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EIGHTH ITEM ON THE AGENDA

Reports of the Committee on Freedom of Association

358th Report of the Committee on Freedom of Association

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Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 4, 5 and 12 November 2010, under the chairmanship of Professor Paul van der Heijden.
2. The members of Argentinian, Colombian, Mexican and Peruvian nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2660, 2726 and 2732), Colombia (Cases Nos 2644, 2710 and 2730), Mexico (Case No. 2734) and Peru (Cases Nos 2594, 2661 and 2724), respectively.

* * *

3. Currently, there are 140 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 33 cases on the merits, reaching definitive conclusions in 15 cases and interim conclusions in 18 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 2318 (Cambodia), 2706 (Panama), 2723 (Fiji), 2726 (Argentina) and 2727 (Bolivarian Republic of Venezuela) because of the extreme seriousness and urgency of the matters dealt with therein.

Urgent appeals

5. As regards Cases Nos 2450 (Djibouti), 2528 (Philippines), 2533 (Peru), 2571 (El Salvador), 2745 (Philippines), 2746 (Costa Rica), 2747 (Islamic Republic of Iran), 2752 (Montenegro), 2753 (Djibouti), 2756 (Mali), 2757 (Peru) and 2758 (Russian Federation), 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 2788 (Argentina), 2789 (Turkey), 2790, 2791 and 2793 (Colombia), 2794 (Kiribati), 2795 (Brazil), 2796 (Colombia), 2797 (Democratic Republic of Congo), 2798 (Argentina), 2800 and 2801 (Colombia), 2803 (Canada), 2804 (Colombia), 2806 (United Kingdom), 2808 (Cameroon), 2809 (Argentina), 2810 (Peru), 2811 (Guatemala), 2812 (Cameroon), 2813 (Peru), 2814 (Chile), 2815 (Philippines), 2816 (Peru), 2817 (Argentina), 2818 (El Salvador), 2819 (Dominican Republic), 2820 (Greece) and 2821 (Canada), since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

Observations requested from governments

7. The Committee is still awaiting observations or information from the governments concerned in the following cases: 2177 and 2183 (Japan), 2361 (Guatemala), 2508 (Islamic Republic of Iran), 2516 (Ethiopia), 2664 (Peru), 2712, 2713 and 2714 (Democratic Republic of Congo), 2741 (United States), 2743 (Argentina), 2770 (Chile), 2772 (Cameroon), 2774 (Mexico), 2778 (Costa Rica), 2780 (Ireland), 2781 (El Salvador), 2784 (Argentina) and 2787 (Chile).

Partial information received from governments

8. In Cases Nos 2203 (Guatemala), 2265 (Switzerland), 2522 (Colombia), 2639 (Peru), 2655 (Cambodia), 2673 (Guatemala), 2725 (Argentina), 2750 (France), 2761 (Colombia), 2765 (Bangladesh), 2768 (Guatemala), 2792 (Brazil) and 2805 (Germany), 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 2241 (Guatemala), 2254 (Bolivarian Republic of Venezuela), 2341 and 2445 (Guatemala), 2602 (Republic of Korea), 2609 (Guatemala), 2613 (Nicaragua), 2684 (Ecuador), 2694 (Mexico), 2702 (Argentina), 2708 and 2709 (Guatemala), 2717 (Malaysia), 2749 (France), 2751 (Panama), 2754 (Indonesia), 2760 (Thailand), 2762 (Nicaragua), 2766 (Mexico), 2767 (Costa Rica), 2769 (El Salvador), 2771 (Peru), 2773 (Brazil), 2775 (Hungary), 2776 (Argentina), 2777 (Hungary), 2779 (Uruguay), 2782 (El Salvador), 2783 (Cambodia), 2785 (Spain), 2786 (Dominican Republic), 2799 (Pakistan), 2802 (Mexico) and 2807 (Islamic Republic of Iran), 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 deeply regrets that the Government has still not given any follow-up to its recommendation made five years ago for a direct contacts mission to the country in order to obtain an objective assessment of the actual situation and urges the Government to accept this mission without delay.

Transmission of cases to the Committee of Experts

12. The Committee draws the legislative aspects of the following case to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Indonesia (Case No. 2737).

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

Case No. 2153 (Algeria)

13. The Committee last examined this case at its November 2009 meeting [see 355th Report, paras 14–21]. In its communication dated 17 May 2010, the Government reiterates that the Supreme Court decision of 3 December 2008 put an end to the dispute between the two parties as the domestic remedies have now been exhausted.
14. *Noting that the Government has not provided the requested information, the Committee is bound to reiterate its previous recommendations and consequently urges the Government to inform it without delay of the final judicial decisions that are handed down concerning the following trade union members and officials: Mr Hadj Djilani Mohamed, who was dismissed and has suffered anti-union harassment, and who was sentenced to a month's imprisonment for slander; Mr Houari Kaddour, who was dismissed from the health administration on 6 March 2006 for trade union activities, without referral to the disciplinary commission or any recourse to the remedies provided for by law; Mr Sadou Sadek, who has been suspended from his post without pay since June 2007 and is being prosecuted for his trade union activities; and Mr Mourad Tchikou and Mr Rabah Mebarki, SNAPAP representatives, who were subjected to anti-union harassment.*

Case No. 2302 (Argentina)

15. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 32–34] and on that occasion it expressed the expectation that the appeals relating to the administrative proceedings against members of the SIJUPU executive committee and the *amparo* (protection of constitutional rights) application relating to the dismissal of the SIJUPU General Secretary would be settled in the very near future and requested the Government to keep it informed in that regard and to send its observations on the alleged lack of participation of SIJUPU in the organization of the Judicial Training Institute.
16. In its communication of 6 October 2009, SIJUPU alleges that: (1) it faces discrimination in that it is prevented from putting posters or announcements on the walls at the entrance to the courthouse, while the Bar Association is allowed to do so; (2) the administrative proceedings and the *amparo* application mentioned in the original complaint have not yet been settled; (3) SIJUPU requested a pay review and, in the absence of a response, it called a strike from 1 June 2009 and the striking workers had wages deducted for nine strike days to dissuade them from exercising their constitutional right to strike; and (4) a 15 per cent pay increase was finally agreed upon, but at the time of the complaint the workers had still not received it.
17. In its communication of 27 June 2010, the Government indicates that, according to the relevant information that was gathered, the High Court of San Luis:
 - categorically denies the allegation concerning the ban on assembly and on putting up posters and indicates that the union was simply told to do these things in the places that are specifically designated for union communications. In this regard, the Court states that it has taken into consideration the Labour Relations (Public Service) Convention, 1978 (No. 151), Part III, Articles 6 and 7, in relation to the facilities to be afforded to public employees' organizations;

- categorically denies the existence of irregularities (to which the complainant refers only in general terms, without identifying the specific offence) in the administrative proceedings. The Court reports that: (i) the proceedings “Dr Luis Burroni – Justice of the Peace – San Luis concerning the application for administrative proceedings on behalf of Ms Lidia I. Ávila (Case No. 6-B-07)” have been pending settlement since 5 April this year, further to the completion of their preliminary examination and their referral to the Attorney-General, who handed down a decision on 31 March advising that no sanctions be applied; (ii) with regard to the case of Mr Juan Manuel González, General Secretary, neither has any evidence been added to the submission to demonstrate that the case has not progressed in any way. In this regard, the Administrative Secretary of the High Court indicates that the case was referred to the Office of the State Prosecutor;
- with regard to the mentioned orders to deduct pay for strike days, these have been issued by a court and fall beyond the competence of the High Court, as both the *amparo* applications that are pending decision have been brought by the same entity; and
- finally, as mentioned by the complainant organization, a 15 per cent pay increase was agreed upon, and the Court indicates that at a meeting with the union there was a willingness to settle the disputes in a climate of collaboration and respect.

