Labour Productivity and Competitiveness Act; and (3) there was found to have been no contravention of the cited social and labour regulations, in particular those on freedom of association, and the affected workers have the right to initiate legal proceedings in order to demand their rights. Lastly, the Committee takes note that the Government states that the Office of the Legal Adviser of the Sector requested the coordinator of the Supreme Court of Lima for information on whether the dismissed workers have initiated legal proceedings and, if so, on the current status of the proceedings. In these circumstances, the Committee requests the Government to keep it informed of any legal action brought by the abovementioned trade union leaders and workers in relation to their dismissal.*
983. *With respect to the allegation relating to the replacement of strikers during the abovementioned strike of 15, 16 and 17 April 2008, the Committee takes note that the Government indicates that an inspection was conducted (inspection order No. 4794-2008) and that the commissioned labour inspector confirmed that, while the trade union was carrying out the industrial action, the employer, Registry Zone No. IX, Lima Office, adopted measures that contravened the right to freedom of association and the right to strike, and specifically states that: (1) Registry Zone No. IX replaced the unionized workers while they were exercising their right to strike, by staff linked to the institution through vocational training schemes, affecting 441 unionized workers; (2) the employer's representative did not allow the visit by the labour inspector to be carried out together with trade union representatives, and the inspector advised that this act amounted to a form of obstruction of the labour inspection; (3) consequently, the labour inspector, through contravention notice No. 1343-2008-MTPE/2/12.3, proposed a fine of PEN105,000 for contravention of social and labour regulations; and (4) the Third Subdirectorate for Labour Inspection, through decision No. 13017-2008-MTPE/2/12.330, fined Registry Zone No. IX PEN105,000 and that ruling was upheld by the Labour Inspection Directorate through decision No. 927-2009-MTPE/2/12.3, dated 28 October 2009, the administrative channels having been exhausted. Recalling the importance that it attaches to the principle that the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 632] and in the light of the Government's efforts in relation to these events, the Committee will not pursue its examination of these allegations.*

984. *With respect to the challenged legislative provisions on the exercise of the right to strike, the Committee observes that the Government does not refer specifically to these provisions, but rather refers to the definition of a strike, the requirements for declaring a strike, the impact of a strike and grounds for declaring a strike illegal. The Committee recalls that responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved [see **Digest**, *op. cit.*, para. 628]. The Committee observes that these legislative issues are already being pursued by the Committee of Experts on the Application of Conventions and Recommendations (CEACR). In these circumstances, while taking note that the Government has informed the CEACR that a draft general labour act is being processed which repeals the Collective Labour Relations Act, the Committee, like the Committee of Experts, expects that the act that is adopted will comply fully with the principles of freedom of association.*

The Committee's recommendations

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

- (a) *The Committee expects that, with the promotion of appropriate mechanisms as proposed by the Government, the Union of Workers of Registry Zone No. IX, Lima Office, and the bargaining committee of Registry Zone No. IX, Lima Office, will be able finally to conclude a collective agreement. The Committee requests the Government to keep it informed in this regard.*
- (b) *Taking note that the labour inspector indicated that there had been no violation of the legal rules on freedom of association, the Committee requests the Government to keep it informed of any legal action that the trade union leaders, Mr Elías Vilcahuamán, Secretary-General of the National Federation of Workers of the National Public Registries System, Ms Adriana Delgado Angulo, Secretary of the SUNARP organization and Ms María Yolanda Zaplana Briceño, Deputy Secretary-General and union members Ms Rosemary Almeida Bedoya, Ms Elizabeth Mujica Valencia, Ms Miriam Reyes Candela, Ms Nelly Marimón Lino Montes and Ms Rocío del Carmen Rojas Castellares, may have initiated in relation to their dismissals.*
- (c) *The Committee expects that the new general labour act (repealing the Collective Labour Relations Act) to be adopted will comply fully with the principles of freedom of association.*

CASE NO. 2703

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

**Complaint against the Government of Peru
presented by
the General Confederation of Workers of Peru (CGTP)**

Allegations: The complainant alleges the anti-union dismissal of the board members of the Union of Workers of Hogar Clínica San Juan de Dios

- 986.** The complaint is contained in a communication dated 20 February 2008 from the General Confederation of Workers of Peru (CGTP). The CGTP sent new allegations in a communication dated December 2008.
- 987.** The Government submitted its observations in communications dated 12 November 2009 and 25 May 2010.
- 988.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 989.** In its communication of 20 February 2009, the CGTP alleges the anti-union dismissal in Hogar Clínica San Juan de Dios of the board of the Union of Workers of Hogar Clínica San Juan de Dios , namely:

Sergio Ruiz Taipe	General Secretary
Lamberto O. Babetón Venancio	Organization Secretary
Ángel T. Tarazona Rodríguez	Legal Defence Secretary
Lucio Cuya Pullo	Press and Media Secretary
Miguel L. Jaimes Salinas	Treasurer
Teófanés P. Eulogio Espinoza	Discipline Secretary
Héctor D. Rojas Machuca	Records and Archives Secretary
Emiliano Sulca Cerda	Social Welfare Secretary
Mónica Elisa Meneses La Riva	Technology and Statistics Secretary
Enrique Thomas Vargas Deudor	External Relations Secretary
Dionisio Lajos Zambrano	Steward

- 990.** The CGTP indicates that Hogar Clínica San Juan de Dios is a medical establishment that has been providing all kinds of orthopaedic, traumatology and rehabilitation services to adults and children since 1952. The clinic has six facilities in Peru, and its headquarters in Lima employs a total of 210 workers, of which more than half are unionized. The complainant indicates that, on 17 November 2008, the management of Hogar Clínica San Juan de Dios sent notarized letters to workers' homes, informing them that they would be subjected to a collective dismissal procedure, enclosing a list of the names of the workers who would be dismissed. The management of Hogar Clínica San Juan de Dios based its decision on the marked and lasting deterioration of its economic and financial situation, which has caused an ongoing deficit that is being offset through donations and the sale of part of its assets.
- 991.** The CGTP adds that, on 18 November 2008, the clinic filed a petition with the administrative labour authority for the initiation of a procedure for the collective termination of the employment contracts, for economic or structural reasons, of 103 workers – including 20 workers with disabilities – on the objective grounds of the ongoing deterioration of its economic and financial situation. According to the CGTP, on 19 November 2008, the administrative labour authority requested that Hogar Clínica San Juan de Dios include with its petition the following information: (a) the grounds for the termination; (b) proof of receipt by the affected workers of the relevant information from the employer, specifying the grounds for the termination and listing the names of the affected workers; (c) the clinic's total number of employees; (d) the names and addresses of the affected workers, expressly indicating that they represent a minimum of 10 per cent of the clinic's total workforce; (e) as many copies of the petition and supporting documentation as there are affected workers; (f) a sworn statement indicating that Hogar Clínica San Juan de Dios is affected by the objective grounds invoked, together with an expert report and a document proving that the meeting in which negotiations were directly or otherwise conducted, took place, with a notarized record of attendance; (g) an indication as to whether and which of the affected workers are unionized; and (h) proof of payment of the relevant fee, with proof of payment from Banco de la Nación.
- 992.** The CGTP adds that the administrative labour authority, through an unnumbered subdirectorial decision dated 12 December 2008, declared inadmissible the petition for the collective termination of employment contracts, filed on economic and structural grounds. Hogar Clínica San Juan de Dios lodged an appeal against this decision before a higher authority. The administrative appeal was settled by the Directorate for the Prevention and Settlement of Disputes through directoral decision No. 01-2009-MTPE/2/12.2 of 5 January which upholds the unnumbered subdirectorial decision of 12 December 2008. On 25 November 2008, the clinic's management decided unilaterally to deny 103 workers access to the facilities, informing them that they had been dismissed for the reasons indicated in the notarized letters that had been sent to their homes between 17 and 22 November 2008. Among the 103 dismissed workers was the entire trade union board, which should have been protected by trade union immunity.
- 993.** The CGTP notes that, on 28 November 2008, the trade union, represented by its board, filed a petition for *amparo* (the protection of constitutional rights) before the 27th Civil Court of Lima against Hogar Clínica San Juan de Dios in connection with the collective dismissal, resulting from the alleged termination of working relations on objective grounds: economic and structural reasons. The petition was declared admissible and has been communicated to the defendant. Also, on 15 December 2008, a petition for a preventive measure was filed before the 27th Civil Court of Lima, requesting the workers' reinstatement. The petition was granted through decision No. 4 of 6 January 2009, but has yet to be enforced owing to actions which have delayed the proceedings and implementation. The CGTP alleges that the aim of the employer, through its collective

dismissal of the 103 workers – including 86 trade union members and the entire union board – is to eliminate the trade union.

B. The Government's reply

994. In its communications of 12 November 2009 and 25 May 2010, the Government notes that the rights to the freedom of association and collective bargaining are set out under article 28 of the Political Constitution of Peru. Furthermore, as the State of Peru has ratified ILO Conventions Nos 87 and 98, the provisions of these international instruments are binding throughout the national territory.

995. In relation to the complaint, the Government notes that Hogar Clínica San Juan de Dios has indicated that it carried out the procedure for collective dismissal on economic and structural grounds, in strict application of the law, without hidden reasons relating to the elimination of any trade union. In this connection, it presented its defence, indicating the following:

- According to the conclusions of the expert report of 30 June 2008 prepared by Hogar Clínica San Juan de Dios in connection with the collective termination of employment contracts on just grounds: “... Hogar Clínica has not achieved a level of self-sufficiency enabling it to use its revenue from donations and reserve funds to enhance its capacity for providing care, improve its equipment, etc., but on the contrary, has used those resources to finance its current expenses, principally through the payment of its caregiving staff ... Hogar Clínica must reduce its staff expenditure by approximately 50 per cent in order to bring its operational deficit down to manageable levels ... staff cuts, in general, should mainly be applied in the administration, clinical and orthopaedic units. In accordance with our expert report, we believe that there are objective, structural grounds for the collective termination of some of the employment contracts of workers active in the aforementioned areas of activity, in line with the provisions under the single consolidated text of Legislative Decree No. 728, approved by Supreme Decree No. 003-97-TR ...”.
- If trade union leaders were included in this collective dismissal on economic and structural grounds, it is only because the restructuring process affects their areas of work, which will be eliminated. The four union board members with trade union immunity who were included in the list of dismissals worked in the areas set out below: Mr Sergio Ruiz Taípe, Mr Lamberto Babetón Venancio and Mr Ángel Tarazona Rodríguez: the orthopaedic unit; and Ms Mónica Meneses La Riva: the post-operative unit.
- None of the remaining workers included in the complaint benefited from trade union immunity in accordance with section 12(b) of Supreme Decree No. 11-92-TR, the Regulations implementing the Collective Labour Relations Act, insofar as in the case of a primary-level trade union, as in the present case, such immunity covers three trade union leaders for the first 50 workers represented, plus one leader for every additional 50 workers, up to a maximum limit of 12 leaders. Since the trade union represents 105 workers, only four leaders are covered by trade union immunity.
- With regard to the board members of the complainant trade union: Mr Miguel Luis Jaime Salinas, Mr Teófanés Pedro Eulogio Espinoza, Mr Emiliano Sulca Rojas and Mr Dionisio Lajo Zambrano have concluded conciliation agreements; Mr Sergio Ruiz Taípe, Mr Héctor Darío Rojas Machuca and Mr Enrique Thomas Vargas Deudor have been reinstated; and the proceedings in connection with Mr Lamberto Óscar Babetón Venancio, Mr Lucio Cuya Pullo, Ms Mónica Elisa Meneses La Riva and Mr Ángel Teófilo Tarazona Rodríguez are still under way.

996. The Government draws attention to the procedure for collective dismissal, and domestic legislation on the matter. In particular, it notes that the single consolidated text under Legislative Decree No. 728, the Labour Productivity and Competitiveness Act, approved by Supreme Decree No. 003-97-TR, is the legal provision covering the labour relations of workers subject to the labour regulations governing private activity. In this respect, section 46(b) of the Act sets out that economic, technological, structural or similar reasons are among the objective grounds for the collective termination of employment contracts. Likewise, section 48 sets out that the termination of employment contracts on the objective grounds covered under section 46(b) can only be carried out in cases where a minimum of 10 per cent of the total workforce of the enterprise is involved, subject to the following:

- (a) The enterprise should furnish the trade union, or if there is none, the workers or their authorized representatives, with the relevant information stating the precise reasons for dismissal and list the names of the affected workers. This will enable the administrative labour authority to institute proceedings.
- (b) The enterprise, together with the trade union, or if there is none, with the affected workers or their representatives, shall enter into negotiations to reach agreement on the conditions of termination of employment contracts or other measures to avoid or limit the termination of employment. Such measures might include the temporary suspension of activities, either partially or in full; a reduction in working shifts, days or hours; a change in working conditions; a revision of the collective conditions in force; and any other measure that may foster continuity of the enterprise's economic activities. This agreement shall be binding.
- (c) At the same time, or at a later date, the employer shall submit to the administrative labour authority a sworn statement indicating that it is affected by the objective grounds invoked, and enclose an expert report certifying the merits thereof; this report must be prepared by an auditor authorized by the Office of the Controller General of the Republic. Also, the employer may petition for a complete suspension of activities for the duration of the proceedings, which shall be deemed to be approved upon receipt of said communication, without prejudice to subsequent verification by the labour inspectorate. The administrative labour authority shall notify the trade union, or if there is none, the workers or their representatives, of the expert report within 48 hours of receipt; the workers may then submit additional expert reports within the following 15 working days.
- (d) Past that time frame, the administrative labour authority has 24 hours to convoke conciliation meetings with the worker and employer representatives, which must be held within the three working days that follow.
- (e) Past those time frames, the administrative labour authority must hand down a decision within five working days, at the end of which, if no decision has been made, the petition shall be considered to be approved.
- (f) Any appeal against the express or implied decision must be lodged within three working days, and the matter must be resolved within five working days. If no decision has been handed down within that time frame, the challenged decision shall be upheld.

997. The Government adds that, similarly, under section 50 of the Act, for cases covered under section 46(b), the employer shall notify the affected workers of the authorization for dismissal and provide them with social benefits as required by law. In this connection, the procedure for the collective dismissal on economic and structural grounds, instituted by Hogar Clínica San Juan de Dios, falls to the Subdirectorate for Collective Negotiations, under Cases Nos 276098-2008-MTPE/2/12.210 and 21308-2009-MTPE/2/12.210.

998. According to Case No. 276098-2008-MTPE/2/12.210:

- Hogar Clínica San Juan de Dios submitted its petition for collective dismissal on 18 November 2008, invoking economic and structural grounds. To facilitate consideration of this request, the petitioner was asked to submit documentation as

required under administrative procedure No. 5(b) of the Compendium of Administrative Procedures (TUPA) within ten days. The petitioner was later informed that the deadline had expired.

- The petitioner sent the requested information to the administrative labour authority, but as it was incomplete, its petition for collective termination was declared inadmissible by an unnumbered subdirectorial decision of 12 December 2008, and the case was shelved.
- An appeal was lodged against the unnumbered subdirectorial decision, which was upheld by directoral decision No. 001-2009-MTPE/2/12.2 of 5 January 2009, handed down by the Directorate for the Prevention and Settlement of Disputes, once again ordering that the case be shelved.
- Subsequently, an application for the judicial review of directoral decision No. 001-2009-MTPE/2/12.2 was submitted and declared inadmissible by the Regional Directorate of Lima and Callao, through an unnumbered directoral decision of 5 February 2009, thus ordering that the case be shelved.

999. According to Case No. 21308-2009-MTPE/2/12.210:

- Hogar Clínica San Juan de Dios submitted its petition for collective dismissal on economic and structural grounds on 12 February 2009, a measure which affected 86 workers. To facilitate consideration of the petition, Hogar Clínica was asked to bring its petition into line with the provisions under 5(b) of the TUPA within ten days.
- Once this was done, the Subdirectorate for Collective Negotiations ordered the hearing of the case on the procedure for the collective termination of employment contracts for economic, technological, structural and similar reasons, instituted by Hogar Clínica San Juan de Dios, notifying the affected workers of the expert report.
- On 30 April 2009, Hogar Clínica San Juan de Dios was ordered to provide the addresses of three workers (Ms Rosa Emperatriz Mariñas de la Peña, Mr Luis Alberto Flores Ruiz and Ms Miriam Reyes la Chira) within five working days, who would otherwise be excluded from the case being heard; this requirement was met on 13 May 2009.
- The Subdirectorate for Collective Negotiations, through an order dated 26 June 2009, invited the parties to hold conciliation meetings on 9, 10 and 13 July 2009; in spite of due notification, the representatives of the trade union organization did not attend the meetings.
- The Directorate for the Prevention and Settlement of Disputes, through directoral decision No. 157-2009-MTPE/2/12.2 of 17 July 2009, rejected the petition for the termination of employment contracts on the grounds that Hogar Clínica San Juan de Dios had failed, in the expert report of 12 November 2008, to duly and adequately substantiate the alleged grounds for the termination.
- At the appeal stage, the Regional Labour and Employment Promotion Directorate of Lima-Callao, through directoral decision No. 035-2009-MTPE/2/12.1 of 14 August 2009, declared the appeal to be inadmissible and confirmed the decision that had been issued at the lower-level review.
- In the final administrative proceedings, the National Labour Relations Directorate, through directoral decision No. 031-2009-MTPE/2/11.1 of 23 September 2009,

excluded from the proceedings 17 workers who, at that time, had no labour relationship with the appellant, and upheld the decisions issued by the Regional Labour and Employment Promotion Directorate of Lima-Callao and the Directorate for the Prevention and Settlement of Disputes.

- Hogar Clínica San Juan de Dios, in a written document dated 13 October 2009, and in line with the administrative labour authority's orders, informed the Subdirector for Collective Negotiations that, of the 86 workers included in the procedure for collective termination, 37 had been reinstated, 48 had concluded a termination agreement, dissolving their labour relationship, and one person had died during the proceedings. This is the most recent update on the case.

1000. With reference to the *amparo* proceedings filed by the trade union on 28 November 2008 before the 27th Civil Court of Lima against Hogar Clínica San Juan de Dios for the collective termination and the preventive measure filed before the same court on 15 December 2008 (which was approved on 6 January 2009), the Government notes that the judiciary has provided the following information: with regard to the main *amparo* proceedings, through decision No. 21 of 24 March 2009, the 26th Special Civil Court of Lima partially upheld the petition and, consequently, ordered that the defendant reinstate the leaders of the Union of Workers of Hogar Clínica San Juan de Dios. This ruling was appealed through decision No. 25 of 6 April 2009 and brought before the higher level court competent to consider the appeal: the First Civil Division of the Supreme Court of Justice of Lima, under Case No. 01191-2009. Through decision No. 4 of 30 July 2009, said First Civil Division reversed decision No. 21 of 24 March 2009 and, by a new decision, declared the petition to be inadmissible. Decision of 11 September 2009 granted leave to file an appeal with the Constitutional Court (*recurso de agravio constitucional*) against the judgement of 30 July 2009, thus bringing the case before the Constitutional Court, where the relevant legal proceedings are still under way.

1001. With regard to the preventive measure, the Union of Workers of Hogar Clínica San Juan de Dios, after its petition was admitted at the first level, requested that the preventive measure consist of the suspension of the action in violation of trade union immunity and order the defendant to reinstate the affected leaders, which was granted by a decision of 6 January 2009. After a series of steps taken to carry out the order, and in the light of the elapsed time, the defendant was issued a fine equivalent to two procedural reference units and was subsequently fined one additional reference unit.

1002. The Government notes that Peruvian labour law governing freedom of association is in line with ILO standards and principles; thus, in relation to ILO Convention No. 98, its legislation protects the right to organize and the free and voluntary affiliation to a trade union and stipulates that the employer should refrain from any activity intended to limit, restrict or otherwise undermine workers' rights to the freedom of association. The employer, against which the Union of Workers of Hogar Clínica de San Juan de Dios filed a complaint in connection with its fraudulent dismissal of the trade union board, presented its answer to the charges; it noted that the relevant workers were included in the procedure for collective termination, not on the basis of their status as trade union leaders, but strictly on the basis of their areas of work, which needed to be eliminated or restructured in line with the technical reports presented in the complaint, which state: "... Hogar Clínica must reduce its staff expenditure by approximately 50 per cent in order to bring its operational deficit down to manageable levels ... staff cuts, in general, should mainly be applied in the administration, clinical and orthopaedic units. In accordance with our expert report, we believe that there are objective, structural grounds for the collective termination of some of the employment contracts of workers active in the aforementioned areas of activity, in line with the provisions under the single consolidated text of Legislative Decree No. 728, approved by Supreme Decree No. 003-97-TR ...".

- 1003.** The Government notes in this regard that Hogar Clínica San Juan de Dios has submitted the documentation substantiating the mutual termination agreement of Mr Miguel Luis Jaime Salinas, Mr Teófanés Pedro Eulogio Espinoza, Mr Emiliano Sulca Rojas and Mr Dionisio Lajo Zambrano, as well as the documentation for the reinstatement of Mr Sergio Ruiz Taipe, Mr Héctor Darío Rojas Machuca and Mr Enrique Thomas Vargas Deudor, all board members of the trade union which formulated the complaint. It should be noted that the signing of a mutual termination agreement is a wilful decision of both the workers and the employer to terminate labour relations, whereby the employer undertakes to pay compensation to the workers and the workers refrain from engaging in legal proceedings, or from instituting new ones.
- 1004.** In this connection, the Government notes that the four remaining board members of the complainant trade union, Mr Lamberto Óscar Babetón Venancio, Mr Lucio Cuya Pullo, Ms Mónica Elisa Meneses La Riva and Mr Ángel Teófilo Tarazona Rodríguez, are involved in the aforementioned *amparo* proceedings, on which a final decision has yet to be made by the Constitutional Court. Also, it should be noted that Hogar Clínica San Juan de Dios has deposited with the competent legal body the social benefits for the union leaders who have instituted the aforementioned *amparo* proceedings. The administrative labour authority shall therefore refrain from issuing an opinion on this matter, as to do otherwise would mean that any officials who did not comply with the relevant rule under the single consolidated text of the Judiciary Organization Act might be held liable, in accordance with section 139(2) of the Political Constitution of Peru, which is based on respect for the independence of the judiciary, the fundamental pillar for safeguarding the rule of law in the country. Notwithstanding the foregoing, of the workers alleged to have been affected and who are included in the complaint, 11 are union leaders, and the remaining are workers. Of those 11 union leaders, three have been reinstated, four have concluded termination agreements and four others have filed *amparo* proceedings, currently being heard before the Constitutional Court.

C. The Committee's conclusions

- 1005.** *The Committee notes that, in this case, the complainant alleges that, notwithstanding that the administrative labour authority declared inadmissible the petition for the collective termination of employment contracts for economic and structural reasons, Hogar Clínica San Juan de Dios (hereafter "Hogar Clínica") nevertheless dismissed 103 workers, including all 11 board members of the Union of Workers of Hogar Clínica San Juan de Dios, invoking the deterioration of its economic and financial situation.*
- 1006.** *The Committee notes that, according to the employer (Hogar Clínica): (1) the procedure for collective termination on economic and structural grounds was carried out in strict application of the law, without any hidden reasons in connection with the elimination of the trade union; (2) if trade union leaders were included in the procedure for collective termination, it is because they worked in the areas affected by the restructuring process; and (3) of the 11 board members mentioned in the complaint, three have been reinstated, four have concluded termination agreements and four have instituted legal proceedings which are still under way.*
- 1007.** *The Committee notes that the Government draws attention to the legal provisions in connection with the objective grounds – economic, technological, structural or similar reasons – for the collective termination of employment contracts, and also notes that: (1) on 18 November 2008, Hogar Clínica filed a petition before the administrative labour authority for collective dismissal on economic and structural grounds, which was declared inadmissible; and (2) on 12 February 2009, Hogar filed a new petition before the administrative labour authority, which included 86 workers (and not 103, as claimed by the complainant, since 17 of them did not have an employment relationship), which was*

also rejected. The Government states that, of these 86 workers, 48 concluded a mutual termination agreement, 37 were reinstated and one died in the course of the proceedings.

- 1008.** *The Committee further notes that, according to the Government, the trade union organization in question instituted legal proceedings in connection with the dismissals and the judiciary noted that: (1) in connection with the main amparo proceedings, (i) through decision No. 21 of 24 March 2009, the 26th Special Civil Court of Lima partially upheld the petition and ordered the reinstatement of the trade union leaders; (ii) this judgement was appealed, and through decision No. 4 of 30 July 2009, the Civil Division of the Supreme Court of Justice of Lima reversed decision No. 21 of 24 March 2009 and declared the petition filed by the dismissed union leaders inadmissible; and (iii) through a decision of 11 September 2009, the dismissed trade union leaders were granted leave to file an appeal with the Constitutional Court (recurso de agravio constitucional) against the ruling of 30 July 2009, and the case was brought before the Constitutional Court, where proceedings are still under way; and (2) the preventive measure to suspend the action in violation of trade union immunity was granted by a decision of 6 January 2009. After a series of steps taken to carry out the order, and in the light of the time that had elapsed, Hogar was issued a fine equivalent to three procedural reference units (approximately US\$370).*
- 1009.** *In this respect, 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]. In these circumstances, while noting that four union leaders were granted, through a preventive measure, a temporary order for reinstatement, the Committee expects that the Constitutional Court will issue a final ruling in the very near future in connection with the dismissal of trade union leaders Mr Lamberto Óscar Babetón Venancio, Mr Lucio Cuya Pullo, Ms Mónica Elisa Meneses La Riva and M Ángel Teófilo Tarazona Rodríguez, and will take the aforementioned principle into account. The Committee requests the Government to keep it informed in this regard.*

The Committee's recommendation

- 1010.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

The Committee expects that the Constitutional Court will issue a final ruling in the very near future in connection with the dismissal of the leaders of the Union of Workers of Hogar Clínica San Juan de Dios, Mr Lamberto Óscar Babetón Venancio, Mr Lucio Cuya Pullo, Ms Mónica Elisa Meneses La Riva and Mr Ángel Teófilo Tarazona Rodríguez. The Committee requests the Government to keep it informed in this regard.

CASE NO. 2748

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

**Complaint against the Government of Poland
presented by
the Independent Self-Governing Trade Union “Solidarnosc”
(NSZZ “Solidarnosc”)**

Allegations: The complainant organization alleges acts of anti-union discrimination by the employer, including: harassment and unlawful dismissal of the union shop steward, interfering with and obstructing the trade union’s meetings and activities, and the misappropriation of the trade union’s property

- 1011.** The complaint is contained in a communication from the Independent Self-Governing Trade Union “Solidarnosc” (NSZZ “Solidarnosc”) dated 7 December 2009 (initially dated April 2008).
- 1012.** The Government forwarded its response to the allegations in a communication dated 18 February 2010.
- 1013.** Poland 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), as well as the Workers’ Representatives Convention, 1971 (No. 135).

A. The complainant’s allegations

- 1014.** In a communication dated 7 December 2009, the complainant organization NSZZ “Solidarnosc” raises the following issues: unlawful dismissal of the NSZZ “Solidarnosc” shop steward; intimidation of the shop steward (criminal allegations, not recognized by the Court); interference with trade union activities (non-recognition of the NSZZ “Solidarnosc” shop steward); hampering organization of trade union meeting; discrimination of trade union (moving of the NSZZ “Solidarnosc” union offices from the site); misappropriation of trade union property (union flags).
- 1015.** The complainant organization indicates that the incidents described below took place against the background of an ongoing collective dispute (since 2002) between the employer and the trade unions on irregularities connected with the enterprise social benefit fund. According to the complainant, the position of the trade union was confirmed by an inspection performed by the National Labour Inspectorate (NLI). On 2 April 2005, the mediation undertaken by the Ministry of Labour failed, and the issue of the social fund went to the District Court VII, Labour Department in Wroclaw, file No. VII P 5635/05. The value of the claim for 2006 exceeded 2,600,000 Zlotych (PLN) (roughly €740,000), which demonstrates the importance of the problem. On 13 March 2007, the Regional Court VII Wydział Pracy [Labour Department] rendered a judgement in the case ordering the defendant PZ Cussons Polska SA to pay back the amount of PLN1,063,433.21 to the account of the enterprise social benefit fund.

- 1016.** The complainant organization indicates that, in May 2003, as a result of the prolonged collective dispute, the NSZZ “Solidarnosc” flew trade union banners and flags which were torn off by PZ Cussons Polska SA. The flags – property of the union – were misappropriated by the enterprise. The Public Prosecutor’s Office, to whom the offence was reported, saw nothing illicit in the activities of the enterprise. The Prosecutor’s Office claimed, among others, that “it was established that flags and banners have been returned to the aggrieved union”, which was not true, thus discontinuing legal proceedings referring to interference in trade union activities.
- 1017.** Furthermore, in August 2003, the enterprise transferred the union’s offices to a remote part of the city (approximately 8 km away from the company), under the pretext of refurbishment works. This location of the union quarters was a specific sanction for the trade union’s activities and was intended to impede contacts with the members. There were empty premises where the union had been located so far, which could have been made available to it. Upon being informed about the offence, the Prosecutor’s Office decided to discontinue the proceedings. Ever since, although refurbishment works have ended, the union has been unable to use the premises. At the same time, the premises of the other trade union in the enterprise (NSZZ Pracownikow PZ Cussons Polska SA – OPZZ) continued to be located on the site.
- 1018.** The complainant organization also indicates that, in June 2006, the enterprise once again violated the trade union and social benefits fund legislation. The union responded by stepping up the protest in progress since October 2005 and displaying more trade union flags. On 29 June 2006, the enterprise once again tore off the flags (property of the union) and tried to remove them from the enterprise by car. The whole event was witnessed by the Chairman of NSZZ “Solidarnosc” at PZ Cussons Polska SA, Mr Wacław Pastuszka. He tried to stop the car in order to prevent the flags from being taken away. Security guards attempted to force him out, causing bruises and scratches, as a result of which he had to seek medical aid. To date, the flags removed by the enterprise from the premises have not been returned to the union.
- 1019.** On 29 June 2006, the enterprise notified the District Prosecutor’s Office for Wrocław Krzyki Wschod about a criminal offence perpetrated by Mr Pastuszka, charging him with: organizing illegal trade union protest action; damaging the company vehicle; misappropriation of union flags; and threatening the representative of the enterprise, Lesław Bos, to criminally harm him or his next of kin. Taking into account the absurdity of the charges, the complainant states that the institution of criminal proceedings against Mr Pastuszka was mainly intended as intimidation.
- 1020.** On Friday, 21 July 2006, 2.00 p.m., Mr Pastuszka was handed a notice addressed to the Enterprise Commission of NSZZ “Solidarnosc” with the information on intended termination of his employment on disciplinary grounds related to the June incident. The statutory period for the Enterprise Commission to take a stance is three days and expired on Monday, 24 July 2006. The complainant states that, due to the weekend, a realistic time for organizing a meeting of the Enterprise Commission was Monday. On the morning of 24 July, Mr Pastuszka requested leave on that very day to prepare the meeting of the Enterprise Commission and to seek legal advice at the Dolny Slask Regional Board of NSZZ “Solidarnosc”. The leave was granted. Having received legal advice from the Regional Board, Mr Pastuszka went back to the enterprise to arrange a board meeting but was refused admittance. His immediate superior informed him that the reason was allegedly the fact that he was on leave, although company regulations stipulate that chairmen of trade unions have the right to enter the premises of the company.
- 1021.** According to the complainant, since Mr Pastuszka was not allowed in, it was impossible to hold the meeting at the enterprise between the first and second shifts, which meant there

was no statutory quorum. The employer refused to exempt Mr Damian Korniak (member of the NSZZ “Solidarnosc” Enterprise Commission working the second shift) from his normal duties to carry out an ad hoc trade union activity (attending the meeting). In order to get a quorum, it became necessary to call in a member of the NSZZ “Solidarnosc” Enterprise Commission returning from holiday that day and to find another venue for the meeting, which resulted in major delay and made it impossible for the Commission to clarify the circumstances of the incident on site. The meeting was finally held at about 7 p.m., and the NSZZ “Solidarnosc” Enterprise Commission adopted a resolution in which it did not express its consent to the termination of Mr Pastuszka’s employment under paragraph 52 of the Labour Code, as the reasons given by the employer did not give grounds for disciplinary job termination and Mr Pastuszka’s employment was subject to special protection because of his function as the Chairman of the Enterprise Commission of NSZZ “Solidarnosc” and of the Works Council.

- 1022.** On 27 July 2006, Mr Pastuszka was handed a disciplinary notice despite the lack of authorization for the notice from the part of the trade union organization, which is required by law. On 31 July 2006, a case for reinstatement of the dismissed trade union leader was filed with the District Court for Wroclaw-Srodmiescie Labour Court (file No. IV P 584/06).
- 1023.** On 31 July 2006, the Regional Board informed the Managing Board of PZ Cussons Polska SA in writing that under the existing laws, despite employment termination, Mr Pastuszka was still the Chairman of the Enterprise Commission of NSZZ “Solidarnosc” at PZ Cussons Polska SA and that the termination of his contract of employment and the mode of such termination were without prejudice to his rights within the enterprise union organization. The letter also said that according to company regulations, the Chairman of the trade union enjoyed the right of entering company premises, and any obstruction whatsoever in this respect would be an impediment to trade union activities, a criminal act under article 35 of the Trade Unions Act.
- 1024.** On 2 August 2006, the NSZZ “Solidarnosc” Regional Board notified the District Prosecutor’s Office for Wroclaw Krzyki Wschod about a criminal offence perpetrated by the Managing Board of PZ Cussons Polska SA, charging it with: (1) contravention of article 35(1)(ii) of the Polish Trade Unions Act by impeding trade union activities carried out by the enterprise union under the existing law; (2) contravention of article 35(1)(iii) of the Trade Unions Act by discrimination of workers (especially Waclaw Pastuszka) as to their trade union membership; and (3) contravention of article 218 of the Penal Code through the malicious and persistent infringement of the provisions of the labour laws, including the Trade Unions Act. On 29 November 2006, the District Prosecutor’s Office discontinued investigation of the case on grounds of the absence of illicit deed.
- 1025.** On 12 December 2006, a complaint was filed by the NSZZ “Solidarnosc” against the discontinuance of inquiry. On 9 February 2007, as far as the impediment of union activities is concerned, the Regional Public Prosecutor allowed the complaint, revoked the decision of the District Public Prosecutor and referred the case back to the District Public Prosecutor’s Office, which reinstated the inquiry about the issue under file No. 1 Ds. 585/07. As for the discrimination against Waclaw Pastuszka, the Regional Prosecutor decided not to allow the complaint, and the complaint was sent to the District Court Wroclaw Krzyki Wydzial II Karny [Criminal Department], which approved the decision as well-founded on 26 March 2007. The union gave up further claims in this regard and the decision became final.
- 1026.** On 13 March 2007, when rendering judgement in the case of file No. VII P 5635/05 concerning the enterprise social benefit fund, the Regional Court VII Wydzial Pracy [Labour Department] also gave its position on the issue of the representation of NSZZ

“Solidarnosc”, stating that: “Despite the termination of employment of 27 July 2006, Waclaw Pastuszka is still authorized to represent the trade union ..., because under §5 of the Constitution of NSZZ “Solidarnosc” mentioned here, the loss of job does not mean the loss of membership rights. And then under the provisions of article 2, paragraph 4 of the abovementioned Trade Unions Act: the unemployed in the understanding of the provisions on employment maintain their right to trade union membership ...”. The sentence is not yet legally valid as both parties appealed against it.

- 1027.** On 25 July 2007, the NSZZ “Solidarnosc” Regional Board received the decision of the District Prosecutor’s Office for Wroclaw Krzyki Wschod of 21 December 2006 to discontinue the inquiry in the case of file No. 1 Ds. 1282/06 initiated against Waclaw Pastuszka. The District Prosecutor’s Office stated that the protest action carried out by the union consisting of flying flags was carried out in conformity with the law, that Mr Pastuszka did not damage the company vehicle, that he did not misappropriate trade union flags from the vehicle because the flags were union property and Mr Pastuszka represented their owner, and that he did not threaten Mr Leslaw Bos to criminally harm him or his next of kin.
- 1028.** On 13 July 2007, the NSZZ “Solidarnosc” Regional Board received the decision of the District Prosecutor’s Office for Wroclaw Krzyki Wschod of 28 June 2007. After reinstatement of the inquiry in relation to the impeding of trade union activities, the District Prosecutor’s Office once again did not find any attributes of a prohibited act in the employer’s actions, thus deciding to discontinue proceedings in the case of file No. 1 Ds. 585/07. On 20 July 2007, the NSZZ “Solidarnosc” once again lodged a complaint with the Regional Prosecutor against the decision to discontinue the inquiry, charging the District Public Prosecutor’s Office with non-exercise of due diligence in establishing the facts and the circumstances of the case.
- 1029.** As regards the moving of the trade union’s offices, the NSZZ “Solidarnosc” indicates that the Prosecutor merely stated that, since the employer suggested another location, there was no infringement on the provisions of the law in this respect. The complainant organization denounces that the Prosecutor failed to consider or determine the following: that the NSZZ “Solidarnosc” was deprived of its premises in Krakowska Street in 2003 under a pretext of refurbishment, and although refurbishment works have ended, the trade union has been unable to use the premises ever since; when the refurbishment works really started and ended; whether there have been any premises in Krakowska Street that could have been made available to the union and whether there was another possible solution for meeting this obligation by the employer (e.g. joint use of the premises by both trade unions operating in the company); why, after refurbishment, the union did not return to the premises used by it before 2003; whether there were really objective reasons for offering the union the premises in Dlugosza Street; that the employer had and still has vacant space in Krakowska Street and that the other union, NSZZ Pracownikow PZ Cussons Polska SA – OPZZ, has been using the rooms in Krakowska Street all the time; that the vast majority of members of NSZZ “Solidarnosc” work in Krakowska Street; and, finally that, in the company’s bulletin, the President of the company calls the decrease in union membership a success, and says “the largest trade union (i.e. NSZZ “Solidarnosc”) no longer needs a full-time chairman.” The complainant concludes that transferring its offices to a place 8 km away from the employer’s seat impeded trade union activities.
- 1030.** As regards the prevention of the NSZZ “Solidarnosc” from holding a meeting on 24 July 2006 and barring the admittance of the Chairman of the NSZZ “Solidarnosc” Enterprise Commission onto company premises, the complainant condemns that the Public Prosecutor’s Office carried out the investigation in a negligent way, without clarifying and considering all the circumstances of the case. It particularly blames the Office for not hearing the witness Slawomir Poswistak, the union’s legal adviser, in connection with the

events, even though it was motioned when the offence was reported and the evidence could have been instrumental. In its view, the Prosecutor erroneously decided that the evidence was not significant enough to have an explicit effect on the functioning of the trade union organization. Also, the findings that there were no obstacles to getting a quorum necessary for taking a resolution were wrong. Organizing a rightful meeting took numerous additional activities from the Chairman and other members of the NSZZ "Solidarnosc" Enterprise Commission, such as inviting and waiting for the arrival of a member returning from holiday, finding a new venue, etc. As for refusing admittance to Mr Pastuszka on 24 July 2006, the Prosecutor allegedly ignored the fact that the employer infringed not only the Trade Unions Act but also the company regulations, according to which the chairpersons of trade unions have the right to enter the company's premises. Contrary to the findings, refusal of admittance to the Chairman of the trade union was not a single incident, but a permanent practice of the employer; the Prosecutor's Office was informed by letter of 20 June 2007 that on the very day Chairman Pastuszka arrived at the company in order to grant one of the members a statutory benefit, the employer refused to let him onto the company premises. The Regional Prosecutor was informed by letter of 1 August 2007 that on 26 July, when the meeting of the Presidium of the NSZZ "Solidarnosc" Enterprise Commission was planned to take place at the company's seat in Krakowska Street, Mr Pastuszka was again not allowed to enter the premises, and the meeting was held at the gate, with Mr Pastuszka standing in the street and the other members within the confines of the company.

- 1031.** The complainant further indicates that, despite a properly lodged motion, first on 2 August 2006 and then on 2 July 2007, signed by Mr Pastuszka, to release Mr Mariusz Musialek from his normal duties (under article 32(1) and (2) of the Trade Unions Act) so that he could perform trade union duties, the employer refused to do so. Another example was the refusal to release members of the NSZZ "Solidarnosc" Enterprise Commission (under article 31(3) of the Trade Unions Act), without withholding their remuneration, so that they could perform current trade union duties such as the union meeting on 10 August 2006. The complainant considers that this is simply due to the fact that the motion was signed by Mr Pastuszka. Notwithstanding the ruling of the Regional Court VII Wydział Pracy in Wrocław of 13 March 2007 (file No. VII P 5635/05) stating that Waclaw Pastuszka had the right to represent the trade union organization in spite of termination of employment, the enterprise has kept challenging his right to represent the NSZZ "Solidarnosc". The complainant condemns that the Prosecutor ignored the presented evidence, in particular the letters of 4 and 9 August 2006 addressed by the enterprise to the NSZZ "Solidarnosc". Their contents allegedly show that the employer excessively interfered with the independence and self-governing of the union and illegitimately tried to decide who may become its chairman, who is authorized to receive mail or to sign letters on behalf of the NSZZ "Solidarnosc" Enterprise Commission, which is in breach not only of article 30 of the Constitution of the Polish Republic and article 1(2) of the Trade Unions Act but also of EU laws and ILO Conventions. According to the complainant, the following findings of the Prosecutor are inconsistent with the above facts of the case and not supported by any evidence: that the employer allegedly released union members from their normal duties at every request presented in due time; that the enterprise did not ignore the union's position expressed in letters signed by Mr Pastuszka but only informed the union about its opinion on the issue of proper representation; that Mr Pastuszka's right to represent the union has never been questioned by the employer; and that the dispute did not make it impossible to perform trade union activities. In the complainant's view, the fact that, for over a year, the Chairman was not allowed to enter the company's premises, and his deputy could not exercise the right to be released from his normal duties to carry out union activities, resulted in an obstruction of the activities of a union with 130 members. The Prosecutor also failed to notice that by refusing to release trade union activists from normal duties, the employer contravened stipulations of the existing law (see verdict of the Supreme Court of 6 June 2001 I PKN 460/00, Prok. i Pr. 2002/12/48).

- 1032.** As for the misappropriation of the trade union's flags in June 2006, the complainant denounces that the Prosecutor carried out no investigation and improperly decided that the whole issue had already been assessed by the District Prosecutor's Office (file No. 1 Ds. 1282/06). The District Prosecutor's investigation, however, concerned the misappropriation of trade union flags by Waclaw Pastuszka from the company vehicle, as reported by the employer, and the Prosecutor had discontinued those proceedings since the flags were the property of the trade union and Mr Pastuszka represented their owner. In the complainant's view, the issue of tearing off and misappropriation of union flags by the enterprise was not covered by the proceedings. The complainant further denounces that, in his decision (file No. Ds. 585/07), the Prosecutor excused the removal by the employer of the union flags stating that the employer wanted to report an alleged offence, and not to misappropriate the flags. According to article 308(1) of the Penal Code, securing evidence of an offence lies within the competence of the Prosecutor or the police, and not any third party. The complainant adds that the fact that the flags have never been returned to the union discloses the employer's real intentions.
- 1033.** The complainant states that the above activities of the PZ Cussons Polska SA elicited no reaction on the part of the Polish Government or any public institution. The NSZZ "Solidarnosc" believes that the unlawful practices of interfering into the union's affairs and obstructing its activities (the transfer of union offices, preventing NSZZ "Solidarnosc" organization from holding its meeting on 24 July 2006 and barring its Chairman from performing his union duties, as well as the seizure of union flags) were aimed at intimidating its members. This might drive the union out of the company, should membership drop below the statutory threshold.
- 1034.** The complainant adds that, in spite of the fact that in 2004 the Committee on Freedom of Association called on the Polish Government to "... secure the freedom of association and collective bargaining, especially through the recognition of trade unions and their protection against discrimination and interference", the events described above demonstrated that exercising freedom of association is seriously impeded in Poland. It was particularly conspicuous with regard to non-discrimination and protection against unjustified dismissal, which must be ensured to union officials if they are to perform their fundamental obligation of fighting for the rights of the workers. The above also highlighted the lack of due diligence and the negligence of the Public Prosecutor's Office in determining the facts of the case and considering all the evidence presented, and that the behaviour of the Managing Board of Cussons SA was characterized by permanence, persistence, malice and was still ongoing.
- 1035.** NSZZ "Solidarnosc" believes that the events described above, the anti-union climate in the enterprise, the hostile attitude to union activities and the discrimination practiced because of engagement in such activities are a major threat to the rights guaranteed by ILO Conventions Nos 87 and 98, and that the employer activities at PZ Cussons Polska SA are in serious violation of union rights and the principle of social dialogue. According to the complainant, it is of extreme importance that in the case of international corporations like PZ Cussons Polska SA, there should be no double standards for respecting workers' rights and freedom of association on the basis of whether they are at home or in another country.
- 1036.** Finally, the complainant states that the problem of wilful and persistent discrimination against union members and officials should be extensively debated by the Tripartite Commission. The Government should encourage employers' organizations to express clearly their position on enterprises operating in Poland in which union members and officials are discriminated against and attempts are made to drive the union out of the enterprise. The administrative and judicial mechanisms should be designed to prevent the law from being circumvented and to protect freedom of association.