18. *The Committee takes note of this information. With regard to salary deductions for strike days, while the Committee notes that legal action has been taken in this regard, it recalls that “salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 654]. With regard to the proceedings and the amparo application concerning the SIJUPU leaders, the Committee expects that these will conclude in the very near future and requests the Government to keep it informed of the outcome. The Committee also asks the Government to send its observations regarding the alleged lack of participation of SIJUPU in the organization of the Judicial Training Institute. Lastly, the Committee notes that the Government confirms the complainant organization’s claim that an agreement has been reached on a pay increase and that at a meeting with the trade union there was a willingness to settle the disputes in a climate of collaboration and respect.*

Case No. 2459 (Argentina)

- 19.** The Committee last examined this case at its June 2007 meeting, when it requested the Government to take the necessary measures so that the Senior Staff Association of the Córdoba Province Power Corporation (APSE) might join the works council of the Córdoba Province Power Corporation (EPEC) [see 346th Report, para. 208].
- 20.** In a communication dated 10 June 2009, the APSE states that more than two years after the Committee’s recommendations nothing has been done to implement them and that a large number of EPEC workers are still excluded from taking part in policy and economic decisions affecting the functioning of the enterprise.
- 21.** *The Committee regrets that the Government has not sent its observations on the matter and urges it without delay to take the necessary measures so that the APSE may join the works council of the EPEC. The Committee requests the Government to keep it informed of developments.*

Case No. 2603 (Argentina)

22. The Committee last examined this case at its November 2008 meeting, when it made the following recommendations [see 351st Report, para. 231]:
- (a) The Committee expects that the decree on reinstatement without loss of pay of the trade union leader of the Association of Workers of the Provincial and Municipal Public Administration of Salta (ATAP), Ms Marina del Valle Guanica, will be adopted without delay. The Committee requests the Government to keep it informed in this respect.
 - (b) As to the alleged transfer from their workplace of three ATAP leaders who were permanent members of staff at the General Tax Directorate of the Province, Sergio Martín Zamboni, finance secretary, Fátima Elizabeth Gramajo, third substitute member, and Walter Rodolfo Alderete, second regular member of the electoral board, the Committee requests the Government to ensure that an investigation is carried out into the matter without delay and, should it be found that the three were transferred on anti-union grounds, to take steps to ensure their immediate reinstatement in their former posts. The Committee requests the Government to keep it informed in this regard.
 - (c) The Committee requests the Government to take steps in order to facilitate an agreement between ATAP and the relevant authorities of the province of Salta on the deduction of trade union dues from members' wages. The Committee requests the Government to keep it informed in this regard.
23. In communications dated 6 and 26 April 2010, the complainant organization states that: (1) an appeal was lodged by the executive authority of the province of Salta against the reinstatement of trade union leader Marina del Valle Guanica and that the Court of Justice of Salta upheld the appeal and reversed the decision of the court of first instance; and (2) no steps have been taken to carry out the investigation into the alleged anti-union transfers requested by the Committee. ATAP further alleges that there have been obstacles and delays in the handling of a penal complaint against the authorities of the province's Ministry of Labour and Social Welfare concerning the check-off code for the deduction of trade union dues.
24. *The Committee takes note of the information supplied by the complainant organization and requests the Government to send its observations on the matter, to take the necessary steps without delay to initiate an inquiry into the alleged transfer from their workplace of three ATAP leaders who were permanent staff members of the General Tax Directorate of the province of Salta, namely, Sergio Martín Zamboni, finance secretary, Fátima Elizabeth Gramajo, third substitute member, and Walter Rodolfo Alderete, second regular member of the electoral board, and, should it be found that the three were transferred on anti-union grounds, to take steps to ensure their immediate reinstatement in their former posts. The Committee requests the Government to keep it informed in this regard.*

Case No. 2614 (Argentina)

25. The Committee examined this case at its March 2010 meeting and on that occasion requested the Government to take the necessary measures to ensure that the complainant organizations (the Trade Union of Judicial Workers of Corrientes (SITRAJ) and the Argentine Judicial Federation (FJA)) and the High Court of Justice of the Province of Corrientes envisage the possibility of again granting union privileges, on the understanding that their exercise should not negatively affect the efficient functioning of the judiciary in the Province of Corrientes [see 356th Report, para. 225].
26. In its communication of 1 March 2010, SITRAJ states that as a consequence of the criminal complaints filed by the union against the court authorities and against the executive authorities of the province concerning dereliction of duty by public officials,

fraud through mismanagement and the embezzlement of public funds, the court and the provincial authorities have suspended one of the check-off codes (*códigos de descuentos*) (deductions for a refundable assistance fund) that was applicable to members and deductions of union dues are made two months late.

27. *The Committee requests the Government to send its observations with regard to this communication and recalls the principle that “[t]he 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 (revised) edition, 2006, para. 475]. Lastly, the Committee also asks the Government to send its observations in relation to the information recently communicated by the FJA.*

Case No. 2656 (Brazil)

28. The Committee last examined this case at its June 2009 meeting, when it requested the Government to keep it informed as to whether the complaint made to the police against union leader Mr Paulo Roberto Fier had been withdrawn under the written undertaking that the company had signed with the Office of the Public Prosecutor for Labour and, if not, to keep it informed of the status of the complaint and whether legal proceedings had been initiated [see 354th Report, para. 243–257].
29. In a communication dated 21 March 2010, the Government sent information from the company concerned indicating that the complaint made to the police against union leader Mr Paulo Roberto Fier has been withdrawn under the written undertaking signed with the Office of the Public Prosecutor for Labour, with the consequence therefore that no civil or penal charges are brought, or have ever been brought, against him.
30. *The Committee takes note of the information with interest.*

Case No. 2257 (Canada (Quebec))

31. The Committee examined the substance of this case at its November 2009 meeting. It concerns the exclusion of managerial staff from Quebec’s Labour Code, which prevents them from forming unions and from enjoying all the associated rights and prerogatives, in particular: a real right to collective bargaining; the right to a dispute settlement procedure in the absence of the right to strike; and the right to legal protection against acts of interference by employers. In its previous recommendations, the Committee requested the Government to amend the Labour Code in order to resolve all these problems, in accordance with the principles of freedom of association. During its last examination of the case, in November 2009, while noting the serious discussions held since 2006 between the Ministry of Labour of Quebec and various associations of managerial staff, the Committee expressed its expectation that the follow-up proposals of the inter-ministerial committee established for that purpose would fully take its recommendations into account and urged the Government to describe any progress [see 355th Report, paras 29–33].
32. In a communication dated 26 October 2009, the National Confederation of Managerial Staff of Quebec (CNCQ) supported the complaint by the Association of Managerial Staff of Québec (ACSCQ), and reported the refusal by the employer to engage in collective bargaining despite repeated attempts by the representative organizations concerned.
33. The Canadian Managers’ Confederation (CCC) and the CNCQ supported the complaint by the ACSCQ in a communication of 16 February 2010. They confirmed that in fact the attempts by the ACSCQ to negotiate with the employer had proved unsuccessful. They

also indicated that a good governance guide presented by the inter-ministerial committee would not help improve the situation because, as the guide was directly under the aegis of the Government, it could be aimed only at associations of managerial staff in the public and semi-public sectors. State enterprises and municipalities, which are considered as independent corporations, would not be covered by the guide.