B. The Government's reply

- 1037.** In a communication dated 18 February 2010, the Government transmits the remarks of the Ministry of Justice on the specific charges raised by the NSZZ "Solidarnosc".
- 1038.** Regarding the moving of the union's offices, reference is made to proceedings with ref. No. Ds. 3838/04 initiated by way of written notification by Waclaw Pastuszka for the hindering of trade union activity in the period between August 2003–February 2004 through the allocation of premises for the trade union outside the principal establishment of the company, and the refusal of consent to a union meeting (article 35(1)(2) of the Trade Unions Act). The proceedings were discontinued on 5 March 2004 as the Act did not meet the legal definition of an offence. Following a complaint lodged by Mr Pastuszka, which was declared to be well-founded under article 463(1) of the Code of Penal Proceedings, the decision to discontinue proceedings was repealed. On 30 June 2004, the proceedings were discontinued again. Following another complaint, the decision to discontinue proceedings was upheld on 13 December 2004 by the Wroclaw-Krzyki District Court (II Kp 14/04), which stated that it did not discover any errors in legal evaluation or any formal defects.
- 1039.** The Government then refers to the proceedings with ref. No. Ds. 1691/06 initiated by the union on 2 August 2006 in reference to the following: (i) hindering trade union activity of the Enterprise Commission of NSZZ "Solidarnosc" at PZ Cussons Polska SA, conducted in the period between 2003 and 24 July 2006, in particular depriving union members of their seat located within the company premises, failure to grant Damian Korniak exemption from work in order to perform his union duties on 24 July 2006, and forcing the session of the NSZZ "Solidarnosc" Enterprise Commission to be held outside the establishment on that same day (article 35(1)(2) of the Trade Unions Act); and (ii) discrimination of Waclaw Pastuszka in the period between 21–27 July 2006 on account of his trade union membership and of his holding the function of Chairperson of the NSZZ "Solidarnosc" Enterprise Commission in Wroclaw, as well as malicious and permanent acts in breach of his rights (article 35(2)(3) of the Trade Unions Act and article 218(1) of the Penal Code in connection with article 11(2) of the Penal Code).
- 1040.** The proceedings were discontinued on 29 November 2006 for the following reasons: the NSZZ "Solidarnosc" Enterprise Commission was not deprived of its seat where meetings of trade union members could be held and the organization's documentation stored, it was only allocated another room for that purpose; the issue of convenience when travelling to the allocated facilities can only be evaluated subjectively, and cannot be analysed in terms of penal law; furthermore, postponing the session of the NSZZ "Solidarnosc" Enterprise Commission for about two hours, inter alia due to the fact that the employer did not let Mr Pastuszka enter the premises during leave, did not suffice to conclude that it had an actual impact on trade union activity. The decision to discontinue proceedings was appealed against by Waclaw Pastuszka. On 9 February 2007, the Superior Prosecutor acknowledged the appeal as far as the issue of impediment of trade union activities was concerned and revoked the decision to discontinue proceedings in this respect because the complaint has described subsequent events (claim that after 24 July 2006, i.e. since his dismissal, Mr Pastuszka was not recognized as the Chairperson of the union by the enterprise board) that could have been a manifestation of hindering trade union activity (article 35(1)(2) of the Act on trade unions), and which had not been covered by the decision. As far as discrimination and breach of Mr Pastuszka's rights were concerned, the appeal was refuted.
- 1041.** As regards the representation of the trade union organization by Waclaw Pastuszka, the proceedings with ref. No. I Ds. 585/07 sought to establish the reasons why the enterprise board would not recognize Waclaw Pastuszka as the Chairperson of the union after his employment contract had been terminated and, as a consequence, refused to acknowledge

trade union letters he signed. The parties to the conflict entered into a dispute concerning the title of Waclaw Pastuszka to bring actions before the Court, and his authority to represent the trade union before the enterprise board. Nevertheless, the employer did not dispute the fact that the trade union organization operated in the establishment. Case files showed that representatives of the enterprise, whether correct or incorrect in their legal opinions, did not ignore certain proposals put forward by the trade union by failing to react; informed the trade union of their position by way of letters addressing individual issues; and mainly emphasized the problem of appropriate representation, and not of correctness of trade union position on the content of correspondence with PZ Cussons Polska SA, inter alia as regards exemption from the obligation to perform work by Mariusz Musialek, and appointing the Employee Council. The issue of appropriate representation was the subject of letters of 5 October and 22 November 2006 written by the enterprise and addressed to the Seventh Labour Division of Wroclaw Regional Court, and was eventually resolved by the ruling of 13 March 2007 (file ref. No. VII P 5635/05). The investigation on the above case was discontinued by decision of 28 June 2007 due to lack of data proving that the offence had been committed. The Prosecutor pointed out that a different view on a legal matter could not be regarded as a proof that a deliberate action had been taken aimed at hindering trade union activity. The above decision was appealed against by the aggrieved party. The appeal was not acknowledged by the Wroclaw-Krzyki District Court. The files of the said case were examined by the Wroclaw Regional Prosecutor's Office, a unit superior to the Prosecutor's Office, which conducted the proceedings. The Government states that the legitimacy of the decision was not questioned then and that there were no grounds to question it now, since the validity of decisions as to substance has undergone an appropriate inspection by a higher instance.

- 1042.** As concerns the misappropriation of union flags, the proceedings with ref. No. Ds. 854/04 were initiated by the union as regards the hindering of trade union activity in the enterprise in May 2003 by removing flags and posters used for the protest, i.e. an act under article 35(1)(2) of the Trade Unions Act. The proceedings were subsequently discontinued on 18 December 2003 and on 30 June 2004 as the Act did not meet the legal definition of an offence. Both decisions were repealed by the Wroclaw Regional Prosecutor's Office who acknowledged the complaints filed by Waclaw Pastuszka (1 Dsn 30/04/Wr III). The proceedings were discontinued for the third time on 31 December 2004 (Ds. 854/04). Following yet another complaint lodged by the union, the decision to discontinue was upheld by the Wroclaw-Krzyki District Court (Iij Kp 46/05) on 7 November 2005, stating that the investigation was thorough and that the Prosecutor was correct in evaluating the evidence. The Court concluded that actions to order the security guards to remove the banners on behalf of the enterprise board did not meet the legal definition of an offence under article 35(1)(2) of the Act on trade unions, as the protest was illegal. The Government stresses that, from the point of view of reassessment of the legitimacy of the decision, the aforementioned acts already fall under the statute of limitations.
- 1043.** However, the final decision in case 1 Ds. 585/07 acknowledges that the theft or misappropriation of flags and posters belonging to the trade union on 27 June 2006 by individuals acting on behalf of the employer was not investigated. In line with the above, the Government indicates that the Wroclaw Krzyki Wschod District Prosecutor was requested to consider initiating separate proceedings in this respect.
- 1044.** As concerns the Court proceedings before Wroclaw-Srodmiescie District Court in case IVi P 584/06, whereby Waclaw Pastuszka, Chairperson of the Enterprise Commission of NSZZ "Solidarnosc", requested to be reinstated in his job due to unlawful termination of employment contract by the enterprise defendant, the Government informs that the case ended with a valid verdict. On 17 November 2008, the Wroclaw Regional Court (ref. No. VII Pa 400/08) dismissed the appeal of the defendant against the verdict of the Wroclaw-Srodmiescie District Court acknowledging that the dismissal was in breach of

labour law and reinstating the plaintiff in his job with the previous conditions of work and pay. The defendant lodged a cassation appeal to the Supreme Court but withdrew it on 25 May 2009.

- 1045.** Furthermore, the Government forwards information received from the NLI. Over the years 2003–09, inspectors of the Wrocław Regional Labour Inspectorate held nine inspections at the enterprise, the majority of which were conducted in connection with complaints of representatives of the NSZZ “Solidarnosc” Enterprise Commission. The first inspection was carried out in March 2003 following a notification by the trade union on the breach of provisions concerning the company’s social benefit fund. During the inspection, the labour inspector discovered shortcomings, partially confirmed trade union charges relating to the rules of the company’s social benefit fund and prepared a draft recommendation regulating the issues. Two subsequent inspections (conducted in June and July 2004) were not connected with union requests.
- 1046.** In June 2004, the Wrocław Regional Labour Inspectorate received another complaint by the NSZZ “Solidarnosc” Enterprise Commission whereby its Chairperson, Waclaw Pastuszka, requested intervention in the following cases: (i) incorrect operation of the social labour inspection in the establishment; (ii) incorrect organization of work in the establishment; (iii) incorrect payment of remuneration for overtime work; and (iv) breaching regulations on modifying work and remuneration conditions. As a result of the inspection, the labour inspector confirmed the first three charges. As concerns breaching regulations on modifying work and remuneration conditions, it was revealed that positions of all foremen in the Sulfonation Division have been liquidated as a result of restructuring. The establishment director requested the management to transfer Mr Pastuszka from the position of senior foreman dispatcher to that of an operator. The employer informed the trade union of its intent justifying it with the necessity to adapt the organizational structure of the branch to its current needs. Despite the negative opinion of the NSZZ “Solidarnosc” Enterprise Commission, the employer modified Waclaw Pastuszka’s work and remuneration conditions. Although, according to the labour inspector, establishment restructuring justified invoking article 1 of the Act of 13 March 2003 on special principles for terminating employment with employees for reasons not attributable to employees, as well as disregarding the ban on unilateral modification of work and remuneration conditions to the disadvantage of the employee covered with trade union protection without the consent of the management of the trade union organization, regulated by article 32(1)(2) of the Act of 23 May 1991 on trade unions, the recommendations included a request to “consider the possibility of invalidating modification of work and remuneration conditions of Waclaw Pastuszka, Chairperson of the Enterprise Commission of NSZZ “Solidarnosc” due to social interest of the parties”.
- 1047.** During the inspection, the charge was also raised on trade union discrimination by granting NSZZ “Solidarnosc” premises outside the establishment. The labour inspection established the following: the NSZZ “Solidarnosc” Enterprise Commission requested the management a number of times to renovate the premises occupied by the union; taking note of the requests and of the premises condition, the management made the decision to renovate the building; the union was offered substitute premises where it would pursue the activities defined in its charter; the new premises were not located outside the establishment but in the other production plant of the company; failing to recognize that the employer discriminated against the union, the labour inspector nevertheless recommended that the employer consider providing a room within the premises of the production plant at Krakowska Street in Wrocław, for the union to pursue its operation there, so as to ensure that union management had unrestrained access to union members.
- 1048.** In September 2006, as a result of another union complaint, the labour inspector of the Wrocław Regional Labour Inspectorate undertook an inspection in relation to the

enterprise social benefit fund. During the inspection, the NSZZ “Solidarnosc” Enterprise Commission applied for the extension of its scope to cover the breach of regulations on the termination of employment contracts by the enterprise through the dismissal of the union’s Chairperson on disciplinary grounds on 27 July 2006. The labour inspection established the following: the employer stated that the reason behind the termination of employment was a grave breach of basic employee obligations by Mr Pastuszka including breaching Workplace Regulations in force in the company as well as disturbing order and peace in the workplace (which the employer assessed as a grave breach of paragraph 7(26) of Workplace Regulations), and deliberately breaching article 100(1)(2) and article 211 of the Labour Code by actions threatening to life, namely throwing himself under a moving car driven by another employee with a view to hindering execution of his duties. As Waclaw Pastuszka reported the incident as injury at work, it also served as the basis for the employer to terminate his employment contract without notice. The employer emphasized in the written statement that, as Chairperson of the NSZZ “Solidarnosc” Enterprise Commission, Waclaw Pastuszka was especially obliged to observe Workplace Regulations and the law. The employer also pointed out that, pursuant to the body of rulings of the Supreme Court, being a trade union activist did not exempt a union chairperson from the obligation to observe Workplace Regulations, nor from the obligation of displaying basic loyalty towards the employer. The NLI emphasizes, however, that Waclaw Pastuszka was protected from termination of employment twofold: as the Chairperson of the NSZZ “Solidarnosc” Enterprise Commission, he was protected under article 23(1)(1) of the Trade Unions Act (the Enterprise Commission did not consent to terminating his employment), and as a member of the Employee Committee he was protected under article 17(1) of the Act on informing and consulting employees. Thus, the labour inspector included the following conclusion in his recommendations: “Observing the Labour Law when terminating without notice employment contracts of employees serving as trade union activists.” The last inspection in the establishment was carried out in May 2008 and concerned in particular the question of adherence to procedures regarding the current collective labour dispute.

- 1049.** Finally, the Government conveys its remarks on the charge of NSZZ “Solidarnosc” concerning the lack of reaction on the part of the Polish Government or any public body. It emphasizes that the above information clearly shows that both the justice system and the NLI were actively engaged in resolving the situation of trade unions at the enterprise. During the dispute, the NLI held as much as nine inspections and filed a number of requests with the employer. Moreover, the Chairperson of the NSZZ “Solidarnosc” Enterprise Commission was reinstated in his job by way of a valid court sentence.
- 1050.** At the same time, the Lower Silesia Voivodeship Committee for Community Dialogue was also engaged in resolving the conflict on the request of the Lower Silesia Regional Board of NSZZ “Solidarnosc” and decided to delegate two representatives, one to represent the employer and the other to represent the trade unions, for a so-called goodwill mission. Talks between the opposing parties were to take place in the presence of those representatives. During the meeting held on 18 February 2008, members of the Executive Committee acquainted themselves with the views of one party to the conflict and decided to invite PZ Cussons Polska SA’s President for talks but the meeting did not materialize. The meeting finally took place in April 2008 but the President did not sign the record of divergences. Trade union representatives consulted with representatives of the Executive Committee of the Voivodeship Committee for Community Dialogue and with the Office of the Voivodeship Committee for Community Dialogue in relation to the conflict. Also, the Voivode motioned to the employer in writing a number of times. Parties to the dispute then requested the Minister of Labour and Social Policy to appoint a mediator. The appointed mediator participated in dispute resolution, yet due to the death of the mediator (after dispute cessation), the Government states that it is not in a position to provide further information on the nature of the dispute.

1051. As concerns the conclusion by NSZZ “Solidarnosc” that the problem of malicious and permanent anti-trade union discrimination should undergo detailed debate in the framework of the Tripartite Commission, the Government emphasizes that pursuant to article 2(1) of the Act of 6 July 2001 on the Tripartite Commission for the Social and Economic Issues and voivodeship commissions of social dialogue, each party to the Commission may request that issues of great social or economic significance be included in the agenda if it finds that resolving them would be significant from the point of view of keeping social peace. Pursuant to article 2(3) of that Act, each of the parties to the Commission may summon the other party to express its position on an issue considered to be of great social or economic significance. The Government adds that all decisions concerning the agenda of the Tripartite Commission are taken by its Executive Committee, comprised of representatives of the representative workers’ and employers’ organizations, including the Chairperson of NSZZ “Solidarnosc”.

C. The Committee’s conclusions

1052. *The Committee notes that, in the present case, the complainant organization denounces acts of anti-union discrimination by the employer, including: harassment and unlawful dismissal of the union shop steward; interfering with and obstructing the trade union’s meetings and activities; and the misappropriation of the trade union’s property.*

1053. *The Committee notes that, as a result of the acts alleged by the complainant, the Regional Board of the NSZZ “Solidarnosc” filed on 2 August 2006 a complaint (Ref. No. Ds. 1691/06) with the District Prosecutor’s Office for Wroclaw Krzyki Wschod charging the Managing Board of PZ Cussons Polska SA with: (1) contravention of article 35(1)(ii) of the Polish Trade Unions Act through impeding trade union activities; (2) contravention of article 35(1)(iii) of the Trade Unions Act through discrimination of workers (in particular, Waclaw Pastuszka) as to their trade union membership; and (3) contravention of article 218 of the Penal Code through malicious and persistent infringement on the provisions of labour laws, including the Trade Unions Act. On 29 November 2006, the District Prosecutor’s Office discontinued investigation of the case on grounds of the absence of illicit deed. On 12 December 2006, a complaint was filed by the NSZZ “Solidarnosc” against the discontinuation of inquiry. On 9 February 2007, as far as the impediment of union activities is concerned, the Regional Public Prosecutor allowed the complaint and revoked the decision to discontinue. The District Public Prosecutor’s Office reinstated the inquiry about the issue under file No. 1 Ds. 585/07. As for the discrimination against Waclaw Pastuszka, the Regional Prosecutor decided not to allow the complaint, and the complaint was sent to the District Court Wroclaw Krzyki Wydzial II Karny [Criminal Department], which approved the decision to disallow as well-founded on 26 March 2007; the union gave up further claims in this regard. On 28 June 2007, the District Prosecutor’s Office once again decided to discontinue the proceedings as regards the impeding of trade union activities. On 20 July 2007, the NSZZ “Solidarnosc” once again lodged a complaint with the Regional Prosecutor, charging the District Public Prosecutor’s Office with non-exercise of due diligence in establishing the facts and the circumstances of the case, but the appeal was not acknowledged.*

1054. *As regards the moving of the trade union’s offices, the Committee notes the complainant’s allegation that, in August 2003, under the pretext of refurbishment works, the enterprise transferred the union’s offices in Krakowska Street to Dlugosza Street, approximately 8 km away from the company, and that, although refurbishment works have ended, the union has been unable to return to the premises. The Committee notes that, according to the NSZZ “Solidarnosc”, there were empty premises where the union had been located so far, which could have been made available to it, and that, at the same time, premises of the other trade union in the enterprise (NSZZ Pracownikow PZ Cussons Polska SA – OPZZ) continued to be located on site in Krakowska Street. The Committee further notes that, in*

the view of the complainant organization, the transfer of its offices to a remote part of the city has impeded contacts with union members as well as trade union activities, and the Prosecutor failed to take into account the abovementioned facts and circumstances during the proceedings, as well as that the vast majority of members of NSZZ “Solidarnosc” work in Krakowska Street and that there would have been other possible solutions for the enterprise to meet its obligation (e.g. joint use of the premises by both trade unions operating in the company). The Prosecutor maintained that, since the enterprise suggested another location, there was no infringement of law in this respect.

- 1055.** *The Committee also notes that, according to the Government, the issue had already been the subject of proceedings initiated by the union for hindering trade union activity in the period between August 2003–February 2004. The proceedings were discontinued on 5 March 2004, reinstated following a complaint lodged by the union and discontinued again on 30 June 2004. Following another complaint, the decision to discontinue proceedings was upheld on 13 December 2004 by the Wrocław-Krzyki District Court, which stated that there were no errors in legal evaluation or any formal defects. As regards the proceedings initiated by the union at a later stage on 2 August 2006, the Committee notes the indication of the Ministry of Justice that, as regards the transfer of union offices, it was found that the NSZZ “Solidarnosc” Enterprise Commission was not deprived of a seat where meetings of trade union members could be held and documentation stored, as it was allocated another room for that purpose, and that the subjective issue of convenience when travelling to allocated facilities cannot be evaluated in terms of penal law.*
- 1056.** *The Committee further notes from the NLI that, during the June 2004 inspection, it was established that the NSZZ “Solidarnosc” Enterprise Commission had requested the management to renovate the premises occupied by the union, and that the union was offered substitute premises which are not located outside the establishment but in the other production plant of the company. The Committee notes that, while the labour inspection did not find that the enterprise has discriminated against the union, it recommended that the enterprise consider providing a room within the premises of the production plant at Krakowska Street, for the union to pursue its operation there, so as to ensure that union management has unrestrained access to union members.*
- 1057.** *In this regard, the Committee recalls that Convention No. 135, ratified by Poland, calls on ratifying member States to supply such facilities in the undertaking as may be appropriate in order to enable workers’ representatives to carry out their functions promptly and efficiently, and in such a manner as not to impair the efficient operation of the undertaking concerned. For the right to organize to be meaningful, the relevant workers’ organizations should be able to further and defend the interests of their members, by enjoying such facilities as may be necessary for the proper exercise of their functions as workers’ representatives, including access to the workplace of trade union members. Respect for the principles of freedom of association requires that the public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions. It is even more important that employers exercise restraint in this regard. They should not, for example, do anything which might seem to favour one group within a union at the expense of another [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 1098, 1106 and 859].*
- 1058.** *The Committee notes that the enterprise, following a request made by the NSZZ union, did renovate the premises occupied by the union and provided the union with premises remote from its membership, without considering possible alternatives and without allowing it to return to its previous premises at the end of the refurbishment works, while the other trade union in the enterprise continues to be located at the main premises. The Committee, taking into account the recommendation formulated by the NLI, therefore invites the*

Government to bring the NSZZ “Solidarnosc” and the enterprise together with a view to finding a mutually acceptable solution to the issue of trade union premises, bearing in mind the importance of ensuring both the effective functioning of the union and of the enterprise.

- 1059.** *The Committee also notes that the union stepped up the protest in progress since October 2005 by displaying further trade union flags. It further notes that, according to the complainant, on 29 June 2006, the enterprise once again tore off and tried to remove the union’s flags from the premises by car, and that the Chairman of the union, Mr Waclaw Pastuszka, sought in vain to prevent it from doing so; the flags removed from the premises by the enterprise have never been returned to the union. The Committee further notes the indication that the enterprise filed a complaint against Mr Pastuszka with the District Prosecutor’s Office, charging him, inter alia, with the misappropriation of trade union flags; and that, on 21 December 2006, it was decided to discontinue the inquiry since the union’s protest action consisting of flying flags was lawful, and Mr Pastuszka did not misappropriate the flags because the flags were union property and Mr Pastuszka represented their owner. The complainant further alleges that the Prosecutor unlawfully excused, without investigating, the enterprise removal of the union flags stating that the enterprise only wanted to report the alleged offence rather than misappropriate the flags.*
- 1060.** *The Committee notes the Government’s confirmation of the 2003 judicial proceedings as described by the complainant and its further specification that, after another complaint lodged by the union, the decision to discontinue was upheld by the Wroclaw-Krzyki District Court concluding that the actions (to order the security guards to remove the banners) taken on behalf of the enterprise did not constitute an offence under article 35(1)(2) of the Trade Unions Act, as the protest was illegal. While the Government underlines that these acts already fall under the statute of limitations, the Committee notes that as regards the theft or misappropriation of flags and posters belonging to the trade union by individuals acting on behalf of the employer in June 2006, the Government concedes that the issue has not been investigated in the framework of the 2006 proceedings.*
- 1061.** *The Committee has always drawn attention to the importance of the principle that the property of trade unions should enjoy adequate protection [see **Digest**, op. cit., para. 189]. Recalling that the confiscation of trade union property by the authorities, without a court order, constitutes an infringement of the right of trade unions to own property and undue interference in trade union activities [see **Digest**, op. cit., para. 190], the Committee considers that the same is valid in case of unjustified seizure of union property by the employer. It therefore notes with interest the Government’s indication that the District Prosecutor was requested to consider initiating new proceedings as regards the theft or misappropriation of flags and posters belonging to the trade union by individuals acting on behalf of the employer in June 2006, since the issue has not yet been investigated. The Committee expects that these proceedings will conclude shortly, and that the flags and banners belonging to the union will be returned to it without delay, if they have not already been returned. The Committee requests to be kept informed of further developments in this regard.*
- 1062.** *As regards the dismissal of Mr Pastuszka and other allegations of acts of interference in union affairs, the Committee notes from the complainant that, in view of a notice addressed to the NSZZ “Solidarnosc” Enterprise Commission on Friday afternoon of 21 July 2006 concerning the intended termination of his employment on disciplinary grounds related to the flags incident in June 2006, and in order to observe the statutory period for taking a position (three days, expiring on Monday, 24 July), Mr Pastuszka requested and was granted leave on Monday to prepare the meeting of the NSZZ “Solidarnosc” Enterprise Commission. The Committee notes the complainant’s allegation*

that Mr Pastuszka was subsequently refused admittance to the enterprise, for the reason that he was on leave, although company regulations stipulate that chairpersons of trade unions have the right to enter the premises of the company. As, according to the complainant, it became impossible to hold the meeting between the first and second shift to secure the statutory quorum, the union asked for the exemption from normal duties of Mr Damian Korniak (member of the NSZZ "Solidarnosc" Enterprise Commission on the second shift) but the enterprise refused. Finally, after calling in a member of the NSZZ "Solidarnosc" Enterprise Commission who was returning from holiday and finding another venue outside the enterprise for the meeting, the NSZZ "Solidarnosc" Enterprise Commission adopted a resolution in which it did not give its consent to the termination of Mr Pastuszka's employment. The Committee also notes the complainant's allegation that, during the proceedings, the Prosecutor failed to take into account the abovementioned facts and circumstances; ignored evidence, such as the witness of the events, Slawomir Poswistak (the union's legal adviser), and the fact that the refusal of admittance was not a single incident but a permanent practice (refusal to enter the premises on 20 June 2006 for granting a statutory benefit to a member and on 26 July 2006 for a meeting of the Presidium of the Enterprise Commission, which finally took place at the gate); and erroneously decided that the acts were not significant enough to affect the union's functioning.

- 1063.** Furthermore, the Committee notes that, according to the complainant, the NSZZ "Solidarnosc" Regional Board informed the enterprise, by letter of 31 July 2006, that under the existing laws, despite employment termination, Mr Pastuszka was still the Chairman of the union, thus enjoying, according to company regulations, the right of entering company premises. It further notes that, on 13 March 2007, when rendering judgement in the case concerning the enterprise social benefit fund, the Regional Court confirmed this reading of the law. Notwithstanding the above, the enterprise allegedly continued to challenge the right of Mr Pastuszka to represent the NSZZ "Solidarnosc", in breach of article 30 of the Constitution of Poland, article 1(2) of the Trade Unions Act, Supreme Court verdict of 6 June 2001, EU laws and ILO Conventions. Thus, despite properly lodged motions on 2 August 2006 and on 2 July 2007 signed by Mr Pastuszka, the enterprise refused to release the Deputy Chairman, Mr Mariusz Musialek, from his normal duties. According to the complainant, it also refused to release members of the NSZZ "Solidarnosc" Enterprise Commission without withholding remuneration so that they could perform trade union duties (e.g. the union meeting on 10 August 2006), simply because the motion was signed by Mr Pastuszka. The complainant further indicates that the Prosecutor ignored the presented evidence and erroneously established that the enterprise allegedly released union members from their normal duties at every request presented in due time; that it did not ignore the union's position expressed in letters signed by Mr Pastuszka but only informed about its opinion on the issue of proper representation; that Mr Pastuszka's right to represent the union has never been questioned; and that the dispute did not make it impossible to perform trade union activities.
- 1064.** The Committee notes that, in its reply, the Government refers to the proceedings initiated by the union on 2 August 2006 in relation to, inter alia, hindering trade union activity in the period between 2003 and 24 July 2006. This aspect referred in particular to the failure to grant Damian Korniak exemption from work for performing his union duties on 24 July 2006, and forcing the session of the Commission to be held outside the establishment on that same day. According to the Ministry of Justice, the proceedings were discontinued because postponing the session of the Enterprise Commission for about two hours inter alia due to the fact that the employer did not let Mr Pastuszka enter the premises during leave, did not suffice to conclude that this had an actual impact on trade union activity. The Superior Prosecutor then revoked the decision to discontinue proceedings in this respect because the complaint described subsequent events relevant to a claim of anti-union discrimination.

- 1065.** *The Committee also notes from the Government's reply that, while the parties to the conflict entered into a dispute concerning the authority of Mr Pastuszka to bring actions before the Court and to represent the union, the enterprise did not dispute the fact that the trade union organization operated in the establishment. According to the Ministry of Justice, case files showed that representatives of the enterprise, whether correct or incorrect in their legal opinions, did not fail to react on certain proposals tabled by the union; and informed the union of their position by way of letters dated 5 October and 22 November 2006 mainly emphasizing the problem of appropriate representation, and not of correctness of trade union position on, for example, the exemption from work of Mariusz Musialek. The Committee notes the Government's indication that the issue of appropriate representation was eventually resolved by way of the ruling of 13 March 2007, and that the Prosecutor discontinued proceedings on 28 June 2007 pointing out that a different view on a legal matter may not be regarded as proof that a deliberate action had been taken aimed at hindering trade union activity. In the Government's view, the legitimacy of the decision, which was upheld following another appeal, should not be questioned, since the validity of decisions as to the substance has undergone an appropriate inspection by a higher instance. Finally, the Government indicates that the Chairperson of the NSZZ "Solidarnosc" Enterprise Commission was reinstated in his job by way of a valid court sentence, and that the defendant employer withdrew a cassation appeal lodged with the Supreme Court.*
- 1066.** *The Committee wishes to recall that freedom of assembly constitutes a fundamental aspect of trade union rights, and that trade unions should be able to hold meetings freely in their own premises for the discussion of trade union matters. In this regard, the Committee observes that the access by Mr Pastuszka, as the Chairperson of the NSZZ "Solidarnosc" Enterprise Commission, to the workplace in Krakowska Street, and the exemption from normal duties of union members to carry out union activities, were essential to the organization's ability to make a determination in the matter of his dismissal, as prescribed by law. In this respect, and bearing in mind its concerns noted above as regards the change of the trade union's premises, the Committee recalls that workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation function [see **Digest**, *op. cit.*, para. 1104]. Moreover, the Committee recalls that Paragraph 10 of the Workers' Representatives Recommendation, 1971 (No. 143), provides that workers' representatives in the undertaking should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions, and that, while workers' representatives may be required to obtain permission from the management before taking time off, such permission should not be unreasonably withheld.*
- 1067.** *Finally, the Committee wishes to draw special attention to the importance which it attaches to one of the fundamental principles of freedom of association that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest**, *op. cit.*, para. 799]. Welcoming the Government's indication that, after more than two years of proceedings, Mr Pastuszka has been reinstated in his job with the previous conditions of work and pay, the Committee expects that all necessary measures will be taken to ensure respect for the aforementioned principles in practice. The Committee expects that, in the future, the Chairperson of the NSZZ "Solidarnosc" Enterprise Commission will be afforded access to the enterprise with*

due regard for the rights and property of management, and that the necessary time off from work, without loss of pay or benefits, for carrying out representation functions will not be unreasonably denied by the enterprise.

- 1068.** *More generally, the Committee notes the complainant's allegation that the unlawful practices of the enterprise interfering into union affairs, obstructing its activities and aimed at intimidating union members, elicited no reaction from the Government or any public institution. At the same time, the Committee notes from the Government's reply that both the justice system and the NLI were actively engaged in resolving the situation at the enterprise: the NLI held nine inspections and filed a number of requests with the employer; the Chairperson of the NSZZ "Solidarnosc" Enterprise Commission was reinstated in his job by way of a valid court sentence; the Lower Silesia Voivodeship Committee for Community Dialogue engaged in resolving the conflict on the request of the Lower Silesia Regional Board of NSZZ "Solidarnosc", albeit without success; and the Minister of Labour and Social Policy appointed a mediator at the request of the parties to the dispute.*
- 1069.** *The Committee takes due note of the complainant's suggestion that the problem of anti-union discrimination should be extensively debated by the Tripartite Commission, and that the Government should encourage employers' organizations to express clearly their position on the issue, as well as the Government's indication that pursuant to the Act of 6 July 2001 on the Tripartite Commission for the Social and Economic Issues and voivodeship commissions of social dialogue, each party to the Commission may request that issues of great social or economic significance be included in the agenda, and may summon another party to express its position. All decisions concerning the agenda of the Tripartite Commission are made by its Executive Committee, comprised of representatives of the representative workers' and employers' organizations, including the Chairperson of NSZZ "Solidarnosc". In light of the important considerations raised in this case, the lack of consideration at certain levels of important allegations of anti-union discrimination and the fact that the Committee has in the past examined three cases concerning Poland involving similar issues (see Cases Nos 2291, 2395 and 2474; 333rd, 337th and 344th Reports, respectively), the Committee urges the Government, as it has in these previous cases, to intensify its efforts, under the auspices of the Tripartite Commission, to ensure that the principles of freedom of association and collective bargaining are applied, particularly as regards adequate protection against acts of anti-union discrimination and interference. The Committee thus expects that the Tripartite Commission will take up the matter in the near future and requests to be kept informed of the developments in this regard.*

The Committee's recommendations

- 1070.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) As regards the moving of the trade union's offices, the Committee, taking into account the recommendation formulated by the NLI, invites the Government to bring the NSZZ "Solidarnosc" and the enterprise together with a view to finding a mutually acceptable solution to the issue of trade union premises, bearing in mind the importance of ensuring both the effective functioning of the union and of the enterprise. The Committee requests to be kept informed of the developments in this regard.*
 - (b) As regards the alleged misappropriation of the union flags, the Committee expects that the new proceedings initiated in relation to the theft or misappropriation of flags and banners belonging to the trade union by*

individuals acting on behalf of the employer in June 2006, will conclude shortly, and that the flags and banners belonging to the union will be returned to it without delay, if they have not already been returned. The Committee requests to be kept informed of the developments in this regard.

- (c) *As regards the dismissal of Mr Pastuszka and other allegations of acts of interference in union affairs, the Committee, welcoming the Government's indication that Mr Pastuszka has been reinstated in his job with the previous conditions of work and pay, expects that all necessary measures will be taken to ensure respect in practice for the principles of freedom of association set out in its conclusions. In particular, the Committee expects that, in the future, the Chairperson of the NSZZ "Solidarnosc" Enterprise Commission will be afforded access to the enterprise with due regard for the rights and property of management, and that the necessary time off from work, without loss of pay or benefits, for carrying out representation functions will not be unreasonably denied by the enterprise.*
- (d) *More generally, the Committee urges the Government to intensify its efforts, under the auspices of the Tripartite Commission, to ensure that the principles of freedom of association and collective bargaining are applied, particularly as regards adequate protection against acts of anti-union discrimination and interference. The Committee thus expects that the Tripartite Commission will take up the matter in the near future and requests to be kept informed of the developments in this regard.*

CASE NO. 2712

INTERIM REPORT

**Complaint against the Government of the
Democratic Republic of the Congo
presented by
the Congolese Labour Confederation (CCT)**

***Allegations: Abduction and arbitrary detention
by the special services of three trade unionists,
including the President of the Congolese Labour
Confederation***

1071. The complaint is contained in a communication dated 11 April 2009 from the Congolese Labour Confederation (CCT).

1072. As the Government has not replied, the Committee has been obliged to adjourn its examination of this case on two occasions. At its March 2010 meeting [see the Committee's 356th Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report (1972), approved by the Governing Body, it could present a report on the substance of the case at its next meeting if the observations or information requested had not been received in due time. To date the Government has not sent any information.

1073. The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

1074. In a communication dated 11 April 2009, the CCT alleges abduction and illegal detention for three months of two trade unionists, Mr Richard Kambale Ndayango and Mr Israël Kanumbaya Yambasa, and of the union's President, Mr Nginamau Malaba. According to the CCT, the arrests and detentions in question followed the presentation of a number of demands and a number of actions by the organization. The CCT cites, as an example, a representation signed in November 2007 by agents and officials of the Ministry of the National Economy concerning mission orders considered to be discriminatory and memos addressed to the Ministry of the National Economy and to the Prime Minister, which had already led to threats to have members of the CCT union committee arrested by the special services.

1075. The CCT concludes that the trade unionists working for the Ministry of the National Economy and Foreign Trade are being harassed because they have information on financial irregularities that have resulted in a shortfall in state income and the failure to pay civil servants their salaries and benefits.

1076. The complainant organization states, lastly, that it complained to the Attorney-General of the Republic and the Supreme Court in connection with the abduction, arbitrary detention, and violation of the fundamental rights of Mr Nginamau Malaba, President of the CCT, by certain individuals.

B. The Committee's conclusions

1077. *The Committee deplores that, despite the time that has passed since the complaint was presented, the Government has still not replied to the allegations of the complainant organization, although it has been invited to do so on a number of occasions, including by means of an urgent appeal. The Committee urges the Government to be more cooperative in the future.*

1078. *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had expected to receive from the Government.*

1079. *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see the Committee's first Report, para. 31].*

1080. *The Committee notes that the present case concerns the arrest and detention of three trade unionists by the country's special services. The Committee wishes to make it clear from the outset that it has no competence to examine the accusations made by the complainant organization concerning financial irregularities on the part of the administration, and its remit is rather to examine allegations of violations of freedom of association and the*

absence of normal judicial procedure for trade union officials in the exercise of their legitimate union activities.

1081. *The Committee notes that, according to the CCT, two trade unionists, Mr Richard Kambale Ndayango and Mr Israël Kanumbaya Yambasa, as well as the President of the union, Mr Nginamau Malaba, were arrested on 11, 16 and 19 January 2009, respectively, by agents of the National Intelligence Agency (ANR). It is alleged that they were kept in custody for one month, without any access to legal counsel or to their families, before obtaining an order by the magistrates Kinshasa/Gombe magistrate's court for their provisional release. Despite this order, they have been kept in prison following an appeal by the prosecution service.*

1082. *The Committee notes that, according to the documents attached to the complaint:*

- Mr Malaba, Mr Ndayango and Mr Yambasa, all of whom signed a memorandum denouncing financial irregularities at the Ministry of the National Economy, were detained for one month following their arrest by ANR agents in January 2009;*
- formal authorization for their detention was allegedly given only after the fact;*
- Mr Malaba was allegedly not brought before an investigating magistrate until 19 February 2009, following a complaint filed by the Minister of the National Economy and Foreign Trade;*
- the three trade unionists have been held since 23 February 2009 at the Kinshasa Correctional and Re-education centre (CPRK);*
- the Kinshasa/Gombe magistrate's court, on 26 February 2009, ordered their provisional release but they remained in custody because of the appeal by the prosecution service against the lower court's decision to release them;*
- an appeal court hearing set for 13 March 2009 was to have decided whether or not to release them; and*
- the three trade unionists are said to have been subjected to inhumane and degrading treatment.*

1083. *The Committee notes that, according to the complainant organization, the detention of the trade unionists was a retaliatory and intimidatory measure of the kind to which CCT members have been subjected since July 2007, and was a response to a number of actions by the CCT to challenge discriminatory mission orders (representation of 27 June 2007 addressed to the Ministry of the National Economy, attached as an annex), and to claim certain benefits on behalf of the agents and officials of the Ministry of the National Economy (memo of 26 December 2007 to the President of the National Assembly; petition of 14 November 2008 to the Minister of the National Economy, attached as an annex), and to report financial irregularities within the Ministry for the National Economy which have been detrimental to civil servants by depriving them of their salaries and benefits. The Committee recalls that freedom of opinion and expression and, in particular, the right not to be penalized for one's opinions, is an essential corollary of freedom of association, and workers, employers and their organizations should enjoy freedom of opinion and expression in their meetings, publications and in the course of their trade union activities.*

1084. *In the light of the information provided and in the absence of any reply from the Government, the Committee notes that there is nothing in this case that would rule out the possibility that the arrests and detention of Mr Malaba, president of the CCT, and of Mr Ndayango and Mr Yambasa were linked to their trade union activities. The Committee*

recalls in this regard that the detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular; furthermore, the arrest and detention of trade unionists without any charges being laid or court warrants being issued, constitutes a serious violation of trade unions rights [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, paras 64 and 69].

- 1085.** *Consequently, the Committee urges the Government, without delay, to hold an independent inquiry to elucidate the reasons for the arrests of the two CCT trade unionists, Mr Richard Kambale Ndayango and Mr Israël Kanumbaya Yambasa, and of the President of the union, Mr Nginamau Malaba, on 11, 16 and 19 January 2009, respectively, by ANR agents; to ascertain the charges laid against them to justify their detention; and, if it is found that they are detained solely for reasons linked to their legitimate trade union activities, to release them immediately and punish those responsible in a way sufficiently dissuasive to prevent any future recurrence of such acts and compensate them for any lost wages. The Government is also requested to provide copies of the court decisions in this matter, in particular, the decision of 26 February 2009 of the Kinshasa/Gombe magistrate's court, the decision of the appeal court where a hearing had been set for 13 March 2009, and to indicate the follow-up to the court decisions.*
- 1086.** *The Committee is very concerned by the statement, according to which not only were the three trade unionists kept in detention for one month before obtaining a hearing following a complaint by the Minister of the National Economy and Foreign Trade, but the individuals in question were also subjected to inhumane and degrading treatment. The Committee urges the Government to hold an inquiry without delay into these allegations and to report on the outcome. The Committee also requests the Government, or the complainant organization, to indicate the follow-up action taken on the complaint filed by the CCT on 28 January 2009 with the Attorney-General of the Republic.*

The Committee's recommendations

- 1087.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee deplores that the Government has still not replied to the complainant organization's allegations, despite having been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future.*
 - (b) The Committee urges the Government to hold an independent inquiry without delay to elucidate the reasons for the arrests of the two CCT trade unionists, Mr Richard Kambale Ndayango and Mr Israël Kanumbaya Yambasa, and of the President of the organization, Mr Nginamau Malaba, on 11, 16 and 19 January 2009, respectively, by ANR agents; to ascertain the charges laid against them to justify their detention; and, if it is found that they were detained solely for reasons linked to their legitimate union activities, to release them immediately and punish those responsible in a manner sufficiently dissuasive to prevent any recurrence of such acts in the future, and compensate them for any lost wages.*

- (c) *The Government is requested to provide copies of the relevant court decisions in this case, including the decision of 26 February 2009 of the Kinshasa/Gombe magistrate's court, the decision of the appeals court for which a hearing was set for 13 March 2009, and to indicate any follow-up action taken.*
- (d) *The Committee urges the Government to hold an inquiry without delay into the allegation that the three trade unionists concerned were held in custody for one month before obtaining a hearing and were subjected to inhumane and degrading treatment, and to indicate the outcome.*
- (e) *The Committee requests the Government or the complainant organization to indicate the follow-up action taken on the complaint filed by the CCT with the Attorney-General of the Republic on 28 January 2009.*
- (f) *The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of the present case.*

CASE NO. 2713

INTERIM REPORT

**Complaint against the Government of
the Democratic Republic of the Congo
presented by
the National Union of Teachers in Registered Schools (SYNECAT)**

*Allegations: Various acts of harassment against
the General Secretary of the union and
interruption of the union's national congress by
the police*

- 1088.** The complaint is contained in a communication dated 20 April 2009 from the National Union of Teachers in Registered Schools (SYNECAT).
- 1089.** As the Government has not replied, the Committee has been obliged to adjourn its examination of this case on two occasions. At its March 2010 meeting [see the Committee's 356th Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report (1972), approved by the Governing Body, it could present a report on the substance of the case at its next meeting if the observations or information requested had not been received in due time. To date, the Government has not sent any information.
- 1090.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

- 1091.** In a communication dated 20 April 2009, SYNECAT alleges that its national congress on 14 April 2009 was interrupted by police sent by the Governor of Kinshasa City and Province. According to the complainant, the congress had been organized with the assistance of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and had been opened by the delegate of the Ministry of Employment, Labour and Social Security. At the time of the interference, a summons was handed to the General Secretary of SYNECAT, Mr Jean Bosco Puna.
- 1092.** According to the complainant, there is a private dispute between the General Secretary of SYNECAT and the former President of the union, Mr André Malasi, who was disowned when he was appointed to political office (Assistant District Commissioner of Kikwit, Bandundu Province). SYNECAT held an extraordinary general meeting on 8 March 2008 and passed a vote of no confidence against him, as a result of which he was no longer authorized to make any commitments on the union's behalf until the next congress. According to the complainant, the abrupt stoppage of the SYNECAT national congress can be explained by the fact that the Governor of Kinshasa City and Province is a relation of Mr Malasi.
- 1093.** The complainant also alleges harassment of the union's General Secretary, Mr Puna, who was unlawfully suspended following a teachers' strike from September to November 2008, has received no salary for the period from March 2008 to 2009 despite the fact that he was reinstated, and has been summoned to appear before the Gombe higher court in connection with an issue that should be settled democratically within the union.
- 1094.** SYNECAT demands the restoration of its rights and, referring to a press release by the African Association for Human Rights (ASADHO), denounces the violations of trade union rights and threats of arbitrary arrest made against the union's General Secretary, demands that protection be given to the latter and to all union officials who have been subjected to harassment after demanding better working and living conditions, without being manipulated by the authorities.