34. In a communication dated 22 July 2010, the ACSCQ indicates that no progress has been made in this case and that it rejected the inter-ministerial committee's guide on good governance, which cannot be applied to state enterprises or therefore to the managers represented by the ACSCQ. Finally, the complainant organization indicates that it recently sent letters requesting that official meetings be held but it has received no response from the Government.
35. In a communication dated 12 January 2010, the Government states that the inter-ministerial committee prepared a guide on good governance which it submitted in September 2007 to the Interassociation des cadres du Québec (Inter-Association of Managerial Staff of Quebec), and that it has since then been awaiting the outcome of the consultations that the Inter-association said that it intended to hold with its members on the issue. In its communication dated 20 October 2010, the Government indicates that the ACSCQ has lodged an accreditation request with the Labour Relations Board by which it also contests the constitutional validity of article 1(L), paragraph 1, of the Labour Code. Since the appeals are still pending before the national tribunals, the Government indicates that it has to reserve its comments until the decisions are made.
36. *The Committee takes note of the information provided. It notes with regret that no progress has been made in this case even though more than six years have passed since it made its recommendations on the substance of the case, on the need to amend the legislation of the Province of Quebec. In these circumstances, the Committee strongly urges the Government to maintain a continuous dialogue with the representative organizations concerned with regard to following up its recommendations. It expects the Government to report without delay on meaningful progress in the adoption of measures to amend the Labour Code of the Province of Quebec in order to resolve the problems of compliance with the principles of freedom of association that have been raised for many years. The Government is requested to indicate the status of the guide on good governance, which, according to the complainant organization, cannot be applied to the managerial staff that it represents, and to provide its observations on the latest allegations by the complainant organization, the CNCQ and the CCC.*

Case No. 2430 (Canada)

37. The Committee last examined this case, which concerns provisions of a statute (Colleges Collective Bargaining Act, RSO 1990, c. 15) that denied all public colleges' part-time employees the right to join a union and engage in collective bargaining, at its March 2010 meeting [356th Report, approved by the Governing Body at its 307th Session, paras 40–42]. On that occasion, the Committee noted with satisfaction the Government's indication that the Amended Colleges Collective Bargaining Act (CCBA) came into effect on 8 October 2008 (except for certain transitional provisions). According to the Government, the new legislation gave part-time and sessional faculty and part-time support staff at Ontario's colleges the right to bargain collectively; established two new province-wide bargaining units for colleges (one for part-time and sessional faculty staff and one for part-time support staff) and a certification process to allow part-time employees to unionize and bargain collectively modelled on the process in place for other workers in Ontario who are covered by the Labour Relations Act (LRA), 1995; and included other reforms to modernize the collective bargaining process for the college sector to give the

parties more ownership and control over the process as it exists in other sectors covered by the LRA.

- 38.** In a communication dated 27 April 2010, the complainant – National Union of Public and General Employees (NUPGE) – requests that the Committee reopen its examination of this case. The complainant alleges that, despite the amendments made to the CCBA, part-time workers employed by Ontario’s public colleges are still being denied their fundamental right to join unions and bargain collectively. The complainant argues that the amendments to the CCBA are rendered meaningless by other sections of the Act, which allow employers to prevent unions from representing part-time employees at the province’s 24 community colleges. Specifically, under the amended CCBA, 35 per cent of affected workers must sign union cards in order for the Ontario Labour Relations Board (OLRB) to order a vote. Under section 31 of the CCBA, the colleges are allowed to challenge the number of cards the union has signed if they suspect that the union has not signed enough cards, a privilege that employers have taken advantage of. To justify these challenges, employers must produce their own lists of the numbers of employees affected by the certification vote. The complainant alleges that employers “flood” these lists with employees who clearly would not be part of the union bargaining unit, resulting in mediation and litigation at the OLRB that can take months or even years. The complainant estimates that the colleges are spending approximately \$5,000 per day on hearings, by which they are fighting the certification vote.
- 39.** Furthermore, the complainant notes that union card-signing can take months, as Ontario’s 24 colleges are spread across the province. Because of this dispersal, the colleges can manipulate the timing of the workers’ contracts to limit the number of signed union cards. The complainant indicates that all the employer has to do is to make sure that those who signed union cards are not working when the union certification application is filled; under the CCBA, the signed cards of employees who are no longer working are not counted. The complainant acknowledges that the amended CCBA does allow part-time college workers to unionize, but argues that to date, it is completely failing in practice.
- 40.** By a communication dated 8 October 2010, the Government of Canada forwards the reply of the Government of Ontario in this case. The latter recalls that the Colleges Collective Bargaining Act (CCBA) came into effect in October 2008 and gave part-time and sessional faculty and part-time support staff at Ontario’s colleges the right to bargain collectively. The Government explains that the CCBA initially creates two new bargaining units, one for part-time support staff and one for part-time academic staff at Ontario’s colleges. The Act also provides for a process to change, establish or eliminate bargaining units. The Ontario Public Service Employees’ Union has filed certification applications to represent both the part-time academic staff and part-time support staff units. In both cases, representation votes have been held and the ballot boxes have been sealed pending a decision by the Ontario Labour Relations Board (OLRB) concerning issues that remain in dispute between the parties. As the matter is before the OLRB, an independent quasi-judicial tribunal with expertise in labour relations, the Government of Ontario considers that it would be inappropriate for it to comment further on that case. It indicates, however, that the parties involved in the certification process for both part-time bargaining units are following the process outlined in the CCBA which is very similar to the process that applies in respect of most employees in Ontario. The Government trusts that the matter will be resolved soon.
- 41.** *The Committee takes note of the information provided by the Government and the complainant organization. In particular, the Committee notes that, according to the complainants, while the legislation in question grants part-time employees at Ontario’s colleges the right to unionize and engage in collective bargaining, the amended Act also allegedly affords employers the opportunity to exploit procedural mechanisms which could*

substantially impede or altogether prevent the workers' ability to utilize these rights, frustrating the legislative intent of the drafters of the Act. In this respect, the complainant refers to section 31 of the Act, which allows colleges to challenge the number of cards union members have signed, and explains that employers take advantage of this privilege, thereby delaying the certification process. The complainant also alleges that the colleges can manipulate the timing of the workers' contracts so as to limit the number of signed union cards.

42. *The Committee notes the Government's indication that the Ontario Public Service Employees' Union has filed certification applications to represent the both part-time academic staff and part-time support staff units and that, in both cases, representation votes have been held and that ballot boxes have been sealed pending a decision by the OLRB concerning issues that remain in dispute between the parties. The Committee regrets, however, that the Government provides no observations on the complainant's allegations that mediation and costly litigation at the OLRB can take months or even years, as it considers it inappropriate to comment on the case while the matter is pending before the OLRB. Recalling the importance which it attaches to the maintenance of the harmonious development of labour relations and considering that the allegations, if they are true, may indeed hinder the collective bargaining rights of the workers in question, the Committee requests the Government to initiate consultations with the union concerned with the view to address the concerns raised by the complainant organization. The Committee requests the Government to keep it informed of the outcome of such discussions as well as any decision taken by the OLRB on the matters currently pending before it.*

Case No. 2355 (Colombia)