B. The Committee's conclusions

- 1095.** *The Committee regrets that, despite the time that has passed since the complaint was presented, the Government has not replied to the complainant's allegations, although it has been invited to do so on a number of occasions, including by means of an urgent appeal. The Committee urges the Government to be more cooperative in the future.*
- 1096.** *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body in its 184th Session (1972)], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had expected to receive from the Government.*
- 1097.** *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see the Committee's first Report, para. 31].*
- 1098.** *The Committee notes that the present case concerns the interruption of the SYNECAT national congress by the police on 14 April 2009 and the harassment of the union's*

General Secretary. In this regard, the Committee notes that according to the documentation supplied by the complainant, SYNECAT held an extraordinary meeting on 8 March 2008 and passed a vote of no confidence against its President, Mr Malasi, thereby depriving him of all authority to undertake any commitments on the union's behalf until the next general congress. The Committee also takes note of the communication from the Governor of Kinshasa City and Province dated 8 April 2009 addressed to Mr Puna in his capacity as SYNECAT General Secretary, in which he states that Mr Malasi had informed him of his intention to file a complaint with the Gombe higher court regarding the dispute within SYNECAT and that, in the light of this dispute, he would not authorize a meeting by SYNECAT. The Committee notes that SYNECAT nevertheless went ahead with its national congress on 14 April 2009 as planned, and that the congress was interrupted by the police. The Committee notes that a summons against Mr Puna was issued by the Kinshasa/Gombe prosecution authorities. The Committee also notes that according to the press release from ASADHO of 16 April 2009 (a copy of which is supplied by the complainant), the police also broke into the premises of SYNECAT on 15 April 2009 in their search for Mr Puna on the grounds that he had gone ahead with the congress.

- 1099.** *The Committee, noting that the difficulties encountered by the complainant originated in a dispute between the union's General Secretary, Mr Puna, and its President, Mr Malasi, recalls that conflicts within a trade union lie outside the competence of the Committee and should be resolved by the parties themselves or by recourse to the judicial authority or an independent arbitrator [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 1123]. Similarly, the Committee has had occasion in the past to recall that, in cases of trade union internal conflict, judicial intervention may contribute to clarifying a situation from a legal point of view and help to normalize the management and representation of the trade union organization concerned.*
- 1100.** *As regards the forcible entry by police of SYNECAT premises, the Committee maintains that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights, and that the right of the inviolability of the premises of organizations of workers and employers also necessarily implies that the public authorities may not insist on entering such premises without prior authorization or without having obtained a legal warrant to do so [see **Digest**, op. cit., paras 178 and 180]. In the absence of any reply from the Government, the Committee requests the latter to provide its observations on these allegations and to indicate whether the action taken by the police was based on a judicial warrant.*
- 1101.** *The Committee also notes with concern the allegations that the General Secretary of SYNECAT has been subjected to harassment. The Committee notes that the complainant refers to the General Secretary's suspension following a strike by teachers, retention of his salary for a period of 12 months ordered at ministerial level, and his summons by the judicial authority. 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 [**Digest**, op. cit., para. 522] and it is the Government's responsibility to ensure that this principle is respected. The Committee urges the Government to investigate these allegations without delay, to communicate the outcome thereof and, if it is found that the union official in question was suspended from his functions for carrying out legitimate trade union activities, to ensure the wages owed to him are paid.*
- 1102.** *As regards the acts of harassment of trade unionists in general, the Committee recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest**, op. cit., para. 44]. The Committee requests the Government to provide its*

observations on the allegations of harassment of the General Secretary of SYNECAT without delay and to report on the current situation and on the action taken on the matter referred to the Gombe higher court in connection with which the General Secretary has been summoned.

The Committee's recommendations

1103. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee regrets that the Government has not replied to the complainant's allegations, despite having been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.*
- (b) The Committee, recalling the principle of the inviolability of trade union premises and property, and in the absence of any reply from the Government, requests the latter to provide its observations on the allegations relating to the forcible entry by the police of SYNECAT premises, and to indicate whether the action taken by the police was based on a judicial warrant.*
- (c) The Committee urges the Government to investigate without delay the allegations concerning the suspension of the SYNECAT General Secretary from his teaching functions following a strike and the retention of his salary for a period of 12 months, to communicate the outcome of the investigations and, if it is found that the union official in question was suspended for having carried out his legitimate trade union activities, to ensure that the salary arrears owed to him are paid.*
- (d) The Committee requests the Government to provide its observations on the allegations of harassment of the SYNECAT General Secretary without delay, to report on the current situation and on the action taken on the matter referred to the Gombe higher court in connection with which he received a summons.*

CASE NO. 2714

INTERIM REPORT

Complaint against the Government of the Democratic Republic of the Congo
presented by
the Congolese Labour Confederation (CCT)

Allegations: Harassment and intimidation of trade union leaders through disciplinary measures and suspensions in reprisal for making a petition

- 1104.** The complaint is contained in a communication dated 14 April 2009 from the Congolese Labour Confederation (CCT).
- 1105.** As the Government has not replied, the Committee has been obliged to adjourn its examination of this case on two occasions. At its March 2010 meeting [see the Committee's 356th Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report (1972), approved by the Governing Body, it could present a report on the substance of the case at its next meeting if the observations or information requested had not been received in due time. To date, the Government has not sent any information.
- 1106.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

- 1107.** In a communication dated 14 April 2009, the CCT alleges acts of harassment and intimidation of trade union officials who had signed a petition requesting information on the application of the law establishing the nomenclature of acts giving rise to administrative, judicial and state revenues and arrangements for the collection thereof. According to the complainant, two of the officials in question, Mr Basila Baelongandi and Mr Hervé Bushabu Kwete, are victims of harassment carried out by the General Secretariat for Foreign Trade as a reprisal for the petition signed by the CCT and the Force syndicale nouvelle (FOSYN).
- 1108.** The complainant states that its two members in question have been subjected to anti-union discrimination, including by disciplinary measures up to, and including, suspension. It states that it protested against such methods, which are described as harassment and intimidation aimed at stifling the union, but has received no reply from the authorities. The acts continue to this day.
- 1109.** The organization also states that alongside these efforts to marginalize the union, the General Secretariat for Foreign Trade has appointed a delegate who is not really a trade unionist to the Bonus Allocations Committee, which favours a non-transparent process for refunds.

B. The Committee's conclusions

- 1110.** *The Committee regrets that, despite the time that has passed since the complaint was presented, the Government has not replied to the complainant's allegations, although it has been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future.*
- 1111.** *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had expected to receive from the Government.*
- 1112.** *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of*

freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see the Committee's first Report, para. 31].

- 1113.** *The Committee notes that the present case concerns allegations of retaliatory acts of harassment and intimidation of trade union leaders by an administrative authority. The Committee notes that the CCT and the union FOSYN, on 16 June 2008, signed a petition addressed to the Ministry of the National Economy and Foreign Trade requesting more transparent implementation of Law No. 04/15 of 16 July 2004, establishing the nomenclature of acts giving rise to administrative, judicial and state revenues and arrangements for the collection thereof, and better information for unions on the allocation of bonuses and refunds to ministry departments, in accordance with the law, and the ending of partisan appointments of agents and officials for official missions.*
- 1114.** *The Committee notes that, in a letter of 25 June 2008, the General Secretariat for Trade informed Mr Basila Baelongandi, Mr Bushabu Kwete and Ndombe JP that they had been suspended from their posts in the light of the disciplinary proceedings for allegedly spreading false information (letter No. 79/MINEC/SG.COM/141/jd/2008, provided by the complainant). The Committee notes that, according to the documents provided by the complainant, Mr Bushabu Kwete has received three summonses dated 20 and 26 June and 1 July 2008 from the General Directorate of Prosecutions. Mr Bushabu Kwete was also notified of the instigation of disciplinary proceedings, dated 25 June 2008, alleging the following offences: misleading agents with false information concerning bonuses and refunds, failure to respect hierarchical lines of management, insubordination and manifest bad faith, despite a number of warnings.*
- 1115.** *The Committee notes that following letters of protest from the CCT concerning the acts of anti-union discrimination against its members (communication of 23 June 2008 to the Attorney General of the Republic) and the Government's renewed consideration of the demands contained in the petition of 16 June 2008 (communications of 29 September 2008 to the Minister of the National Economy and Foreign Trade and of 13 January 2009 to the Prime Minister), Mr Bushabu Kwete was notified of another preventive suspension on 14 January 2009 on the grounds of his speaking in disrespectful terms of the Minister of the National Economy and Foreign Trade during a televised broadcast. The Committee, furthermore, notes the letter addressed to the Secretary General for Foreign Trade on 20 January 2009, in which the CCT protests against the instigation of disciplinary proceedings against Mr Basila Baelongandi and Mr Bushabu Kwete, which are described as acts of harassment against trade unionists who had exercised their rights.*
- 1116.** *The Committee wishes to state at the outset that, in its view, issuing a petition like the one signed by the CCT and the union FOSYN on 16 June 2008, appears to be a legitimate action by organizations in the defence of their members' interests. In the light of the information provided by the complainant organization and in the absence of any observations from the Government in this regard, the Committee notes that there is nothing to rule out the possibility that the disciplinary measures, up to and including suspension from their posts, against Mr Basila Baelongandi and Mr Bushabu Kwete, CCT union officials, and their summons to appear before the prosecution authority of the Republic, are directly linked with their trade union activities.*
- 1117.** *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. Furthermore, the Committee recalls that the right of petition is a legitimate activity of trade union organizations, and persons who sign such trade union petitions should not be reprimanded or punished for this type of activity [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 799 and 508]. The Committee urges the Government, without delay, to provide detailed information on the reasons for the disciplinary measures applied to Mr Basila Baelongandi and Mr Bushabu Kwete, CCT officials, in June 2008 and January 2009, to indicate in particular whether they remain suspended from their posts and, if so, why. If it is found that the measures in question were motivated solely by their legitimate trade union activities, the Committee expects that the officials in question will be reinstated without delay and paid the wages arrears and other benefits owed to them, and that the Government will ensure that such acts of anti-union discrimination will not recur in future. If reinstatement is not possible for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the trade union leaders are paid an adequate compensation which would represent a sufficiently dissuasive sanction for anti-union discrimination.

1118. *The Committee requests the Government to provide its observations without delay on the summons issued to Mr Bushabu Kwete by the national prosecution service and, in particular, to indicate the reasons for this.*

1119. *As regards the appointment of a trade unionist who, according to the complainant, has no union mandate, to the Bonus Allocations Committee, the Committee notes that the General Secretariat for Trade identified and appointed the trade unionist in question in order to “win over the Secretariat”. Recalling that it is for trade unions to appoint their own representatives to consultative bodies, the Committee requests the Government to reply in detail to the complainant’s allegations in this regard without delay. The Committee also requests the Government, or the complainant, to provide information on the composition of the General Directorate for Administrative, Judicial and State Revenues (DGRAD) and to explain the role of the unions in this regard.*

The Committee’s recommendations

1120. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee regrets that the Government has not replied to the complainant’s allegations, despite having been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.*
- (b) *The Committee urges the Government without delay to provide detailed information on the reasons for the disciplinary measures applied against Mr Basila Baelongandi and Mr Bushabu Kwete, CCT union officials, in June 2008 and January 2009, indicating in particular whether they remain suspended and, if so, why. If it is found that the measures in question were motivated solely by their legitimate trade union activities, the Committee expects that the officials in question will be reinstated without delay and paid the wages arrears and other benefits owed to them, and that the Government will ensure that such acts of anti-union discrimination will not*

recur in future. If reinstatement is not possible for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the trade union leaders are paid an adequate compensation which would represent a sufficiently dissuasive sanction for anti-union discrimination.

- (c) *The Committee requests the Government to provide its observations without delay on the summons issued by the prosecution service for Mr Bushabu Kwete to attend a hearing and, in particular, the reasons for the summons in question.*
- (d) *The Committee, recalling that it is for trade unions to appoint their own representatives on consultative bodies, requests the Government to reply without delay in detail to the complainant's allegations concerning the appointment of a trade unionist who, according to the complainant, has no union mandate, to the Bonus Allocations Committee.*
- (e) *The Committee requests the Government, or the complainant, to provide information on the composition of the bodies within the DGRAD and to clarify the role of the unions in that regard.*

CASE NO. 2738

DEFINITIVE REPORT

**Complaint against the Government of the Russian Federation
presented by
the Russian trade Union Staff (and Students) of Educational
and Cultural Institutions, State, Municipal and not-for-profit
Organizations, Communal Services and Trade (RPRiU)**

Allegations: The complainant organization alleges that its member organization, the Moscow Police Employees' Trade Union, was subjected to an illegal search during which documents relating to trade union accounts and computers were confiscated, bringing the union's activities almost completely to a halt

- 1121.** The complaint is contained in communications from the Russian Trade Union of Staff (and Students) of Educational and Cultural Institutions, State, Municipal and not-for-profit Organizations, Communal Services and Trade (RPRiU) dated 22 April and 17 July 2009.
- 1122.** The Government sent its observations in a communication dated 1 February 2010.
- 1123.** The Russian Federation 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

- 1124.** By its communications dated 22 April and 17 July 2009, the RPRiU submits a complaint against the Government of the Russian Federation on behalf of its affiliate, the Moscow Police Employees' Union (PSM). The RPRiU explains that the PSM was established on 2 July 1991 to represent and protect the social and labour rights and interests of Moscow employees of the Moscow State Department of Internal Affairs (Moscow GUVd), responsible for the police.
- 1125.** The complainant alleges that since 2002, directors of various Moscow GUVd offices have been attempting to obtain personal information about members of the PSM. However, following the representation to the Office of the Public Prosecutor, these officials were given warnings and were informed that their activities in respect of the PSM were against the law. According to the complainant, notwithstanding these warnings, on 7 April 2009, agents of the Economic Crimes Division of the Moscow GUVd broke into the premises of the police trade union and prevented its employees from leaving their workstations and using land line or mobile telephones. The officers explained their actions by invoking an order dated 1 April 2009 of the acting head of the Division to conduct a search at the PSM premises. According to the officers, the search was ordered following allegations of improper use by the PSM leadership of trade union dues paid by its Moscow members. According to the document, the premises, safes and workstations of the union leaders and of the chief accountant should be made available for inspection. The complainant indicates that the agents of the Economic Crime Division categorically refused to produce a copy of that order, but produced an order signed by a senior official of that Division on 6 April 2009 instructing the union to submit a number of documents, including the list of the union's members and accounts.
- 1126.** The complainant considers that the search of the PSM premises, during which a drawer in the desk of the chief accountant was broken into, six processors and one server removed and the original bookkeeping documents and accounts seized, was conducted without any adequate grounds and in contravention of the law. The complainant claims that particular attention was paid to the documents containing union members' personal data. As a result of these actions by agents of the employer and the removal of virtually all working documents and material, the activities of the PSM in Moscow were blocked.
- 1127.** The complainant considers that the very issuance of the order in question is contrary to the following legislative provisions: section 7 of the Trade Unions Act, which stipulates that "trade unions and federations thereof shall independently formulate and adopt their own by-laws, regulations on primary union organizations and structures; and shall form union bodies and organize their activities, hold meetings, conferences, congresses and other such events"; sections 5(1) and 24(2) of the same Act, according to which the executive is not entitled to exercise any form of control, including financial control, over the activities of a trade union; section 86(5) of the Labour Code, which prohibits employers from obtaining and processing data on workers' union membership; section 6 of the Act on Official Searches, which does not provide for search operations involving work stations being broken into and removal of original accounts and bookkeeping documents and computer equipment; as well as provisions of Conventions Nos 87 and 98.
- 1128.** The complainant also indicates that the annually renewable collective agreement concluded in 1992, has not been renewed due to the negative position of the Moscow GUVd directors.

B. The Government's reply

- 1129.** By its communication dated 1 February 2010, the Government explains that in accordance with a Presidential Decree concerning questions pertaining to the Ministry of Internal Affairs, that Ministry is responsible for carrying out operational investigations and preliminary inquiries in criminal matters, in accordance with the legislation.
- 1130.** In the present case, following a submission of a collective statement by members of the PSM alleging contraventions of the legislation in respect of the distribution of funds by the chairperson of the PSM, forwarded by the prosecution service, the deputy chief of the Moscow GUVd, responsible for the economic security, ordered a search of the police union premises, buildings, equipment, etc. The order in question was issued in accordance with the federal Law on Criminal Investigations. On 7 April 2009, pursuant to this order, the search was carried out in accordance with the relevant legislation. The search established that the PSM has contravened certain financial procedures. In the light of the search findings, a report on these irregularities was drawn up. In accordance with the legislation on the criminal procedure, a decision was taken to refer the material to the investigations department of the Office of the Public Prosecutor. The Government explains that the action taken pursuant to the instructions of the Moscow Public Prosecutor cannot be construed as interference by the government or internal affairs authorities in the activities of trade unions.
- 1131.** Finally, the Government indicates that the sole representative body within the Moscow GUVd, under the terms of the 2008–11 collective agreement, is another union, the primary trade union organization of the Moscow GUVd.

C. The Committee's conclusions

- 1132.** *The Committee observes that the complainant organization alleges that its member organization for police employees, the PSM, was subjected to an illegal search during which documents relating to trade union accounts and computers were confiscated, bringing the union's activities almost completely to a halt. The Committee notes the reply of the Government. According to the Government, the search was ordered following a representation from the members of the PSM and was carried out in conformity with the national legislation.*
- 1133.** *The Committee recalls that the Russian Federation has ratified Convention No. 87, Article 9 of which provides that, "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations".*
- 1134.** *In the light of this text, there is no doubt that the International Labour Conference intended to leave it up to each State to decide the extent to which it considered it appropriate to apply the rights envisaged in the Convention to members of the armed forces and the police, in other words, by implication, that States which have ratified the Convention are not obliged to recognize the rights set out therein for those categories of workers [see 145th Report, Case No. 778 (France), para. 19, and 332nd Report, Case No. 2240, para. 264]. Nevertheless, the Committee notes with interest that several member States have recognized the right to organize of the police and the armed forces in accordance with freedom of association principles.*
- 1135.** *In these circumstances and given the divergence of information provided by the complainant and the Government, the Committee believes that it is unable to take this matter further and recommends to the Governing Body that it should decide that the case does not call for further examination.*

The Committee's recommendation

1136. *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that the case does not call for further examination.*

CASE No. 2744

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

Complaint against the Government of the Russian Federation presented by the Federation of Trade Unions of Russia (FTU/R)

Allegations: The complainant alleges that officers of the Federal Air Traffic Controllers' Union of Russia (FPAD) are denied access to the workplace of their members at the State Corporation of Russia for the Organization of Air Traffic and that in violation of the existing agreement, the employer ordered for the office of the FPAD of Russia and its primary trade union to be moved to another, smaller place

1137. The complaint is contained in a communication from the Federation of Trade Unions of Russia (FTU/R) dated 10 November 2009.

1138. The Government sent its observations in communications dated 1 and 17 February 2010.

1139. The Russian Federation has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

1140. By its communication dated 10 November 2009, the FTU/R submits a complaint against the Government of the Russian Federation on behalf of its affiliate, the Federal Air Traffic Controllers' Union of Russia (FPAD of Russia).

1141. The complainant explains that the FPAD of Russia was established on 1 November 1991. It represents 90 per cent of workers employed in the provision of air navigation services in the country. Members of the FPAD of Russia are mainly employed by the State Corporation of Russia for the Organization of Air Traffic. The FPAD of Russia has over three hundred primary and regional organizations. Its eight thousand members are air traffic controllers, personnel of the meteorological services and other technical staff. Its headquarters are situated in the enterprise's main building (Leningradsky prospect 37/7, office 254). The premises were provided for the use by the FPAD of Russia executive committee and its primary organization pursuant to the agreement of 25 May 2007 between the General Director of the enterprise and the FPAD of Russia, free of charge and without limit of time (attached to the complaint). This agreement was concluded on the

basis of section 377 of the Labour Code and clause 9.4.3 of the 2007–10 collective agreement.

- 1142.** The complainant alleges that on 9 September 2009, the Deputy General Director of the enterprise sent a letter to the FPAD of Russia primary organization, in which he advised that another office space has been allocated to the FPAD. The new office (29 square meters) is situated in a different building (Leningradsky prospect 37 A/1, office 5) and is to be shared with another primary trade union. The union was asked to move by 11 September 2009. In its reply, the FPAD of Russia stated that according to clause 2 of the agreement signed on 25 May 2007, the employer had made a commitment to grant the union an additional office of not less than 18 square meters; therefore, FPAD of Russia would accept the new office as an additional one. On 19 and 21 October 2009, the FPAD of Russia received further letters requesting that union to vacate the premises by 26 October 2009. The FPAD of Russia replied that the enterprise had no right to unilaterally denounce the commitments it had accepted under the agreement signed on 25 May 2007 and that the union could be deprived of its premises only pursuant to a judicial decision. The complainant organization provides copies of the abovementioned communications.
- 1143.** The complainant further alleges that on 26 October 2009, the management of the enterprise forbade the FPAD of Russia President, the chairperson of its primary organization and the staff of both organizations to enter the office of the FPAD of Russia and its primary trade union. Furthermore, electronic passes of the FPAD of Russia staff have been blocked and the security guards have been instructed by the General Director of the enterprise to deny them access to the union office. Due to the actions of the enterprise management, representatives of the FPAD of Russia and its primary trade union are denied access to the building of the corporation, where its 70 members work and where its trade union documents and seals, etc., are stored. The complainant indicates that the newly allocated office has only one phone number, has no fax equipment, no computers nor other technical facilities.
- 1144.** The complainant organizations considers that the enterprise has violated the agreement of 25 May 2007, the 2007–10 collective agreement and the agreement dated 19 May 2009 on the indexation of salaries and signing of a new collective agreement. The FTU/R further considers that the reason behind the management's actions is numerous appeals made by the FPAD of Russia to the Office of the Public Prosecutor and courts. The complainant indicates that the FPAD of Russia primary organization took legal actions against the management of the enterprise in connection with the infringements of the 2007–10 collective agreement and the agreement dated 19 May 2009 on the indexation of salaries, as well as the infringements of provisions of the Labour Code concerning the right of a trade union to inform its members about its activities, illegal placing of video cameras at the workplaces, illegal orders on the commercial and official secrets and refusals to give employees information and documentation with respect to their professional activities. The FPAD of Russia, on behalf of the members of its primary trade union organization, also lodged numerous complaints before the courts, almost all of which received favourable decisions. It indicates, in particular, that only during September–October 2009, the Moscow Office of the Public Prosecutor made three representations and issued one warning to the enterprise ordering to stop illegal actions in respect of the refusal to index wages, to give information and documentation to the employees concerning their work and the illegal placing of video cameras. So far, the decisions of the Public Prosecutor have been ignored.
- 1145.** The complainant indicates that with respect to the abovementioned infringements, the FPAD of Russia and its member organizations have also appealed to the President of the Russian Federation, the Minister of Transport, the Director of Federal Air Navigation

Authority, as well as to the office of the Public Prosecutor and the State Labour Inspection. The complainant indicates that a special commission has been appointed by the Director of Federal Air Navigation Authority to examine all of the abovementioned cases of infringements.

B. The Government's reply

- 1146.** By its communications dated 1 and 17 February 2010, the Government indicates that the Moscow branch of the State Labour Inspectorate has carried out an inspection to verify compliance with the labour legislation at the State Corporation for the Organization of Air Traffic and that the Ministry of Health and Social Development has met with the management of the corporation.
- 1147.** Regarding the issue of premises situated at Leningradsky prospect 37/7, office 254, where the FPAD of Russia and one of its 15 primary trade union organizations had their headquarters, it was established that under point 1.1 of its statutes, the FPAD of Russia is a national-level public association. According to section 377 of the Labour Code and point 9.4.3 of the collective agreement with the company, the employer is required to provide premises only to the elected body of primary union organizations representing employees. The Government explains that while on 25 October 2009, the employer suspended the right of access to the building and the office of the FPAD of Russia, it had allocated appropriate premises for the use by the elected body of the FPAD of Russia primary trade union and that representatives of the primary trade union have unrestricted access to the territory of the company.
- 1148.** On the basis of the findings of the Moscow State Labour Inspectorate, the managing director of the company was given a formal instruction to ensure that the measures are taken to rectify infringements of the labour legislation. Pursuant to this instruction, the company was required to index workers' wages in accordance with section 134 of the Labour Code and to ensure that members of the primary union organization of workers employed by the company enjoyed unhindered access to the premises allocated to the union. The enterprise was required to inform the Moscow State Labour Inspectorate of all measures undertaken in accordance with this instruction within one month (by 25 February 2010). Under the terms of section 19 of the Administrative Offences Code, failure to implement the instruction is punishable by a fine and in the event of a substantive contraventions, the case may be referred to the court.
- 1149.** The Government indicates that before the above instruction was issued, on 20 November 2009, the Savelov district court in Moscow examined the complaint against the company lodged by workers of the FPAD, seeking a ruling that the employer's action with regard to indexing wages was illegal and asking for compensation for moral damages. The Court established that at the time the claims were made, the union in question was engaged in negotiations with the employer on amendments to the collective agreement and indexation of wages, in accordance with the procedure laid down in the collective agreement. Because the negotiations were still on at the time the court had the case before it and because the procedure for amending the collective agreement had not been adhered to, the court did not examine the claim made by the union's representatives on the basis of section 222(1) of the Code of Civil Procedure, as the parties had not used the out-of-court dispute settlement procedure available under the collective agreement.

C. The Committee's conclusions

- 1150.** *The Committee notes that the present case raises the issues of facilities to be afforded to workers' representatives. It notes in particular that, the complainant in this case, the*

FTU/R, alleges that the officers of the FPAD, its affiliate, are denied access to the workplace of their members at the State Corporation of Russia for the Organization of Air Traffic and that in violation of the existing agreement, the employer ordered for the office of the FPAD of Russia and its primary organization to be moved to another, smaller place. The Committee notes the observations provided by the Government.

- 1151.** *With regard to the issue of trade union premises, the Committee notes that the offices of both the national trade union FPAD of Russia and its primary trade union of workers of the corporation were located in the corporation's main building pursuant to the agreement of 25 May 2007 concluded by the enterprise and the FPAD of Russia. The office was provided to both trade union entities free of charge and for the use without limit of time. However, as appears from the exchange of communications between the FPAD of Russia and the enterprise, in September–October 2009, referring to the business needs of the corporation, the management requested the FPAD of Russia and its primary trade union to vacate the office in the main building and move to an office it has allocated to the primary trade union in another building. The FPAD primary trade union's premises are currently situated in the newly allocated office space. The Committee notes in this respect the Government's indication that the new office was allocated pursuant to section 9.4.3 of the 2007–10 collective agreement and section 377 of the Labour Code, which provides for a general obligation on the employer to provide the enterprise primary trade union with an office space.*
- 1152.** *With regard to the provision by the enterprise of trade union premises, the Committee recalls Paragraph 9 of the Workers' Representatives Recommendation (No. 143), according to which:*
- (1) Such facilities in the undertaking should be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.*
 - (2) In this connection, account should be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.*
 - (3) The granting of such facilities should not impair the efficient operation of the undertaking concerned.*
- 1153.** *It further underlines the need to strike a balance between two elements: (i) facilities in the undertaking should be such as to enable trade unions to carry out their functions promptly and efficiently and (ii) the granting of such facilities should not impair the efficient operation of the undertaking [see Case No. 2642 concerning the Russian Federation, 355th Report, paras 1171 and 1172]. The Committee therefore considers that the actions of the corporation did not infringe upon the above mentioned principle of freedom of association.*
- 1154.** *With regard to the access to the workplaces of trade union members, the Committee notes that according to the complainant, representatives of the FPAD of Russia and its primary trade union are denied access to the building of the corporation, where its 70 members work and where trade union documents and seals, etc., are stored. According to the Government, however, representatives of the primary trade union have unrestricted access to the territory of the company. The Committee further notes the Government's indication that following an inspection carried out by the State Labour Inspectorate, the managing director of the company was given a formal instruction to ensure that members of the primary union organization of workers employed by the company enjoyed unhindered access to the premises allocated to the union. The Committee further notes that the*

management of the enterprise refers to article 4 of the Law on Transport Security, pursuant to which, access to the corporation can only be granted upon obtaining special passes.

- 1155.** *The Committee recalls that workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation function and that trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 1104–1105].*
- 1156.** *From the documents submitted by the complainant organization, the Committee understands that Mr Kovalev is the President of the FPAD of Russia and is also the chairperson of the FPAD of Russia primary trade union organization. The Committee therefore considers that he, as well as other determined representatives of the primary trade union organization, should be granted access to the workers in the undertaking, with due respect for the rights of property and management, so as to enable them to carry out their representation function. The Committee therefore requests the Government to bring the parties – the management of the corporation and the FPAD of Russia – together in order to facilitate their reaching an agreement in relation to the access to be provided to the representatives of the FPAD of Russia and its primary trade union, bearing in mind the principles above. It further requests the Government to ensure that the FPAD of Russia has indeed recuperated its documents, seals and other property from the office it had previously occupied. It requests the Government to keep it informed in this respect.*
- 1157.** *With regard to the question of indexation of wages as provided for in the collective agreement, the Committee notes from the Government's reply that the Moscow State Labour Inspectorate has instructed the enterprise to index workers' wages in accordance with section 134 of the Labour Code and report back on the measures taken in this respect by 25 February 2010. The Committee notes that pursuant to section 134 of the Labour Code, the enterprises other than those financed by the State budget shall index wages in accordance with the collective agreements in force. Recalling that collective agreements should be binding on the parties [see **Digest**, op. cit., para. 939], the Committee expects that the enterprise has complied with the Inspectorate's instruction and requests the Government to keep it informed in this respect.*

The Committee's recommendations

- 1158.** *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 bring the parties – the management of the corporation and the FPAD of Russia – together in order to facilitate their reaching an agreement in relation to the access to be provided to the representatives of the FPAD of Russia and its primary trade union and to keep it informed in this respect.*
- (b) *The Committee requests the Government to ensure that the FPAD of Russia has recuperated its documents, seals and other property from the office it had previously occupied. It requests the Government to keep it informed in this respect.*

- (c) *The Committee expects that the State Corporation of Russia for the Organization of Air Traffic has complied with the Inspectorate's instruction to index workers' wages in accordance with the collective agreement and requests the Government to keep it informed in this respect.*

CASE NO. 2711

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

**Complaint against the Government of the Bolivarian
Republic of Venezuela**
presented by
the National Press Trade Union (SNTP)

Allegations: Violent suppression and dissolution of a commemorative trade union demonstration on May Day and restrictions and interference by the authorities in the exercise of the right of free election of officials of the complainant trade union

- 1159.** The complaint is contained in a communication of the National Press Trade Union (SNTP) dated 12 May 2009. This organization submitted additional information and new allegations in communications dated 1 July and 29 September 2009.
- 1160.** The Government sent its observations in communications dated 20 October 2009 and 8 March 2010.
- 1161.** The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Allegations of the complainant

- 1162.** In its communications of 12 May and 1 July 2009, the SNTP indicates that it submits a complaint against the Government of the Bolivarian Republic of Venezuela for extremely serious violations of freedom of association; in particular, the forcible dissolution by the Metropolitan Police, involving personal injury, of a demonstration of workers celebrating May Day, International Workers' Day, which took place in Caracas.
- 1163.** The SNTP alleges that the traditional workers' march started peacefully, as usual, but after only a few kilometres, it was the subject of a cowardly and cunning ambush by the police, who launched themselves at the workers, using tear gas, shots of pellets and jets of dyed water from armoured vehicles. These repressive acts occurred even though the workers had not crossed the boundaries of the narrow zone authorized for the traditional march. There could have been a major tragedy, since the demonstrators were corralled by the uniformed police who blocked all exits. Many workers were arrested and then released.
- 1164.** Never in the democratic history of the country and its trade union movement has there been such a savage and uncivilized assault as that displayed on May Day by the police

acting on the orders of the national executive power. This was not the first time that a workers' demonstration has been suppressed, quite the opposite. Breaking with a democratic tradition going back over 40 years, the Government has adopted the depraved practice of suppressing workers' demonstrations, at times with the support of armed civilian gangs and, furthermore, treating as criminals those who take part in these demonstrations and collective labour disputes.

1165. Paradoxically, at the same time, but following another route, the trade unions which support the Government held another march in total freedom. Moreover, it was a march financed by public funds, involving workers uniformed in red, the red of the official government party. Also taking part were public servants threatened with losing their job if they did not do so. There was not the least restriction on the route taken by this march. The participants were guaranteed complete and safe passage and the march ended at a platform set up right next to the Government Palace from which the President of the Republic himself addressed them. In his lengthy address, the President took it upon himself to justify the vandalistic acts committed by the police against the other demonstration, the one by workers who do not follow his orders. This, moreover, clearly constituted an act of interference and anti-union discrimination, as the Government guarantees financing and protection to trade unions which support it and suppresses those which act independently, as occurred in the case which is the subject of this complaint.

1166. In the light of the foregoing, the SNTP requests the Committee on Freedom of Association to issue the relevant pronouncements so that the country will guarantee full application of Convention No. 87. The SNTP encloses press cuttings in support of its allegations. These indicate that the trade unions are demanding that the Ombudsman's Office and the Attorney-General's Office should investigate the use of toxic gases.

1167. In its communication of 29 September 2009, the SNTP alleges that the Government dictates and applies laws which restrict and obstruct the right of trade unions, and that of the SNTP in particular, to draw up their constitution and elect their representatives with total freedom, in violation of freedom of association.

1168. Despite the Government's promises to the ILO, the National Electoral Council (CNE) recently issued two new instruments which mislead the unprepared interpreter and, in reality, maintain the intervention of the CNE in the electoral activity of trade unions: (a) Resolution No. 090528-0264, containing provisions on technical advice and logistical support for trade union elections, appears to offer simple advice and support to trade unions which "voluntarily" so request. The fact is, however, that nowadays a trade union election has no practical effect in the Bolivarian Republic of Venezuela in the eyes of the Ministry of Labour and other public authorities, and even private persons, if it takes place without the involvement of the CNE. Moreover, the resolution which complements it, which we mention below, in practice cancels out its possible beneficial effects; (b) Resolution No. 090528-0265, containing provisions to guarantee workers' human rights in trade union elections, seemingly designed to guarantee trade union democracy, especially concerning elections, consists of empty verbiage and, perversely, invokes the highest principles of human rights and democracy. Concealed and consolidated behind this humanitarian veil is the intervention of the CNE in trade union election proceedings by means of an appeal that may be exercised by "the workers concerned" (article 21). The new CNE resolutions have nothing to do with the right of employers' and workers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes (Article 3 of Convention No. 87).

1169. The SNTP denounces that these new provisions are already being applied in a manner contrary to Convention No. 87 to obstruct the holding of elections in the SNTP. Even in

the full knowledge that the intervention of the CNE in trade union elections is contrary to freedom of association, the SNTP holds two elections according to the previous rules of the CNE, since otherwise its activities would cause even more difficulties and serious disadvantages for its members. Nevertheless, in the process of the new elections in 2009, even worse obstacles were raised than on previous occasions, to the extent that it was sought to force them to renounce the constitution of the organization to align it with the CNE provisions. In particular, it is sought to impose: (a) an election model which combines a uninominal voting system for some offices and proportional representation of minorities for others; (b) abolition of the list of substitutes set out in the trade union constitution, invoking that there was no established method for electing them; (c) a fixed number of electors and committees in voting centres, contrary to all our previous experience; and (d) the list of trade union members signed by each of them.

- 1170.** The CNE has made it known that until these changes are made, it will not process the request for “assistance” for the holding of elections. Moreover, the SNTP is not even sure that these are the CNE’s only objections, because, with the passage of time, the CNE has been adding new requirements. All these actions of the CNE are extremely serious contraventions of the right of our union to draw up its constitution and freely elect its representatives. Furthermore, under article 128 of the Regulations pursuant to the Basic Labour Act (which also violates freedom of association and the right to collective bargaining) the failure to implement the electoral process deprives the executive board of our union of the power to intervene in collective bargaining and collective labour disputes.

B. The Government’s reply

- 1171.** In its communications of 20 October 2009 and 8 March 2010, the Government replies to the alleged “forcible dissolution of the demonstration involving personal injury”, that it should be noted that the demonstration to which the SNTP refers was organized by the Venezuelan Workers’ Confederation (CTV) and was authorized by the supreme authority of the town of Libertador, the Mayor, Mr Jorge Rodríguez, using the following route: “assembly and starting point, Plaza Venezuela, continuing via Paseo Colón, Av. Oscar Machado, Plaza Morelos, Av. México, ending in the Plaza Parque Carabobo, involving the parishes of El Recreo and Candelaria”. According to the established route, Caracas City Hall coordinated with the Ministry of Popular Power for the Interior and Justice, the Metropolitan Police, Civil Defence and the Caracas Police, concerning compliance with the authorized routes, safety of demonstrators and public order. However, the participants in the march convened by the CTV, and supported by the opposition parties, decided to breach the agreement with the municipal authorities and tried, using violence, to force the barrier of the public order and security forces, encouraged by their leaders who incited them to cross the established limits to reach the National Assembly, as they had originally declared their intention.
- 1172.** The Government adds that the demonstrators’ actions resulted in the dissolution of the demonstration, since they had not only violently crossed the limits established for the march, but also threw various objects at the security forces and caused damage and looting of the installations of an area which serves as a popular market known as the PDVAL situated close to where the march was to end.
- 1173.** As regards the alleged injuries caused by the police and State security forces, the “repression of demonstrators and arrest of workers”, the Government indicates that the Attorney-General’s Office had not received any complaint which would give rise to the opening of an internal inquiry or proceedings into the case. In addition, the Government states that in consultations held with the Ombudsman’s Office, an agency of the Civil Power whose responsibility is essentially to “defend human rights, protect and promulgate those rights, supervise the duties of the public administration”, among other things, that

Office indicated that it had received only one complaint related to the alleged repression by the police of the participants in the May Day demonstration. In dealing with that complaint, it had asked the complainants for information which would allow the alleged victims to be identified, as that information had not been provided when the accusation was made. The Government indicates that, up to now, the complainants have not provided the information requested by the Ombudsman's Office, which has made it impossible to proceed with investigations into the case.

- 1174.** Furthermore, the Ombudsman's Office has not received any complaint or carried out investigations related to the alleged arrest of workers during the march, as stated by the complainant trade union. In general, the comments of this State body indicate that "there is no evidence of violations of workers' human rights of the kind alleged by the SNTP". It can therefore be inferred that the activists have not filed complaints of violation of their human rights with the natural competent authorities.
- 1175.** With regard to the alleged "acts of interference and anti-trade union discrimination", based on the charge that "the national Government guarantees financing and protection to trade unions which support it and suppresses those which act independently", the Government emphasizes that the Bolivarian Republic of Venezuela recognizes the right of freedom of association as a human right in instruments of national and international rank. Thus, the Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Constitution of the Bolivarian Republic of Venezuela provides, in article 95, as follows:

Article 95

Workers, without any distinction whatsoever and without the need for prior authorization, shall have the right to establish freely such trade unions as they see fit to better protect their rights and interests, and to join them or not, in accordance with the law. These organizations shall not be subject to intervention, administrative suspension or dissolution. Workers shall be protected against any act of discrimination or interference contrary to the exercise of this right.

- 1176.** The Government continues, with regard to the differentiated treatment which is allegedly granted to trade unions which support the Government, that such an accusation is irresponsible slander, since it is not accompanied by any evidence to support it. In particular, with reference to the May Day demonstration, the trade union confederations National Union of Workers (UNT) and CTV obtained the necessary permits for the respective commemorative marches on that day from the competent authorities. The difference was the behaviour of the demonstrators, since, on the one hand, the workers who feel they are supported by the Venezuelan opposition were the perpetrators of disturbances and violence when they tried to pass the limits established for normal conduct of the activity thus ignoring the permits granted by the competent authority. For their part, the workers who feel supported by the Government's stance celebrated the day following the route established for them, thus demonstrating their civic mindedness and peaceful attitude.
- 1177.** The Government concludes by stating that each of the requests by the SNTP representatives has been dealt with by the relevant administrative departments, following the procedures established by domestic law and in international conventions, and the requests of that organization had been answered fairly according to the law.

C. The Committee's conclusions

- 1178.** *The Committee observes that in the present complaint, the complainant organization alleges: (1) the repression and dissolution by the police, using tear gas and firing shots, of*

a peaceful trade union demonstration in Caracas celebrating May Day, resulting in injuries and arrests of several participants; (2) that at the same time, there was another march financed by public money which reached the Government Palace where the President of the Republic justified the vandalistic acts committed by the police against the other demonstration, which in the opinion of the complainant organization constitutes acts of interference and discrimination contrary to Convention No. 98; and (3) legal interference by the National Electoral Council (CNE) in the elections of the executive board of the complainant trade union.

- 1179.** *As regards the alleged repression of the peaceful trade union demonstration celebrating May Day resulting in injuries and arrests of several participants, the Committee notes the Government's statements that: (1) the demonstration in which the complainant trade union participated was organized by the CTV and authorized by the competent authorities, which authorized a route and coordinated compliance with the authorized routes, safety of demonstrators and maintenance of public order; (2) the participants in the march tried, using violence, to force the barrier of the public order and security forces, encouraged by their leaders, who incited them to cross the limits of the established route to reach the National Assembly, which was their originally stated intention. In addition, the participants threw various objects at the security forces and caused destruction and looting of the installations of a so-called popular market where the march was supposed to end;(3) as regards the alleged injuries, no complaint had been received in the Attorney-General's Office giving rise to the opening of an investigation of proceedings. Only one complaint had been received by the Ombudsman's Office related to the alleged repression by the police, but the complainants had not provided information allowing the alleged victims to be identified; and (4) as regards the alleged arrests of workers, the Ombudsman's Office had not received any complaints or conducted any investigations.*
- 1180.** *The Committee wishes to recall that the right to organize public meetings and processions, particularly on the occasion of May Day, constitutes an important aspect of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 136]. Consequently, this right should not be arbitrarily restricted by the authorities. In this regard, although it deplores the acts of violence by the demonstrators mentioned by the Government at the end of the route authorized for the march and the injuries inflicted on the demonstrators, the Committee must also emphasize that the Government recognizes that the organizers of the march wished to reach the seat of the National Assembly and that, to justify the route authorized by the authorities, which refused that wish, it invokes general and vague reasons concerning the safety of the demonstrators and maintenance of public order. Furthermore, the Committee observes that the Government has not denied the alleged massive police presence during the demonstration which, in general, is clearly not the most conducive to the normal exercise of a human right, such as that to demonstrate. Lastly, the Committee observes that when the Government replies to the allegations of arrests for a certain time and injuries due to the trade union demonstration, it does so in terms of whether or not complaints were lodged with certain organs of the State (Ombudsman's Office, Attorney-General's Office) and whether they were sufficiently detailed or not, without sending police reports or information from police arrest records. The Committee regrets, in this regard, that the Government's reply alludes to "alleged" arrests or "alleged" injuries when the complainant organization has sent certain items and details in support of its allegations (according to the press cuttings provided by the complainant trade union, the police arrested two named demonstrators for a certain time and then released them).*
- 1181.** *In these circumstances, the Committee draws the Government's attention to the fact that, in general, the use of the forces of order during trade union demonstrations should be limited to cases of genuine necessity, and the police authorities should be given precise instructions so that, in cases where public order is not seriously threatened, people are not*

arrested simply for having organized or participated in a demonstration [see *Digest*, *op. cit.*, paras 150 and 151]. The Committee requests the Government to ensure full compliance with these principles in the future.