43. The Committee last examined this case at its November 2009 meeting, when it made the following recommendations [see 355th Report, para. 400]:
- (a) As regards the declaration as illegal of a strike called at ECOPETROL on 22 April 2004, the Committee, while reiterating its considerations expressed on many occasions, must again urge the Government, in consultation with the representatives of workers' and employers' organizations, to take steps without delay to send a proposal to the legislative authority with a view to amending the legislation (section 430(h) of the Substantive Labour Code) in order to define the conditions for the exercise of the right to strike in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service involving the participation of the trade unions, the employer and the public authorities concerned. The Committee requests the Government to keep it informed of all the relevant developments in the legislation.
 - (b) As regards the allegations presented by SINCOPEPETROL relating to the dismissal of the trade union officials Messrs Ariel Corzo Díaz, Moisés Barón Cárdenas, Alexander Domínguez Vargas, Héctor Rojas Aguilar, Wilson Ferrer Díaz, Fredys Jesús Rueda Uribe, Fredys Elpidio Nieves Acevedo, Genincer Parada Torres, Braulio Mosquera Uribe, Jimmy Alexander Patiño Reyes, Jair Ricardo Chávez, Ramón Mantuano Urrutia, Germán Luis Alvarino, Sergio Luis Peinado Barranco, Olga Lucía Amaya and Jaime Pachón Mejía, also in the context of the stoppage of 22 April 2004, in disregard of trade union immunity, the Committee requests the Government and the trade union to indicate if these workers are covered by the agreement signed between the USO and ECOPETROL on 22 August 2009.
 - (c) As regards the allegations presented by ADECO on ECOPETROL's refusal to bargain collectively, observing that the trade union has submitted a new list of claims in 2009, the Committee requests the Government to take the necessary steps to ensure that the company bargains collectively with the trade union in representation of its members and expects that in the framework of that collective bargaining it will be possible to resolve the outstanding matters. The Committee requests the Government to keep it informed in this respect.

- (d) The Committee invites the complainant organization to provide the Government with all the information in its possession concerning the allegations that ECOPETROL grants benefits, better working conditions or bonuses individually to non-unionized workers, encouraging them to give up trade union membership, and requests the Government to take the necessary steps, as a matter of urgency, to carry out an independent investigation in order to determine on the basis of complete information whether the allegations are true. The Committee requests the Government to keep it informed in this respect.
- (e) As regards the allegations relating to the refusal of Chevron Petroleum Company to bargain collectively with the trade union, the appointment of a Compulsory Arbitration Tribunal and the appeal for annulment of the arbitral award lodged by the company and the trade union in the Supreme Court of Justice, the Committee requests the Government to keep it informed of the pending administrative investigation into the company.
44. In a communication dated 19 January 2010 the Government states that Messrs Ariel Corzo Díaz, Moisés Barón Cárdenas, Alexander Domínguez Vargas, Héctor Rojas Aguilar, Fredys Elpidio Nieves Acevedo, Genincer Parada Torres, Braulio Mosquera Uribe, Jimmy Alexander Patiño Reyes, Jair Ricardo Chávez, Ramón Mantuano Urrutia, Germán Luis Alvarino and Jaime Pachón Mejía (recommendation (b)), are covered by an agreement reached on 22 August 2009, known as the “Agreement concerning workers dismissed in the collective labour dispute of 2002–04”, which ended the dispute between the company and the Workers’ Trade Union that began on 22 May 2009. Moreover, Mr Fredys Jesús Rueda Uribe was reinstated in his post and, on 25 July 2008, Mr Wilson Ferrer Díaz applied for his retirement pension, which was agreed to by the company. The Committee notes the information. The Committee has also been informed of the ruling handed down by the Higher Court of Cúcuta on 22 July 2010 regarding the request for judicial protection presented by the former employees of ECOPETROL, whereby a total of 104 workers were dismissed for taking part in a strike in 2004. The ruling: (1) revokes in its entirety the ruling handed down on 4 June 2010 by the Third Labour Court of the Cúcuta Circuit and accords the plaintiffs the Court’s protection in respect of their fundamental right to work, to freedom of association, to join trade unions and to strike action which ECOPETROL infringed by refusing to comply with the recommendations of the ILO Committee on Freedom of Association; and (2) orders ECOPETROL, through its legal representative and within 48 hours of notification of the Court’s ruling, to proceed to the reinstatement of the plaintiffs, who had been dismissed for taking part in the 22 April 2004 strike, in the same posts as they had held previously, or in posts of an equal or higher grade, and to grant them the wages and benefits that they had ceased to receive. *The Committee, observing that the ruling orders the reinstatement of some of the workers cited in recommendation (b), requests the Government to keep it informed of its implementation.*
45. In a communication dated 27 May 2010 the Government states, with respect to ADECO’s allegation that ECOPETROL refused to bargain collectively (recommendation (c)), that the company and the trade unions operating within the company have concluded a new collective labour agreement for the period from 1 July 2009 to 30 June 2014. *The Committee takes note of the information with interest.*
46. *Finally, the Committee observes that the Government has not sent the information it requested in recommendations (a), (d) and (e) and it requests it to do so without delay.*

Case No. 2356 (Colombia)

47. The Committee last examined this case, which concerns the lifting of the trade union immunity of a union official, the initiation of anti-union disciplinary proceedings, the refusal to bargain collectively with the National Service for Training (SENA) and the anti-union dismissal of employees of the Cali Municipal Enterprises (EMCALI), at its meeting in May 2010 [see 357th Report, paras 35–39]. On that occasion the Committee recalled

that it had requested the Government to consider taking the necessary measures to ensure the reinstatement of the 45 trade union members and six union leaders of EMCALI. In its communication dated 25 October 2010, the trade union organization SINTRAEMCALI informs that during the last meeting with the enterprise EMCALI, a proposal was made which does not correspond to the claims of the trade union since it does not include the reinstatement of the dismissed workers, and that it is willing to continue to participate in the mediation process, with the assistance of the ILO, until a final agreement is reached.

48. *With regard to the allegations concerning SENA, the Committee notes with satisfaction that, thanks to a preliminary contacts mission in July 2010, the parties have reached an agreement whereby: (1) on 15 December 2009, the parties signed an agreement to enter into a process of consultation and negotiation; (2) the parties undertake to pursue the respectful and harmonious development of collective labour relations; (3) they agree to convert the monthly national trade union relations meetings into a permanent round table on labour relations, with a commitment on both sides to act in good faith in pursuing the undertakings entered into under the December 2009 Agreement; (4) an extraordinary session of the permanent round table may be convened to discuss any alleged infringement of trade union rights or any other priority labour issue; and (5) the parties consider Case No. 2356 to have been resolved, as far as they are concerned.*
49. *With regard to the allegations concerning EMCALI, the Committee notes with interest that, thanks to the same preliminary contacts mission, the parties have reached an agreement whereby: (1) in the light of the Committee's recommendation in its 357th Report, which SINTRAEMCALI welcomes, the parties agree to establish a round table to explore methods of consultation and negotiation on case No. 2356, for which EMCALI undertakes to present a proposal; (2) the parties agree to hold a first meeting on 14 July 2010 and to hold as many meetings as necessary to reach an agreed solution; and (3) in witness of their desire to establish a permanent dialogue, the parties undertake to discuss all relevant labour and trade union issues together. Noting that the trade union organization SINTRAEMCALI informs that during the last meeting with the enterprise EMCALI, a proposal was made which does not correspond to the claims of the trade union since it does not include the reinstatement of the dismissed workers, and that it is willing to continue to participate in the mediation process, with the assistance of the ILO, until a final agreement is reached, the Committee requests the Government to consider appointing a mediator with the aim of finding a workable solution to this long outstanding case in line with the Committee's previous recommendations and to keep it informed of the progress made in this regard.*

Case No. 2612 (Colombia)

50. The Committee last examined this case related to allegations of pressure being put on workers to accept a collective agreement, violation of the collective agreement in force and dismissals and disciplinary proceedings in respect of trade union leaders at its meeting in March 2010. At this meeting the Committee made the following recommendations [see 356th Report, paras 615–630]:
- (a) As regards the allegations relating to the pressure put on workers at the BBVA and Granahorrar in the context of the merger between the two entities in 2006 to sign a collective accord despite the existence of a collective agreement which was still valid until 31 December 2007, and the non-compliance with various provisions of this agreement, the Committee requests the Government to keep it informed of the final outcome of the investigation launched by the Territorial Directorate of Cundinamarca.
 - (b) As regards the allegations concerning the harassment of trade union leaders, including dismissals (Mr José Murillo and Mr Henry Morantes) and the pressure put on some workers to leave the union (Ms Nidia Patricia Beltrán, Mr Dairo Cortés, Ms Luz Helena

Vargas, Ms Gloria María Carvajal and Ms Marina Guzmán), the Committee requests the Government to keep it informed of the final outcome of any current judicial proceedings in connection with these allegations.

51. *In this respect, the Committee notes with interest that the parties, benefiting from a new preliminary contact mission which took place in July 2010, reached an agreement in which they declared they agree to: (1) create a space for dialogue in order to examine all the aspects concerning the complaint and, to this end, hold the first meeting on 21 July 2010; (2) examine the possibility of making this space for dialogue a permanent feature in order to discuss common concerns regarding labour relations, such as the principles of freedom of association and collective bargaining; and (3) inform the Government of developments regarding the measures agreed upon.*

Case No. 2720 (Colombia)

52. The Committee last examined this case, which concerns the alleged dismissal of trade union leaders and trade unionists in the telecommunications sector, at its June 2010 meeting [see 357th Report, paras 346–362], when it made 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 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.

53. In this respect, in a communication dated 14 July 2010, the Government indicates that, thanks to a new preliminary contacts mission in July 2010, the parties have reached an agreement whereby: (1) they intend to engage in collective bargaining in order to conclude a collective labour agreement in good faith; (2) they agree to set up a round table to analyse the various aspects of the case, whose first meeting was scheduled for 14 July 2010, and to inform the Government accordingly; and (3) any allegation concerning an infringement of trade union rights may be brought before a bipartite labour committee to be established by common agreement, where they will be examined immediately so that appropriate corrective measures can be taken, if necessary. In a communication dated 1 October 2010, the Government indicates that on 14 July 2010, representatives of the complainant organization (USTC) and the enterprise held a round table and that on that occasion, they have agreed upon the basic criteria for organization of future meetings.

54. *The Committee notes this information with interest.*

Case No. 2630 (El Salvador)

55. The Committee last examined this case at its March 2010 meeting, when it made the following recommendations on the matters still outstanding [see 356th Report, para. 733]:
- (a) The Committee requests the Government to state whether, as a consequence of the coercion of workers to resign their union membership, as identified by the labour inspectorate, the sanctions provided for in national legislation in the case of anti-union practices have been imposed on the enterprise.
 - (b) With regard to granting accreditation for the purpose of the collective agreement to ASTECASACV, the Committee expects that the action brought by STECASACV to

challenge the decision to grant accreditation, currently before the Chamber of Administrative Dispute of the Supreme Court of Justice, will be resolved without delay and that the court will have access to all elements of the case in reaching its decision. The Committee requests the Government to keep it informed in this regard.

56. In a communication dated 23 March 2010, the Government states that the administrative resolution imposing sanctions on the company has been challenged in the Supreme Court of Justice which, pursuant to the Administrative Dispute Jurisdiction Act, has provisionally suspended the resolution from taking effect.
57. *The Committee takes note of the information supplied and requests the Government to send it a copy of the decision on the appeal against the administrative resolution imposing sanctions on the company for bringing pressure to bear on its workers to cancel their union membership. The Committee observes that the Government has not sent any information on its recommendation regarding the accreditation of ASTECASACV for the collective agreement. The Committee therefore reiterates its previous recommendation and firmly hopes that the action brought by STECASACV challenging the decision to grant accreditation, currently before the Administrative Disputes Chamber of the Supreme Court of Justice, will be resolved without delay and that the Court will have access to all elements of the case in reaching its decision. The Committee again requests the Government to keep it informed in this regard.*

Case No. 2304 (Japan)

58. The Committee last examined this case, which concerns the arrest and detention of trade union officers and members, massive searches of trade union offices and residences of trade union leaders, and the confiscation of trade union property, at its November 2008 meeting. On that occasion, the Committee, noting that the seven defendants in the Urawa Train Depot case had appealed their conviction for the crime of coercion to the Tokyo High Court, trusted that the Tokyo High Court would bear in mind the principles of freedom of association in reviewing the case and requested the Government to keep it informed of developments in this respect. Further noting that, in spite of the appeal pending, six of the seven defendants had been dismissed by the JR East Company on grounds that convicted workers disturb worksite order and harm the company's credibility, the Committee requested the Government to take the necessary measures for these dismissals to be reviewed once the Tokyo High Court's decision had been rendered. The Committee also noted that: (1) on 29 November 2007, the Tokyo High Court dismissed the appeal of the complainant Japan Confederation of Railway Workers' Unions (JRU) in its state liability for compensation suit, and the Supreme Court dismissed the JRU's appeal of the Tokyo High Court's judgement on 5 June 2008; and (2) the Tokyo High Court's dismissed the appeal of the Japan Railway Welfare Association (JRWA) in its state liability for compensation suit on 14 February 2008, and the JRWA's appeal of the Tokyo High Court decision was pending before the Supreme Court. The Committee requested the Government to provide a copy of the Supreme Court's decision in the suit brought by the JRU, and to provide a copy of the Supreme Court's decision on the JRWA's appeal as soon as it was handed down [see 351st Report, paras 107–120].
59. In its communication of 8 September 2009, the complainant states, in respect of the Urawa Train Depot case, that on 5 June 2009 the Tokyo High Court upheld the lower court's decision and rejected the defendants' appeal; the seven defendants appealed to the Supreme Court on the same day. The complainant further states that the Tokyo High Court affirmed the reasoning of the lower court, which considered legitimate union activities to be a crime. Furthermore, although the Tokyo High Court recognized that one of the seven defendants was not responsible for two of the 11 criminal acts which the lower court had found him guilty, it nevertheless upheld the conviction and sentencing made by the lower

court on the grounds that the said defendant's partial lack of responsibility would not affect the overall ruling. In respect of the six defendants who had been dismissed by the JR East Company in August 2007, the complainant states that they had filed an application for provisional disposition for payment of wages and habitation in the company-owned apartment houses. On 13 February 2009, the Tokyo District Court rejected their claim for the second time in a row. Furthermore, in the civil trial to demand continuation of their employment by the JR East Company, two rounds of preliminary discussions have been carried out since the appeal court's decision was delivered. Finally, the complainant states that the Government continues to initiate prosecutions against its members as part of a campaign of harassment and repression. Most recently, a JRU member was sentenced to six months in prison, with a two-year suspension of the sentence, for stealing 31 sheets of paper belonging to the JR East Company. In a communication dated 22 September 2010, the complainant indicates that the final appeal of this case to the Supreme Court was dismissed on 7 July, thus finalizing the six months prison sentence, suspended for two years. His suit seeking annulment of his punitive dismissal is pending before the Supreme Court.