- 1182.** *As regards the allegation of different treatment by the authorities of the march by trade unions supporting the Government, the Committee notes that the Government denies these allegations and describes them as slanderous. The Committee wishes to emphasize that the complainant organization has not provided evidence that that march was financed with public money. In addition, in the opinion of the Committee, the fact that that demonstration ended at the Government Palace with an address by the President of the Republic while the CTV demonstration was not authorized to reach the National Assembly, an aim legitimate in itself, raises doubts as to the non-discriminatory treatment of the CTV demonstration by the authorities. The Committee requests the Government to endeavour, in future, to reach agreement with workers' organizations on the authorized route for demonstrations.*
- 1183.** *As regard the allegations of interference by the CNE in the elections of the executive board of the complainant trade union, the Committee deplores that the Government has not responded to these allegations. The Committee observes that, according to the allegations, for the elections for the executive board of the complainant organization for 2009, the CNE has made a condition that they should envisage: (a) an election model which combines a uninominal voting system for some offices and proportional representation of minorities for others; (b) abolition of the list of substitutes set out in the trade union constitution, invoking that there is no established method for electing them; (c) a fixed number of electors and committees in voting centres, contrary to all the trade union's previous experience; and (d) the list of all trade union members signed by each of them.*
- 1184.** *The complainant organization adds that, under article 128 of the Regulations pursuant to the Basic Labour Act, failure to implement the electoral process (in other words, the non-recognition of the electoral process by the CNE) deprives the executive board of the power to intervene in collective bargaining and collective labour disputes. In addition, it appears from the allegations that, under the applicable rules, "the workers concerned" may lodge appeals with the CNE, thus suggesting the possible blocking of trade union elections by a very small number of workers.*
- 1185.** *The Committee wishes to recall that it has, for years, regularly received complaints from trade unions alleging interference by the CNE in elections of executive boards of trade unions. The Committee has reminded the Government that Article 3 of Convention No. 87 enshrines the right of workers freely to elect their officials without interference by the authorities and that, apart from simple voluntary technical assistance, the intervention by the CNE before, during or after elections is a serious violation of Convention No. 87, especially because it is not a judicial body.*
- 1186.** *The Committee further emphasizes that the intervention of that body has been severely criticized by the Committee of Experts on the Application of Conventions and Recommendations and the Committee on the Application of Standards of the International Labour Conference on repeated occasions. In its last report in 2010, for example, the Committee of Experts, after noting that the Committee on the Application of Standards considered that the interference of the CNE in the elections of organizations seriously violates freedom of association, pronounced as follows:*

The Committee [of Experts] observes that these standards [also objected to by the complainant trade union] regulate very closely trade union elections and give an important role to the CNE, once again empowering it to examine appeals made by workers or "the worker concerned". The Committee concludes that the new standards governing trade union elections are not only in violation of Article 3 of the Convention (under which, the regulation

of elections is a matter for trade union rules), but also allows an appeal by one worker to paralyse the proclamation of election results, which is open to anti-union interference of every type.

Under these circumstances, the Committee regrets that for over nine years the Bill to reform the Basic Labour Act has still not been adopted by the National Assembly despite the fact that it had tripartite consensus support. Taking into account the significance of the restrictions which remain in the legislation with regard to freedom of association and the freedom to organize, the Committee once again urges the Government to take measures to accelerate the examination by the Legislative Assembly of the Bill to reform the Basic Labour Act and to ensure that the CNE ceases to interfere in trade union elections. The Committee emphasizes the need to reform the standards adopted in 2009 respecting trade union elections and recalls that the Committee on Freedom of Association has repeatedly found cases of interference by the CNE that are incompatible with the Convention.

1187. *Consequently, as it has done on similar occasions, the Committee must again urge the Government to rule out any intervention by the CNE in elections of the executive board of the complainant trade union and to substantially amend or repeal the provisions relating to the CNE in trade union elections. The Committee requests the Government to take the necessary measures to that effect, to respect the elections of the complainant trade union and to refrain from invoking alleged irregularities or appeals to prevent it from bargaining collectively. The Committee also requests the Government to take steps to amend the legislation to prevent this type of interference.*

1188. *Lastly, as regards the demand of the CNE to obtain lists of members of trade unions who elect the executive board, the Committee draws to the attention of the Government, as it already did in a previous case relating to the Bolivarian Republic of Venezuela, that the establishment of a register containing data on trade union members does not respect rights of the person (including privacy rights) and such a register may be used to compile blacklists of workers [see *Digest*, *op. cit.*, para. 177].*

The Committee's recommendations

1189. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) Considering that the Government has not sufficiently respected the rights of demonstration on May Day and regretting the acts of violence which occurred, the Committee requests the Government in future to respect the principles mentioned in the conclusions and to endeavour to reach agreement with workers' organizations on the authorized route for demonstrations.*
- (b) Considering that the intervention of the CNE in the elections of the executive board of the complainant trade union seriously violates Convention No. 87, the Committee must again urge the Government to exclude any intervention by the CNE in these elections, to substantially amend or repeal the rules relating to the CNE in trade union elections, to respect the elections of the complainant trade union and to refrain from invoking alleged irregularities or appeals to prevent it from bargaining collectively. The Committee requests the Government to take steps to amend the legislation to prevent this type of interference and to keep it informed in this regard.*

- (c) *Lastly, as regards the claim of the CNE to obtain lists of members of trade unions who elect the executive board, the Committee draws to the attention of the Government that the establishment of a register containing data on trade union members does not respect rights of the person (including privacy rights) and such a register may be used to compile blacklists of workers.*

CASE NO. 2736

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

**Complaint against the Government of the
Bolivarian Republic of Venezuela
presented by
the Single Organized National Trade Union of
Workers of the Judiciary (SUONTRAJ)
supported by
Public Services International (PSI)**

*Allegations: Anti-union dismissals, hampering
of free elections of trade union officials,
violation of the freedom to bargain collectively,
restriction of the right of assembly in the
judicial sector*

1190. The complaint was lodged in a communication of November 2009 from the Single Organized National Trade Union of Workers of the Judiciary (SUONTRAJ). Public Services International (PSI) supported the complaint in a communication dated 24 November 2009.

1191. The Government sent its observations in a communication dated 1 May 2010.

1192. The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

1193. In its communication of November 2009, SUONTRAJ presented a formal complaint against the Bolivarian Republic of Venezuela in respect of action taken by the Executive Directorate of the Magistracy of the Supreme Court of Justice (president of its executive board) and by the Executive Director of the Magistracy.

1194. The complainant organization alleges that the Executive Directorate of the Magistracy (DEM) of the Supreme Court of Justice is systematically implementing a policy aimed at outsourcing work in violation of freedom of association and the right to bargain collectively, by perversely applying the principles of flexible labour practices and capitalist neo-liberalism that are a current feature of the administration of justice in the Bolivarian Republic of Venezuela. Specifically, the complainant organization alleges that staff is recruited under inferior conditions than those provided for in the collective agreement in force, in violation of articles 508 and 509 of the Basic Labour Act and article 89 of the

Constitution. It further alleges that contracts of employment are drawn up under which the labour relationship is disguised by an administrative arrangement that confers exorbitant powers on the Executive Director of the Magistracy, such as the power to annul the contract unilaterally without the worker concerned having any right to contest the decision, and to enter into strictly commercial contracts on a fee basis which do not offer any entitlement to the benefits and rights provided for in the Basic Labour Act and in the second collective agreement in force in the Judiciary.

- 1195.** The complainant organization also refers to the systematic refusal to grant trade unionists the right to paid leave for the performance of union duties, as stipulated in the collective agreement and in the laws of the Republic. Furthermore, according to the complainant, the Executive Directorate of the Magistracy of the Supreme Court of Justice, in violation of the principles of freedom of association, dismissed Kennedy José Bolívar Rosales, President of the Caracas Este branch of SUONTRAJ, Alcides David Sánchez Burgos, President of the Caracas Civiles branch, María Esther Santamaría, Finance Secretary of the Anzoátegui Norte branch, Alberto Stevenson Freites Velásquez, President of the Altos Mirandinos and Valles de Tuy branch and Occupational Safety And Health Secretary of SUONTRAJ's National Executive Committee, Francisco Efrén Cermeño Zambrano, Organizational Secretary of the Mérida branch and Cultural and Training Secretary of the National Executive Committee and Mario Arsenio Naspe Rudas, President of the Anzoátegui Norte branch and Information Secretary of the National Executive Committee, from the posts they held in the Judiciary. Moreover, a representative of the employer brought criminal charges against Gilberto Ojeda, President of the Carabobo branch, for carrying out his trade union duties and at the same time initiated disciplinary proceedings against him in order to deny him trade union immunity and stability of employment. In addition, Richard José Rodríguez Álvarez, Secretary-General of The Executive Board of SUNEP-JUDICATURA, was dismissed from the Executive Directorate of the Magistracy, and sanctions are currently being sought against Juan Marcano, Secretary-General of the Carabobo branch of SUNEP-JUDICATURA, in order to have him dismissed irrespective of the trade union immunity with which he is invested.
- 1196.** On 18 March 2009, the Supreme Court of Justice in plenary session issued resolution No. 2009-0008 ordering the complete restructuring of the Judiciary; among other negative provisions for the country's judicial employees, the resolution provides for the suspension without pay of any member of the administrative staff who does not agree to an institutional evaluation, whose parameters and criteria are unknown, without any guarantees that the persons affected will have the right to due process of law and to a defence. The complainant states further that the Executive Directorate of the Magistracy of the Supreme Court of Justice has by virtue of the same resolution dismissed the nine union officials cited above. On 2 April 2009, the SUONTRAJ and SUNEP-JUDICATURA trade union organizations lodged an appeal against resolution No. 2009-0008, ordering the complete restructuring of the Judiciary, but they have not received any reply in accordance with article 51 of the Constitution.
- 1197.** The complainant organization explains that, on 13 August 2009, the Second Administrative Disputes Court of Caracas, attached to the Executive Directorate of the Magistracy of the Supreme Court of Justice, on the proposal of its President Emilio Ramos González, barrister-at-law, handed down court ruling No. AP42-R-2006-000550 on an appeal lodged by the Executive Directorate itself against an administrative ruling calling for the reinstatement of a number of workers who had been dismissed in 2001 and the payment of all their salaries due. The ruling stated that, in the administrative reorganization and restructuring of the Bolivarian Republic of Venezuela's public institutions, the trade union immunity and security of employment provided for by ILO Conventions Nos 87 and 98, the Basic Labour Act and the Constitution did not apply to trade union officials or workers employed in the public administration, including the Judiciary.

- 1198.** The complainant organization also alleges that, on 28 July 2009, the Director-General of Human Resources of the Executive Directorate of the Magistracy issued circular No. 107.0709 requiring union organizations operating within the Judiciary and the Executive Directorate of the Magistracy to request prior authorization to hold workers' meetings, whether ordinary or extraordinary, in any of its administrative or jurisdictional institutions, and prohibiting the holding of such meetings during hours of work so as to avoid any pointless or unnecessary obstruction of the administration of justice. Moreover, the Executive Directorate of the Magistracy has judged or criminalized the holding of meetings by workers at headquarters or in normal places of work, such as law courts, in accordance with judicial ruling No. FP11-O-2005-000031 of 4 October 2005, handed down by the Second Labour Law Tribunal of Puerto Ordaz, which banned SUONTRAJ from holding meetings in the stands at the main entrance to the law courts between the hours of 8.30 a.m. and 3 p.m. Furthermore, on 14 July 2009, the coordinating magistrate of the judicial circuit of the courts of the municipality of Caracas monitored a meeting of workers held by the Caracas Este branch of SUONTRAJ and drew up an official report identifying the trade union officials and workers present, possibly with a view to the Executive Directorate of the Magistracy taking action against the stability of employment of the workers and union officials attending the meeting, which was convened in accordance with SUONTRAJ's by-laws, the Basic Labour Act and the Constitution.
- 1199.** In an official communication to the National Electoral Council dated 10 March 2009, SUONTRAJ requested authorization to hold internal elections, in accordance with point 6 of article 293 of the Constitution, as required by resolutions Nos 041220-1710, 090528-0264 and 090528-0265 issued by the Council's Directorate. So far the Council has not yet replied to the union's request in accordance with article 51 of the Constitution, and the resulting situation is being used by the Executive Directorate of the Magistracy of the Supreme Tribunal of Justice to contest SUONTRAJ's representativity and legitimacy in any processes and procedures affecting the union's members.
- 1200.** On 8 June 2007, the coalition of trade unions of the Judiciary, SUONTRAJ and SUNEP-JUDICATURA, submitted the draft of a third collective labour agreement to the Directorate of the National Inspectorate of Labour and Collective Affairs in the Public Sector of the Ministry of Labour and Social Security. However, owing to the delaying tactics of the Executive Directorate of the Magistracy and of the Ministry of Planning and Development, which illegally and unconstitutionally held up the preparation and official registration of an economic and comparative cost survey by the competent labour administration department – a legal requirement under article 157 et seq. of the Basic Labour Act for the holding of collective negotiations in the public sector – it proved impossible to hold any conciliatory discussions. As a result, the workers covered by the collective agreement have for over two years been prevented from engaging in any negotiation or approval of the draft third collective agreement.
- 1201.** The anti-union practices and the violation of SUONTRAJ's right to freedom of association began when the authorities of the Executive Directorate of the Magistracy were informed that, on 16 January 2009, the union had lodged a complaint with the Republican Moral Council of the Venezuelan Citizenry alleging that the General Directorate of Administration and Finance, the General Directorate of Infrastructure, the Directorate of Purchasing and Contracts and the Directorate of Finances and Accounts – all attached to the Executive Directorate of the Magistracy – were guilty of administrative irregularities that had come to the attention of the Internal Auditing Unit of the Supreme Court of Justice. The matter was taken up by the Republican Moral Council at its ordinary session No. IV on 23 April 2009, at which it was decided to forward SUONTRAJ's accusation of administrative corruption to the Directorate for the Protection of National Assets of the Office of the Public Prosecutor.

1202. Finally, the complainant organization refers to infringements of worker's rights that are unrelated to the exercise of their trade union rights.

B. The Government's reply

1203. In its communication of 1 March 2010, referring to the alleged recruitment of staff under inferior conditions than those provided for in the collective agreement, the Government states that, although SUONTRAJ does not specify the inferior conditions that it claims were imposed on employees of the Executive Directorate of the Magistracy and of the Judiciary, the truth is that, in the second collective agreement for 2005–07, the Executive Directorate – far from offering its employees inferior conditions – looks upon labour as a feature of society that benefits from the protection of the State, whereby the State seeks not just to maintain an economic equilibrium but also to defend the right to health, housing and education that is embodied in the country's Magna Carta.

1204. As a party to the second collective agreement for 2005–07 and going beyond the provisions of the Basic Labour Act, the employer accordingly granted the workers that it recruited the following social benefits and guarantees: appropriate collective insurance for workers and their families (surgery, hospitalization and maternity, personal life and accident insurance, outpatient services); financial assistance (grants, contributions to the cost of school books and stationery, contributions to the education of children with exceptional abilities); contributions towards the coverage of contingencies such as marriage, birth of a child or death of an employee or members of his/her family; payment of overtime, national holidays and days of leave, breaks and special leave; holiday and Christmas bonuses, transport allowance, food tickets, end-of-year children's party, children's holiday plan, toy coupon, meat allowance, the same regular hours of work as regular employees, medical services, as well as a housing policy, credit and savings facilities and other benefits.

1205. That being so, the Government considers that the collective agreement in point does not negatively affect any of the rights laid down in the Constitution or in the Basic Labour Act. All the same, it believes that the Committee on Freedom of Association should request the complainants to supply more precise information identifying the articles or clauses that they see as affecting the workers' acquired rights or benefits negatively.

1206. Regarding the allegation that "contracts of employment are drawn up under which the labour relationship is disguised by an administrative arrangement that confers exorbitant powers on the Executive Director of the Magistracy", the Government categorically refutes any such suggestion, inasmuch as article 65 of the Basic Labour Act stipulates that a mere assumption is sufficient basis for a labour relationship to exist between a person who provides a personal service and a person who receives it. The complainant organization does not offer any legal basis for its allegation that the Executive Directorate of the Magistracy's labour relations are in any way dissimulated, and at no time has the public administration disguised a contract in the manner described.

1207. Regarding the "exorbitant powers" to which the complainant alludes, the term is defined by the Venezuelan jurist Eloy Lares Martínez as follows:

André de Laubadère observes that the concept of "exorbitant powers" often corresponds to exorbitant prerogative. He adds that an exorbitant power is not necessarily a power that is illicit in contracts between parties but simply one that is unusual in that it confers special prerogatives on the administration vis-à-vis the other parties to the contract or on the latter vis-à-vis third parties.

- 1208.** These are contractual provisions that are imposed by the contracting administrative body in order to place the public interest before the private interest of the contracted party. In other words, they are quite separate from private law contracts or from contracts that do not contain any such provision for exorbitant powers. Moreover, these prerogatives derive from the contract's immediate relevance to the public interest or, if one prefers, the public services for which the administration is responsible.
- 1209.** It must be pointed out that recruitment on a fee basis is not the general rule but an exception and that it does not concern a significant number of the active labour force of the Judiciary. In the few cases where staff have been recruited on a fee basis, it is because of the specific nature of the duties involved, as in the case of external advisors who by the very nature of their activities do not fall in the same category as regular employees or contract workers – in terms of hours of work, for example.
- 1210.** Besides, article 9 of the Basic Labour Act stipulates that the fees of such professionals shall consist of the payment of remuneration and other benefits accruing from the labour relationship unless otherwise explicitly agreed. This type of contract is not illegal; it is designed for persons performing a job that calls for special skills, and it may therefore be used as such. Labour relationships of this nature, which are characterized by the performance of a professional service for a specific activity, are governed by labour legislation.
- 1211.** As to the right to terminate a labour relationship unilaterally, it must be noted that this is not an exclusive privilege of the public administration. On the contrary, it is fundamental to any labour relationship, even in the case of a contract between individuals, as stated in article 101 of the labour legislation in force which stipulates that either of the parties may terminate the relationship without prior notice.
- 1212.** Regarding the allegations with respect to trade union meetings, the Government states that, as part of the administrative and operational powers of the Executive Directorate of the Magistracy and its regional administrative directorates and in order to guarantee access to justice for Venezuelan citizens in accordance with article 26 of the Constitution, circular No. 107.0709 of 28 July 2009 requires that the holding of union meetings be authorized only during non-working hours, i.e. outside the hours of work established in each of the administrative bodies of the Judiciary.
- 1213.** Article 6 of the ILO's Right to Organise and Collective Bargaining Convention, 1949 (No. 98), which served as a basis for the Venezuelan Constitution and Basic Labour Act and thanks to which the country has a set of standards guaranteeing freedom of association and the right to bargain collectively, states: "This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way."
- 1214.** The Executive Directorate of the Magistracy has taken this decision because it concerns the particularly sensitive area of the very function for which it is responsible, namely that of guaranteeing the right of access to justice of the Venezuelan people. It is that function which must be the priority of the employees of the Judiciary, and it is for that reason that they can be expected to hold their meetings outside working hours.
- 1215.** On this subject the Constitution reads as follows:

Article 26. Everyone has the right to access the organs comprising the justice system for the purpose of enforcing his or her rights and interests, including those of a collective or diffuse nature, to the effective protection of the aforementioned and to obtain the corresponding prompt decision.

The State guarantees justice that is free of charge, accessible, impartial, suitable, transparent, autonomous, independent, responsible, equitable and expeditious, without undue delays, superfluous formalities or useless reinstating.

Article 257. Procedure represents a fundamental instrument for the administration of justice. Procedural laws shall provide for the simplification, uniformity and efficiency of legal formalities, and shall adopt expeditious, oral and public procedures. Justice shall not be sacrificed because of the omission of non-essential formalities.

- 1216.** It is apparent from the above that the right of access to justice is a fundamental human right and that its mere affirmation does not suffice for its exercise to be ensured in practice. To make up for this shortcoming, the State guarantees this right through its institutions for the administration of justice. Accordingly, the Executive Directorate of the Magistracy, as the institution that is called upon to guarantee the exercise of such rights, ensures that access to justice in the sense intended by the Constitution is a reality; otherwise, it would be nothing more than a declaration of intent that is both unsubstantiated and unenforceable.
- 1217.** The Government states that in the case in point the holding of meetings has not been prohibited, but that the access to justice of the Venezuelan people as a whole is priority and essential.
- 1218.** The restriction on the hours during which workers' meetings can be held derives from the fact that in most cases the circuit courts and other tribunals operate in the administrative headquarters and that the Judiciary must be able to ensure that everyone has access to the administration of justice in order to defend their rights and interests, including those of a collective or diffuse nature, to have those rights and interests protected and to obtain a rapid decision in the matter. This right must come before any other consideration that might run counter to it, since justice can only be effective if the exercise of the corresponding legal procedure is guaranteed in the interests of public order.
- 1219.** The Government points out that, as co-administrators of the second collective labour agreement, the trade unions are in general obliged to act as a coalition. However, when they hold meetings in the various headquarters, they do so separately, and this triples the number of meetings that are liable to hold up the administrative and judicial process. The workers' hours of work are thus reduced and this causes delays in the performance of their duties, which is prejudicial to the plaintiff and contrary to the Constitution. Consequently, the Government requests that the arguments advanced in this respect be dismissed.
- 1220.** That said, the Government stresses that at no moment has the employer prevented the holding of meetings outside working hours and that it has in fact made public installations available for the purpose.
- 1221.** Regarding the alleged imposition of sanctions, the Government states that the regulations of the Judiciary confer on the public administration the power to initiate disciplinary action entailing sanctions that range from a warning to the dismissal of any official who fails to perform his/her duties, inflicts ill-treatment or physical or mental suffering on any person or condones such behaviour.
- 1222.** In the context of the juridical powers vested in the Executive Directorate of the Magistracy and of its obligatory and inalienable disciplinary function, every single disciplinary decision or dismissal must be brought before the relevant labour inspectorate.
- 1223.** The decisions of the various offices of the Judiciary to terminate contracts of employment have complied with the constitutional and legal requirement of due process and the right to a defence laid down in article 49 of the Constitution, as well as in the provisions of the

Basic Labour Act and the disciplinary regulations governing officials of the council of judges and employees of the Judiciary.