- 60.** In a communication dated 13 October 2010, the Government provides the following additional information in relation to the progress of the lawsuits procedure:
- (a) As to the so-called "Urawa Electric Train Depot Incident (case of coercion)", the Judge of Tokyo High Court dismissed the defence's appeal on 5 June 2009 and the defence appealed to the Supreme Court where it is currently being heard.
 - (b) Regarding the legal action for state liability for compensation launched by East Japan Railway Workers' Union (JREU) in 2005, the judge of Tokyo District Court dismissed the compensation claims against the Government and the Tokyo Metropolitan Government (TMG) on 30 November 2009. The JREU has filed Koso appeal on 15 December 2009 and the ruling is expected to be delivered on 30 November 2010.
 - (c) As to the so-called "Gamagori Station Incident (case of theft)", a judge of the Tokyo District Court handed down a suspended sentence of six months imprisonment to the accused on 21 April 2009, and the defence appealed the judgment to the Tokyo High Court. On 5 October 2009, judges of the Tokyo High Court dismissed the defence's appeal, and the defence appealed to the Supreme Court. On 7 July 2010, judges of the Supreme Court dismissed the defence's appeal, and the decision has already become final.
 - (d) Regarding the legal action for state liability for compensation, which the Japan Railway Welfare Association (JRWA) launched against the Government and the TMG in 2003, the Supreme Court dismissed the plaintiffs' appeal and the decision has already become final.
 - (e) Regarding the legal action for state liability for compensation launched by the JRU in 2005, the judge of Tokyo District Court dismissed the compensation claims against the Government and recognized part of the plaintiffs' claims against the TMG on 9 June 2009. The JRU filed Koso appeal on 22 June 2009. The ruling will be delivered on 28 October 2010.
 - (f) Regarding the legal action for state liability for compensation launched by the JRU in 2007, the judge of Tokyo District Court dismissed the compensation claims on 19 June 2009. The JRU has filed Koso appeal on 1 July 2009 and the judge of Tokyo High Court dismissed the compensation claims on 10 March 2010. The JRU appealed to the Supreme Court where it is currently being heard in the court.

- (g) Regarding the legal action for state liability for compensation launched by Akira Matsuzaki, the judge of Tokyo District Court dismissed the compensation claims against the GOJ and the TMG on 24 June 2009. Matsuzaki has filed Koso appeal on 7 July 2009 and the Judge of Tokyo District Court dismissed the compensation claims on 24 February 2010. Matsuzaki appealed to the Supreme Court where it is currently being heard in the court.
61. With reference to the return of the seized items, the Government indicates that the case is currently being heard in the Supreme Court. The prosecutor will return the seized items, as and when it is found appropriate to do so, in the process of the criminal trial. The Government also attaches a copy of the judgments in Japanese, as requested by the Committee.
62. *The Committee takes due note of the information provided by the Government and the complainant. With respect to the Urawa Train Depot case, the Committee notes that on 5 June 2009, the Tokyo High Court upheld the lower court's decision and rejected the defendants' appeal; the seven defendants appealed to the Supreme Court on the same day. The Committee, recalling the importance it attaches to the principle of freedom of speech within the framework of the exercise of legitimate trade union activity, once again expresses the expectation that the principles of freedom of association will be borne in mind in reviewing this case. It requests the Government to provide a copy of the Supreme Court's decision as soon as it is handed down.*
63. *The Committee notes that on 13 February 2009 the Tokyo District Court rejected the claim for payment of wages and habitation in company-owned houses of the six defendants dismissed by the JR East Company in August 2007. Noting further that according to the complainants, in the six defendants' civil trial to demand continuation of their employment by the JR East Company, two rounds of preliminary discussions have been carried out since the appeal court decision was delivered, the Committee requests the Government to keep it informed of developments in this regard and to provide it with information concerning the decision expected shortly from the courts. As regards the dismissal by the Supreme Court of the appeal made by Mr Kato against his conviction for having stolen 31 sheets of paper, the Committee expresses its concern at the apparent severity of this judgment and requests the Government to transmit its observations in respect of this matter and to reply to the remaining allegations in the complainant's communication of 22 September 2010.*

Case No. 2616 (Mauritius)

64. The Committee last examined this case, which concerned alleged use of repressive measures against the trade union movement, including criminal prosecutions, in violation of the right to strike and engage in protests, at its November 2008 meeting [see 351st Report, paras 990–1015]. On that occasion, the Committee had requested the Government to review the Public Gathering Act, in full consultation with the social partners concerned, with a view to amending sections 7, 8 and 18 so as to ensure that any restrictions on public demonstrations are not such as to impede in practice the legitimate exercise of protest action in relation to the Government's social and economic policy; and requested the Government to facilitate a speedy resolution of the case concerning Toolsyraj Benydin and Radhakrishna Sadien that is pending on appeal and – in light of the discontinuation of the latter case against Benydin, Sadien and three other trade unionists – raise to the competent authorities the possibility of giving a favourable review to this matter.
65. In a communication dated 3 May 2010, the Government indicates that, in its view, sections 7, 8 and 18 of the Public Gathering Act (PGA) require no amendment. The Government indicates that section 7 only provides that permission should be sought from

the mayor or chairperson of a local authority to hold a public gathering in a public garden within the area of that local authority, and that the law cannot be amended to allow for a derogation exclusively for trade unions. The local authority has the right of oversight on such premises which are primarily meant for public recreational purposes. With regard to section 8 of the PGA, the Government states that this section provides that the written authorization of the commissioner of police should be sought for the holding of a public gathering in the district of Port Louis on any day on which the National Assembly meets and sits, since the premises of the National Assembly are surrounded by public roads and there is a need to safeguard against the possibility of any external influence being exercised on the members of the Assembly. According to the Government, section 8 does allow for applications to be made and so far there has been no case where any trade union has applied to hold such meeting and the police has turned down the application. As for section 18 of the PGA, the Government indicates that this section provides for the penalty applicable where any person commits an offence under the Act. All citizens being equal under the law, the provisions of the law must be equally applicable to all citizens. One group of citizens or entity cannot therefore be granted derogation from compliance with the law. Finally, the Government informs that the appeal lodged by Mr Benydin and Mr Sadien against the judgement of the intermediate court has been fixed for hearing on 15 November 2010.

66. *The Committee notes the Government's indications relating to the provisions of the PGA. It wishes to recall the concerns it raised previously in respect of sections 7 and 8 of the PGA which it considered targeted gatherings of a particular nature, namely gatherings located in public gardens near local authorities and public gatherings inside the capital on days when the Assembly is in session, and were thus likely to apply automatically in case of protest strikes. Despite the current information provided by the Government as to the applications made under section 8, the Committee recalls its concern that the above provisions contained requirements for written permission or authorization as well as restrictions on the time and place for holding public gatherings which had the potential, in practice, of unduly interfering with the right of trade unions to engage in protest strikes, particularly those intended to express criticism of the Government's economic and social policies. The Committee also observed that section 18 of the PGA provides for a fine of up to 2,000 rupees and imprisonment for a maximum of two years for violations of the PGA. In this regard, it wishes to reiterate that penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 668]. Accordingly, the Committee requests the Government once again to take steps to review the Public Gathering Act and its application, in full consultation with the social partners concerned, so as to ensure that sections 7, 8 and 18 are not applied in practice such as to impede the legitimate exercise of protest action in relation to the Government's social and economic policy. The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*
67. *The Committee notes from the Government's reply that the appeal lodged by Mr Toolsyraj Benydin and Mr Radhakrishna Sadien has been scheduled for hearing on 15 November 2010. Observing that the appeal proceedings were initiated more than two years ago, the Committee regrets this delay and wishes to recall that justice delayed is justice denied [see **Digest**, op. cit., para. 105]. The Committee expects that the Government will facilitate a speedy resolution of the case and that the court will issue its ruling without further delay. Moreover, in light of the previously raised concerns to the effect that the prosecution of the two trade unionists commenced nearly one year and a half after the protests, thus leading*

one to query its rationale (ensuring public order or repressing the trade union movement as contended by the complainants), the Committee once again asks the Government to raise to the competent authorities the possibility of giving a favourable review to this matter. It requests the Government to keep it informed in this regard and to provide it with a copy of the judgement as soon as it is handed down.