- 1224.** The Government states that the procedures initiated by the employees of the Judiciary – involving complaints, requests for reinstatement and payment of salaries due, disciplinary measures, re-employment of workers of the Judiciary – have accordingly all been brought before the relevant regional and national inspectorates of the Ministry of Labour and Social Security.
- 1225.** A number of the complaints lodged have been resolved and settled in favour of the worker, while other cases are still under consideration (serving of summonses, notification of the parties concerned or decision by the relevant labour inspectorate pending), which is clear evidence of the Government’s respect for workers’ rights, procedural guarantees, the right to a defence and due process.
- 1226.** Regarding the alleged “systematic refusal to grant trade unionists the right to paid leave for the performance of union duties, as stipulated in the collective agreement and in the laws of the Republic”, the second collective agreement of employees of the Executive Directorate of the Magistracy and the Judiciary for 2005–07 lays down conditions and guidelines for the granting of paid leave which the administrative body and its national office comply with fully, inasmuch as the workers concerned also comply with the provisions of the said agreement. These cover leave for study (five hours a week when part of the timetable coincides with working hours), examinations (up to ten hours during partial, final and supplementary examinations), upgrading courses, apprenticeships (number of days or hours determined by the body in which they take place), documentation (up to six days a year for the necessary formalities for an identity card, passport, driving licence, birth certificate, student registration for an employee or under-age child, death of a member of an employee’s family (five consecutive days if the death occurs within the federal body in which the worker is employed and seven consecutive days when the death occurs in any other federal body), marriage (five consecutive days from the date of the wedding), birth of a child (as stipulated by law), breastfeeding, sporting events (as required).
- 1227.** In the case of leave not defined in the collective agreement, the employer observes all the legal norms laid down in the laws and regulations in force, such as the Basic Labour Act and its regulations and the staff rules of the Judiciary.
- 1228.** In the same way, paid union leave of up to 150 hours has been regularly and consistently granted in accordance with the provisions of the second collective agreement, as well as the option of paid leave for non-union officials to engage in specific activities (of a cultural or sporting nature or for travel purposes, etc.) – all in the interests of freedom of association.
- 1229.** With regard to leave granted to employees and members of the executive boards of trade union organizations, the Executive Directorate of the Magistracy verifies that the motives advanced are valid and cover a specific period, as stipulated in the second collective agreement for 2005–07, on the understanding that, should the employee requesting such leave be found to have adduced false or futile motives or to have submitted forged or falsified documents or proof or to have used the leave for another purpose than that for which it was granted, the said leave shall be considered null and void and the worker concerned subject to the full force of the law.
- 1230.** Moreover, if the motive for granting the leave ceases to be applicable before the time allotted for the purpose, the employee concerned shall return to his duties.

- 1231.** Finally, the Government states that, if it deems it appropriate, the Committee on Freedom of Association should call on the complainant to supply more precise information, so that the Government can respond to the specific issues.
- 1232.** Regarding the allegation that “the Director-General of Human Resources of the Executive Directorate of the Magistracy issued circular No. 107.0709 on 28 July 2009 requiring union organizations operating within the Judiciary and the Executive Directorate of the Magistracy to request prior authorization to hold workers’ meetings, whether ordinary or extraordinary, in any of its administrative or jurisdictional institutions, and prohibiting the holding of such meetings during hours of work so as to avoid any pointless or unnecessary obstruction of the administration of justice”, the complainant organization claims that the Executive Directorate of the Magistracy “has criminalized the holding of meetings by workers at headquarters or in normal places of work, such as law courts, in accordance with judicial ruling No. FP11-O-2005-000031 of 4 October 2005, handed down by the Second Labour Law Tribunal of Puerto Ordaz, which banned SUONTRAJ from holding meetings in the stands at the main entrance to the law courts between the hours of 8.30 a.m. and 3 p.m.” on Mondays, Tuesdays, Wednesdays, Thursdays and Fridays and has declared that any violation of the foregoing will be considered as a refusal to obey the authority.
- 1233.** As already stated, it is the duty of the Executive Directorate of the Magistracy to guarantee everyone’s right of access to the bodies responsible for the administration of justice, as part of their powers as administrative institutions of the Judiciary. With respect to the complainant’s claim, it must be stressed that only the holding of meetings by trade union organizations during hours of work has been regulated in this manner, in order to prevent the obstruction of the administration of justice, it being understood that such meeting may be held outside working hours and at the headquarters of the Judiciary, as stated in circular No. 0789 of 2 October 2009, issued by the General Directorate of Human Resources of the Executive Directorate of the Magistracy. This decision is in the overriding interest of access to justice, inasmuch as the system of justice is an essential service for all persons answerable before the law and a matter of their legitimate interests, which is why the constant interruption of this activity must be deemed prejudicial.
- 1234.** The complainant is attempting to give a sinister twist to the standards set under the Bolivarian Republic of Venezuela’s laws and regulations, such as circular No. 107.0709 of 28 July 2009, issued by the Director-General of Human Resources of the Executive Directorate of the Magistracy, which ruled that trade union organizations operating within the Judiciary and the Executive Directorate of the Magistracy must seek prior authorization from the said Director-General to hold workers’ meetings, whether ordinary or extraordinary, in any of its administrative or jurisdictional institutions and prohibiting the holding of such meetings during hours of work so as to avoid any pointless or unnecessary obstruction of the administration of justice.
- 1235.** Article 1, paragraph 2, of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), reads as follows:
- Such protection shall apply more particularly in respect of acts calculated to:
- (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.
- 1236.** It is clear from the above that the employer’s consent is necessary for the holding of meetings during working hours, and it was on that basis that the circular issued by the

Director-General of Human Resources was formulated. Once again, the point must be made that there is no question of banning workers' meetings but simply of ensuring everyone's access to justice.

- 1237.** According to the complaint, "the coordinating magistrate of the judicial circuit of the courts of the municipality of Caracas, Richard Rodríguez Blaise, on 14 July 2009, monitored a meeting of workers held by the Caracas Este branch of SUONTRAJ and drew up an official report identifying the trade union officials and workers present, possibly with a view to the Executive Directorate of the Magistracy taking action against the stability of employment of the workers and union officials attending the meeting, which was convened in accordance with SUONTRAJ's by-laws, the Basic Labour Act and the Constitution".
- 1238.** Under the terms of paragraph 45 of the second collective agreement for 2005–07, the trade union activities (such as workers' meetings) of organizations operating within the Executive Directorate of the Magistracy are public in nature, as can be seen from the union's own publications and announcements on its notice board.
- 1239.** Moreover, since the lawyer, Richard Rodríguez Blaise, did not himself attend the meeting in point, the allegation is vague and imprecise.
- 1240.** Again, according to the complaint, "in an official communication to the National Electoral Council dated 10 March 2009 (sic), SUONTRAJ requested authorization to hold internal elections, in accordance with point 6 of article 293 of the Constitution, as required by resolutions Nos 041220-1710, 090528-0264 and 090528-0265 issued by the Council's Directorate" but that "so far the Council has not yet replied to the union's request in accordance with article 51 of the Constitution, and the resulting situation is being used by the Executive Directorate of the Magistracy to contest the SUONTRAJ's representativity and legitimacy in any processes and procedures affecting the union's members".
- 1241.** The Government observes in this connection that the said trade union organization's executive board can exercise its functions only within the context of the union's own affairs and do not go beyond purely administrative affairs, since the term of office for which the board's members were elected has ended. Consequently, the members of the current executive board may engage only in strictly administrative and operational matters in order to protect the union affiliates' rights, and they cannot therefore represent those members in negotiations and collective labour disputes – and even less so in conciliation and arbitration proceedings – nor can they promote, negotiate, conclude, revise or amend collective agreements.
- 1242.** The Government adds that the executive board of the complainant organization is currently outside the ambit of the law as established in the Basic Labour Act, as it has not complied with the necessary electoral requirements for the renewal of its officials. It therefore has no legitimacy to discuss any kind of trade union activity, such as collective bargaining or collective labour disputes, conciliation and arbitration procedures or the promotion, negotiation, conclusion, revision or modification of a draft third collective agreement. Inasmuch as the requisite elections have not yet been held, the board is in contravention of the union's by-laws, the Basic Labour Act and other pieces of national legislation and, pending such elections, it is empowered only to administer the union's own affairs.
- 1243.** That said, in a spirit of conciliation and in order to guarantee the right of freedom of association and the right to bargain collectively, meetings and working parties have taken place with the trade union under the auspices of the Ministry of Labour and Social Security to discuss clauses of the next collective agreement.

- 1244.** The Government states further that SUONTRAJ's national executive committee requested authorization from the National Electoral Council to hold elections for all the trade union's officials whose mandate ended in February 2009. The Electoral Council's General Directorate for Trade Union Affairs, having noted that the bonds posted by the nominees were insufficient under the terms of the union's by-laws, convened the board to inform it of the fact and help it further its cause. However, the committee members failed to attend the meeting or to respond to the invitation of the electoral administration and have not since manifested any interest in the electoral process.
- 1245.** According to the complaint, "the anti-union practices and the violation of SUONTRAJ's right to freedom of association began when the authorities of the Executive Directorate of the Magistracy were informed that, on 16 January 2009, the union had lodged a complaint with the Republican Moral Council of the Venezuelan Citizenry alleging that the General Directorate of Administration and Finance, the General Directorate of Infrastructure, the Directorate of Purchasing and Contracts and the Directorate of Finances and Accounts – all attached to the Executive Directorate of the Magistracy – were guilty of administrative irregularities that had come to the attention of the Internal Auditing Unit of the Supreme Court of Justice. The matter was taken up by the Republican Moral Council at its ordinary session No. IV on 23 April 2009, at which it was decided to forward SUONTRAJ's accusation of administrative corruption to the Directorate for the Protection of National Assets of the Office of the Public Prosecutor", pursuant to point 15 of article 10 of the Citizen's Power Act. The complaint regarding alleged administrative corruption is being investigated by the 50th Prosecutor of the Office of the Public Prosecutor with overall competency at the national level, William Guerrero, lawyer.
- 1246.** On this point the Government observes that at no time has the Executive Directorate of the Magistracy engaged in anti-union practices. On the contrary, it has fully respected freedom of association, mindful of the fact that that freedom derives from the right to form and to join trade unions on the sole condition of complying with the union by-laws. Moreover, the trade unions have been able to conduct their activities in full use of their faculties, to the extent that the exercise of those faculties do not affect in any way the measures adopted by the Executive Directorate as guarantor of the management, government and administration of the Judiciary. The measures taken stem from a constitutional mandate and do not constitute a violation of SUONTRAJ's freedom of association, as claimed in the complaint to the Republican Moral Council of the Venezuelan Citizenry which is responsible for all the functions conferred upon it by the law, with which it is bound to comply.
- 1247.** Regarding the restructuring of the Judiciary and the alleged removal and dismissal of certain union leaders, the Government states that, on 18 March 2009, the Supreme Court of Justice in plenary session, basing itself on article 267 of the Constitution, ordered the complete restructuring of the Judiciary within a year, and that it designated the Judicial Commission and the Executive Directorate of the Magistracy (both of which are attached to the Supreme Court) as the competent authorities for carrying out the order. The ensuing decision was taken to increase the efficiency of the public administration of justice, to combat corruption and impunity and thus to provide a better judicial service.
- 1248.** Clearly, a process of restructuring cannot be interpreted as a disciplinary sanction, as is the case with a dismissal, suspension or warning; it is an administrative and organizational measure which is provided for in the rules and regulations governing the Judiciary.
- 1249.** It must be pointed out that several workers did petition the relevant administrative body – in this case, the various labour inspectorates of the Ministry of Labour and Social Security – to be reinstated and paid all salaries due.

1250. The petitions lodged by these employees of the Judiciary to be reinstated and paid all salaries due have been taken up by the said Ministry; in certain cases they have been upheld, while in others they are still at the notification and summons stage or awaiting a decision.

C. The Committee's conclusions

1251. *The Committee notes that the complainant organization alleges: (1) that the Executive Directorate of the Magistracy of the Supreme Court of Justice is systematically implementing a policy aimed at outsourcing work in violation of freedom of association and the right to bargain collectively, based on principles of capitalist neo-liberalism, by recruiting staff under conditions that are inferior to those stipulated in the collective agreement and legislation in force and by entering into commercial contracts on a fee basis that constitute a labour relationship but without the rights provided for in the Basic Labour Act and in the collective agreement; (2) union officials have been refused the paid leave provided for in the collective agreement; (3) nine union leaders have been dismissed or been the object of disciplinary proceedings in violation of their trade union immunity; (4) a circular was issued on 28 July 2009, requiring prior authorization for workers' meetings and prohibiting them during working hours, along with a ruling by the Supreme Court of Justice banning the holding of such meetings between 8.30 a.m. and 3 p.m.; (5) a union meeting on 14 June 2009 was monitored by the coordinating magistrate of the judicial circuit of the courts of the municipality of Caracas who drew up an official report identifying the participants; (6) the Supreme Court of Justice adopted a decision stating that the process of restructuring must not respect the stability of employment of union officials, passed a resolution on 18 March 2009, dismissing the nine officials referred to above in violation of their trade union immunity and, by virtue of the restructuring order, called for an assessment of all the workers; (7) the National Electoral Council has hampered the holding of SUONTRAJ's union elections and for over two years the Executive Directorate of the Magistracy of the Supreme Court of Justice has refused to hold collective negotiations.*
1252. *According to the complainant organization the anti-union practices began following the lodging of a complaint against the Executive Directorate of the Magistracy of the Supreme Court of Justice alleging administrative corruption. The Committee notes the Government's general statement that at no moment did the Executive Directorate of the Magistracy engage in anti-union practices and that it will abide by whatever decision is handed down in the procedure that has been initiated following the lodging of the complaint.*
1253. *Regarding the alleged failure to comply with the provisions of the collective agreement by outsourcing work, by entering into commercial contracts on a fee basis and by disguising labour relationships, the Committee notes that the Government denies the allegations and states that contracts on a fee basis are the exception and do not concern a significant number of employees of the Judiciary as they are determined by the specific nature of the activity concerned – such as that of external advisors whose duties differ from those of regular employees in terms of hours of work, etc. The Committee notes that the Government requests it to seek additional information from the complainant on these allegations. The Committee invites the complainant organization to supply that information.*
1254. *With regard to the circular of 28 July 2009, which it is alleged restricts the rights of trade unions by requiring that they seek prior authorization for workers' meetings and that such meetings be held outside working hours, and to the monitoring of one such meeting and the drawing up by the coordinating magistrate of the judicial circuit of a report listing the names of participants, the Committee notes the Government's reminder that Convention*

No. 98 does not deal with the position public servants engaged in the administration of the State (Article 6 of Convention No. 87), that Article 1 of Convention No. 98 refers specifically to “union activities outside working hours or, with the consent of the employer, within working hours”, that the Venezuelan people’s right of access to justice is embodied in the Constitution, that justice is an essential service and that the various trade union organizations also hold meetings that cause delays in the work of the employees. The Committee also notes the Government’s statement that public installations are made available for the holding of meetings outside working hours and that no meetings have been prevented from taking place outside hours of work. The Committee notes further the Government’s denial that the coordinating magistrate of the judicial circuit of the courts of the municipality of Caracas monitored the meeting of the complainant organization held on 14 July 2009 or that the coordinating magistrate attended the meeting. The Committee requests the Government to explain for what purpose report No. 138 of 14 July 2009 was drawn up identifying persons attending the said meeting. The Government invites the complainant organization to send additional information if it so wishes.

- 1255.** *Regarding the alleged systematic refusal to grant trade unionists paid leave for carrying out union activities as provided for in the legislation and in the collective agreement, the Committee notes the Government’s statement that, in application of the rules in force, up to 150 hours of union leave have been granted under the collective agreement and other optional arrangements and that all the Executive Directorate of the Magistracy has done has been to verify that the motives were justified and that the leave was for a specific period of time, as stipulated in the collective agreement. The Committee also notes the Government’s observation that the applicable rules do not allow false or futile motives or the submission of forged or falsified documents. The Committee notes further the Government’s suggestion that the complainant organization provides information on specific instances. The Committee invites the complainant organization to send additional information if it so wishes.*
- 1256.** *Regarding the alleged link between the restrictions on the holding of SUONTRAJ’s electoral elections and interference by the National Electoral Council, the Committee notes the Government’s statement that the National Electoral Council had found that the bonds posted by the nominees were insufficient when SUONTRAJ requested authorization to hold elections (the executive board’s mandate ended in 2009) and that the legislation in force requires that in such circumstances the members of the executive board cannot represent the union’s members in collective bargaining.*
- 1257.** *The Committee wishes to place on record that for years it has periodically received complaints from trade union organizations alleging interference by the National Electoral Council in elections to their executive boards. The Committee has had cause to remind the Government that Article 3 of Convention No. 87 establishes the right of workers to elect their representatives in full freedom without interference by the authorities and that – beyond the provision of mere voluntary technical assistance – any intervention by the National Electoral Council before, during or after the elections constitutes an infringement of Convention No. 87, especially considering that it is not a judicial body.*
- 1258.** *The Committee emphasizes, moreover, that interference by this body has repeatedly come in for severe criticism by the Committee of Experts on the Application of Conventions and Recommendations and by the Conference Committee on the Application of Standards. In its 2010 report, for example, the Committee of Experts, considering that the National Electoral Council’s interference in trade union elections constituted a serious violation of freedom of association, recalled that it had raised the following point:*

The need for the National Electoral Council (CNE), which is not a judicial body, to cease interfering in trade union elections and to no longer be empowered to annul them, and the need for the statute for the election of the executive bodies of national (trade union)

organizations, which accords a preponderant role to the CNE in the various stages of such elections, to be amended or repealed.

- 1259.** *The Committee of Experts noted that the Conference Committee, after hearing the Government representative indicate that, in May 2009, a new process of public consultations had been initiated on the draft text of the Basic Labour Act, had adopted the following conclusion:*

Under these circumstances, the Committee regrets that for over nine years the Bill to reform the Basic Labour Act has still not been adopted by the National Assembly despite the fact that it had tripartite consensus support. Taking into account the significance of the restrictions which remain in the legislation with regard to freedom of association and the freedom to organize, the Committee once again urges the Government to take measures to accelerate the examination by the Legislative Assembly of the Bill to reform the Basic Labour Act and to ensure that the CNE ceases to interfere in trade union elections. The Committee emphasizes the need to reform the standards adopted in 2009 respecting trade union elections and recalls that the Committee on Freedom of Association has repeatedly found cases of interference by the CNE that are incompatible with the Convention.

- 1260.** *Consequently, as it has done on similar occasions, the Committee urges the Government to prevent any interference of the National Electoral Council in elections to the executive board of the complainant trade union and that it take measures to amend or repeal the legal provisions that allow the interference of the National Electoral Council in trade union elections. The Committee urges the Government to take appropriate measures in this respect, to respect the elections of the complainant organization and to refrain from invoking supposed irregularities or appeals in order to prevent the conduct of collective bargaining. The Committee also urges the Government to take steps to amend the legislation so as to avoid this kind of interference.*

- 1261.** *Regarding the allegations concerning the restructuring and the dismissal of nine union officials, the Committee notes that the Government states that: (1) the authorities have ordered the complete restructuring of the Judiciary to combat corruption and impunity and thus to provide a better judicial service; (2) the process of restructuring is not a disciplinary sanction but an administrative and organizational measure provided for in the rules and regulations governing the Judiciary. The Committee notes the Government's observation that several workers petitioned the labour inspectorates to be reinstated and paid all salaries due and that in some cases the petitions have been upheld and the workers concerned reinstated in their jobs and paid their salaries due, while in other cases no final decision has yet been reached.*

- 1262.** *The Committee observes that the restructuring appears to have been ordered without any consultation of the organizations of workers of the Judiciary and to have entailed an evaluation of the entire staff. The Committee regrets that the Government does not indicate which workers were duly reinstated in their jobs and whether the dismissed union officials were among their number. The Committee notes that the nine union officials belonged to two major trade union organizations (SUONTRAJ and SUNEP) and, in the absence of any clarification or justification for each case by the Government, it can only conclude that they were dismissed because they were union officials and because of their activities in that capacity, in violation of the trade union immunity provided for in the collective agreement and in the Basic Labour Act. The Committee notes the allegation that, in one of its rulings, the Second Administrative Disputes Court of Caracas declared that trade union immunity does not have to be respected in the case of restructuring. The Committee urges the Government to take the necessary steps to have the nine dismissed union officials reinstated in their jobs. The Committee also draws the Government's attention to the principle that no person shall be prejudiced in employment by reason of trade union membership or legitimate trade union activities, whether past or present, and*

to the fact 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 edition, 2006, paras 770 and 799].

- 1263.** *Since in the present case the dismissals occurred during a process of restructuring, the Committee emphasizes that it is important that governments consult with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees [see **Digest**, op. cit., para. 1081].*
- 1264.** *The Committee also recalls that in cases of staff reductions it has drawn attention to the principle contained in the Workers' Representatives Recommendation, 1971 (No. 143), which mentions among the measures to be taken to ensure effective protection to these workers that recognition of a priority should be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce (article 6.2(f)) and that, in one case, where the Government ascribed the dismissal of nine union officials to programmes of restructuring of the State, the Committee emphasized 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., paras 832 and 833].*

The Committee's recommendations

- 1265.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee invites the complainant organization to supply additional information with respect: (1) to its allegations concerning the systematic outsourcing of work in the Judiciary, disguised labour relations and recruitment on a fee basis in violation of the collective agreement; and (2) its allegations relating to the restriction of the right of trade union members to take time off to carry out trade union activities.*
 - (b) The Committee requests the Government to explain for what purpose report No. 138 of 14 July 2009 was drawn up identifying persons attending the meeting organized by the complainant organization, which according to the latter was possibly intended to enable action to be taken that would be prejudicial for the participants.*
 - (c) The Committee urges the Government to prevent any interference of the National Electoral Council in elections to the executive board of the complainant trade union and that it refrain from invoking supposed irregularities or appeals in order to prevent the holding of collective negotiations, as in previous cases.*

- (d) *The Committee urges the Government to take measures to amend or repeal the legal provisions that allow interference by the National Electoral Council in trade union elections.*
- (e) *The Committee urges the Government to take the necessary steps to have the nine union officials cited in the complaint reinstated in their jobs and to respect the principles referred to in the conclusions with regard to anti-union discrimination and the restructuring process.*

Geneva, 4 June 2010.

(Signed) Professor Paul van der Heijden
Chairperson

Points for decision:

Paragraph 142;	Paragraph 758;
Paragraph 164;	Paragraph 801;
Paragraph 229;	Paragraph 815;
Paragraph 265;	Paragraph 835;
Paragraph 282;	Paragraph 875;
Paragraph 300;	Paragraph 892;
Paragraph 345;	Paragraph 908;
Paragraph 362;	Paragraph 924;
Paragraph 372;	Paragraph 948;
Paragraph 400;	Paragraph 985;
Paragraph 414;	Paragraph 1010;
Paragraph 429;	Paragraph 1070;
Paragraph 590;	Paragraph 1087;
Paragraph 628;	Paragraph 1103;
Paragraph 660;	Paragraph 1120;
Paragraph 676;	Paragraph 1136;
Paragraph 692;	Paragraph 1158;
Paragraph 708;	Paragraph 1189;
Paragraph 730;	Paragraph 1265.