Case No. 2685 (Mauritius)

- 68.** The Committee last examined this case, which concerned alleged acts of anti-union discrimination and refusal to recognize the Syndicat des Travailleurs des Etablissements Privés (STEP) by the Phil Alain Didier Co. Ltd (PAD), at its November 2009 meeting. On that occasion, the Committee made the following recommendations [see 355th Report, paras 891–909]:
- (a) With regard to the alleged refusal by the PAD company to recognize STEP, the Committee requests the Government to keep it informed of the proceedings before the Employment Relations Tribunal and to provide it with a copy of the judgement.
 - (b) With respect to the dismissals of Messrs Martinet and Lagaille, the Committee notes that the Government will keep it informed about the outcome of the criminal proceedings against them and expects that, should they be acquitted of the charges, steps will be taken to reinstate them and to pay wages due and other legal entitlements. It requests the Government to keep it informed in this regard.
- 69.** In communications dated 19 April and 27 May 2010, the Government indicates that the Employment Relations Tribunal organized a ballot on 13 June 2009 to determine the representativeness of STEP at the company. Less than thirty per cent of the workers in the bargaining unit voted in favour of the recognition of STEP. As provided for in section 38 of the Employment Relations Act (ERA), the trade union withdrew its application.
- 70.** With regard to the dismissal of Mr Martinet, the Government states that the police case at the District Court was dismissed on 25 March 2010. On 20 April 2010, following the outcome of the proceedings, the Ministry of Labour, Industrial Relations and Employment has lodged a case for unjustified termination of employment against the company at the Industrial Court on behalf of Mr Martinet. The case will be dealt with on 3 June 2010.
- 71.** With regard to the dismissal of Mr Lagaille, the Government indicates that the decision of the Director of Public Prosecution is still being awaited in the case of “Interfering with motor vehicle” reported by the company to the police. The Government adds that Mr Lagaille has lodged a case for unjustified termination of employment against the company at the Industrial Court, and that the case is scheduled for 6 July 2010.
- 72.** *The Committee takes due note of the information provided by the Government. It requests the Government to provide further information as to the existence of any representative organization in the PAD, as well as to whether the STEP, taking into account the provisions of the ERA, may negotiate with the company, in the absence of an exclusive bargaining agent, at least on behalf of its own members.*
- 73.** *With respect to the dismissal of Mr Martinet, the Committee notes that Mr Martinet has been acquitted of the criminal charges filed against him by the company, and that the Ministry of Labour has initiated on his behalf legal action for unjustified termination of employment before the Industrial Court. The Committee observes that with the acquittal of Mr Martinet of all criminal charges, the grounds for his dismissal have ceased to exist. It expects that the necessary steps will be taken without delay to ensure that Mr Martinet is reinstated in his former position with compensation for lost wages and benefits. The Committee requests the Government to keep it informed in this regard.*

74. *As regards the dismissal of Mr Lagaillarde, the Committee notes the Government's indication that it is still awaiting the outcome of the ongoing criminal proceedings. The Committee expects that a ruling will be handed down expeditiously, and that, should Mr Lagaillarde be acquitted of the charges, steps will be taken without delay to reinstate him in his post without loss of wages or benefits. The Committee requests the Government to keep it informed in this regard and to provide it with a copy of the judgement.*

Case No. 2665 (Mexico)

75. The Committee last examined this case at its March 2010 meeting, when it made the following recommendations on the allegations that were still pending [see 356th Report, para. 999]:

- (a) The Committee, while regretting the excessive delay in the legal proceedings to contest the results of elections to the executive committee of the STSPE, expects that the court will issue its ruling without further delay and requests the Government to keep it informed in this regard.
- (b) The Committee requests the complainant to provide the text of the legal proceedings it has brought in respect of anti-union dismissals or acts of intimidation against members of the STSPE.

76. In its communication dated 31 May 2010, the Government informed the Committee of the ruling handed down by the Conciliation and Arbitration Court of the State of Querétaro on 12 February 2010, which declared admissible the grounds for annulment invoked by one of the teams contesting the renewal of the STSPE. Since neither the representatives of the tricolour team (which had initially won) nor the electoral committee provided any grounds for challenging the ruling, the decision was confirmed. The Government adds that the alleged procedural errors on which this case was based are no longer relevant and the ruling is now legally binding.

77. *The Committee takes note of the information supplied and observes that, noting that the union's by-laws have been violated, the ruling nullifies the elections to the STSPE's executive committee for 2006–07 (which had been challenged by the complainant organization) and orders the holding of new elections.*

78. *Finally, the Committee observes that the complainant organization has not sent it the documents that it requested and therefore reiterates its recommendation that it provide the text of the legal proceedings it has initiated in respect of anti-union dismissals or acts of intimidation against members of the STSPE.*

Case No. 2267 (Nigeria)

79. The Committee last examined this case, which concerns the dismissal of 49 academic lecturers, including five trade union officials, for having exercised the right to strike, at its November 2006 meeting. With respect to the objection of the complainant, the Academic Staff Union of Universities (ASUU), the Industrial Arbitration Panel's (IAP) award was not referred to the National Industrial Court (NIC), the Committee took note of the decision rendered by the Federal High Court of Nigeria on 7 March 2006, to the effect that the Government's decision not to refer the case to the NIC and to refer it back to the IAP was "within the tolerable ambit of the law", and requested to be kept informed of the outcome of the procedure before the IAP. The Committee further reiterated its request that the Government communicate the text of any bill concerning collective bargaining with university unions, and requested the Government to comment on the complainant's allegation that the Government refused to renegotiate the collective agreement and failed

to implement an agreement to constitute a negotiating team. Finally, the Committee, noting that it had not received any information concerning its request that the Government intercede with the parties with a view to obtaining the execution of the judgement of the Federal High Court of Ilorin ordering the reinstatement of the 49 academics, requested to be kept informed of the execution of the Federal High Court's judgement as well as any further judgements rendered on appeal [see 343rd Report, paras 152–158].

80. In its communication of 7 April 2010, the complainant states that on 12 July 2006 the Court of Appeal reversed the 2005 judgement of the Federal High Court of Ilorin ordering the reinstatement of the 49 academics. The Court of Appeal's decision was appealed to the Supreme Court which, in its judgement of 11 December 2009, set aside the decision of the Court of Appeal. With respect to collective negotiations with the Government, the complainant indicates that the Government set up a negotiating committee in December 2006 and negotiations began in January 2007. The complainant withdrew from negotiations on 11 January 2008, when it became clear that the Government was not serious about the deliberations, and embarked on industrial action; negotiations resumed on 25 August 2008 and ended in January 2009. The complainant states that at the negotiations' conclusion, the Government, instead of signing the agreement, attempted to repudiate the agreement reached and impose decentralized re-negotiations. The complainant subsequently engaged in a four-month strike, and an agreement was reached on 21 October 2009.
81. *The Committee notes the information provided by the complainant. It regrets that the Government provides no information respecting the execution of the 2005 judgement of the Federal High Court of Ilorin ordering the reinstatement of the 49 academics, who were dismissed in 2001. Noting further that the Federal High Court's judgement was affirmed by the Supreme Court in December 2009, the Committee once again reiterates the importance it attaches to the principle that cases concerning anti-union discrimination be examined rapidly. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 826]. It once again urges the Government to intercede with the parties with a view to obtaining the execution of the judgement and the rapid reinstatement of the 49 academics. It requests the Government to keep it informed of developments in this regard.*
82. *As concerns collective negotiations, the Committee notes that the complainant had concluded a collective agreement with the Government on 21 October 2009. Finally, the Committee once again requests the Government to inform it of the outcome of the procedure before the IAP, as well as to communicate the text of any bill concerning collective bargaining with university unions.*

Case No. 2527 (Peru)

83. The Committee last examined this case at its March 2010 meeting, when it made the following recommendations regarding alleged acts of anti-union discrimination by the San Martín Mining Company SA [see 356th Report, para. 126]:

The Committee notes the Government's information. The Committee again notes with regret the delay in the proceedings relating to the dismissal of the union official Mr José Arenaza Lander as a result of the appeals against the judicial orders for reinstatement, and expresses the hope that a ruling will be issued in the very near future. The Committee requests the Government to send its observations on the most recent communication of the complainant organization relating to the Supreme Court of Justice's ruling on 11 January 2010, which

resulted in the revocation of preceding judicial decisions that had ordered reinstatement, and to indicate why the judicial order for the provisional reinstatement of Mr César Augusto Elías García had not been complied with. The Committee also requests the Government to reply to the new allegations from the CATP dated 18 July 2009, concerning acts of violence against union official Mr César Augusto Elías García and indicate the outcome of the criminal complaint lodged by this official against the alleged assaults, as described in the attachments to the present complaint.

- 84.** In a communication dated 30 April 2010, the Government states that, in a communication dated 15 January 2010, the Supreme Court of Justice informed it of the status of César Augusto Elías García's appeal for his dismissal to be revoked and for the benefits due to him to be paid. It adds that, in communications dated 26 January and 24 February 2010, the complainant organization, the Autonomous Confederation of Peruvian Workers (CATP), sent it a copy of the decision and information on the action that the CATP had taken. The Government states that the information supplied makes the following points: (1) the Provisional Chamber of Constitutional and Social Law of the Supreme Court of Justice, in its ruling of 22 December 2009, upheld the appeal lodged by the company and therefore revoked the decision concerned; and (2) in the light of the ruling against him, César Augusto Elías García on 15 February 2010, presented a request for legal protection against the said ruling to the Tenth Constitutional Court, where the decision whether or not to consider the request is still pending. In a communication dated 20 October 2010, the Government states that the trade union leader César Augusto García has lodged an appeal against the adverse judicial decisions. Similarly, the trade union leader José Arenaza Lander has lodged an appeal against the adverse first-instance judicial decision.
- 85.** *With regard to the proceedings relating to the dismissal of union leader José Arenaza Lander as a result of the appeals that were lodged against the court order that he be reinstated, the Committee notes that the Government indicates that he has lodged an appeal against the adverse decision of the court of the first instance. The Committee reiterates its previous recommendations and requests the Government to keep it informed of the status of the proceedings and to send it a copy of the appeal ruling when it is handed down.*
- 86.** *With regard to the dismissal and reinstatement of César Augusto Elías García, the Committee recalls that in its previous examination of the case, it requested the Government to inform it of the reasons preventing the immediate reinstatement of the union leader concerned, since his reinstatement had been ordered by court decision (resolution of the Seventh Labour Court of the Higher Court of Justice, confirmed by a resolution of the First Chamber of the Higher Court of Justice of Lima). The Committee notes the Government's statement that on 15 February 2010, César Augusto Elías García presented a request to the Tenth Constitutional Court for legal protection against the ruling handed down by the Provisional Chamber of Constitutional and Social Law of the Supreme Court of Justice on 22 December 2009, in which it upheld the appeal lodged by the company and therefore revoked the decision concerned, and that the decision of the Tenth Constitutional Court whether or not to consider that request, is still pending. The Committee takes note that the Government indicates that César Augusto Elías García has lodged an appeal against the adverse judicial decisions. The Committee requests the Government to keep it informed of developments regarding the requests for judicial protection and to send it a copy of the relevant rulings and judicial decisions when they are handed down.*
- 87.** *With regard to the CATP's allegations of 18 June 2009, concerning acts of violence against union leader César Augusto Elías García and the outcome of the penal complaint lodged by him in connection with the events, the Committee regrets that the Government has provided no information on the subject. It therefore urges the Government to send its*

observations on the allegation and to indicate the outcome of the penal complaint lodged by the union leader in connection with the aggression against him.

Case No. 2559 (Peru)

88. The Committee last examined this case at its November 2008 meeting, when it asked the Government to ensure that union official Roger Augusto Rivera Gamarra was paid the wages that were due to him between his dismissal in 2003 and his reinstatement in 2008, in accordance with the 2007 ruling of the Supreme Court of Justice [see 351st Report, para. 164].
89. In a communication dated 12 February 2010, the complainant organization states that the Government has not complied in full with the payment of the wages and length-of-service benefits, despite the issue of court orders by the Supreme Court of Justice. The first court order (Resolution No. 52 of 29 December 2009, declaring the appeal lodged by the public prosecutor of the Ministry of Agriculture against resolution No. 50 of 26 October 2009, to be inadmissible) calls for the payment of 76,615.60 new soles (PEN) in respect of remuneration, and the second (Resolution No. 53 of 21 January 2010) for the payment within three days of the length-of-service benefits, with interest. However, no payment has yet been made. The complainant organization states that Mr Rivera Gamarra has therefore written to the judge to request the removal of the official who is failing to carry out the court order. The union adds that he also wrote to the official on 8 February 2010, requesting payment of the amounts due to him, such as holiday pay and school fees, as well as of the compulsory contributions in respect of social security (ESSALUD) and the pension fund (AFP). Finally, the complainant organization states that because of the Government's failure to comply with the court orders, the union went on a 24-hour strike on 17 September 2010.
90. *The Committee deeply regrets that the Government has not supplied any information on the subject despite the length of time (five years) that has elapsed since its first examination of the case and requests that it comply in full with the 2007 court order calling for the reinstatement of Roger Augusto Rivera Gamarra and the payment of the wages and other benefits due to him. Recalling that it had noted the reinstatement of the trade union leader in its previous examination of the case, the Committee regrets that such a long time has passed without his being paid the wages and other benefits due to him, as ordered by the judicial authority. The Committee expresses the firm hope that the Government will as a matter of urgency take all necessary steps to ensure that the said wages and other benefits are paid and requests the Government to keep it informed of the action that is taken.*

Case No. 2624 (Peru)

91. The outstanding issues in this case refer to the dismissal of 226 workers following the setting up of the Single Union of Workers of the Municipality of Miraflores (SUTRAOCMUN-M). At its meeting in June 2009, the Committee noted the outcome of the inspection carried out in the Municipality of Miraflores following the complaint presented to the ILO, and requested the Government to keep it informed of the progress of the legal proceedings relating to the perpetration of anti-union acts against the 226 dismissed workers [see 354th Report, para. 187].
92. In a communication dated 22 June 2009, the complainant organization, the National Federation of Public Workers of Peru (FENAOMP), states that the 226 dismissed workers have been reinstated following administrative mediation between the parties which led to an agreement.

93. *The Committee notes the information with satisfaction.*

Case No. 2686 (Democratic Republic of the Congo)

94. The Committee examined the substance of this case at its November 2009 meeting. It concerns allegations of interference by the authorities in the activities of a trade union, arrest and detention of trade unionists, seizure of the union's correspondence and computer equipment and a public smear campaign against the union. On that occasion, the Committee formulated the following recommendations:

- (a) The Committee requests the Government to carry out an independent inquiry into the conditions of the arrest and detention of the SYNCASS officials Mr Mambu, Mr Ilwa and Mr Sukami and, if it is shown that their arrest and detention did not adhere to the principles recalled here with regard to the arrest and detention of trade unionists, to take appropriate measures to ensure that such situations cannot occur again in the future.
- (b) The Committee requests the Government to indicate the nature and the status of the current legal or administrative proceedings against the SYNCASS BDD official accused of misappropriation of funds, and to inform it of any decisions handed down by the bodies concerned and any follow-up action.
- (c) The Committee requests the Government to provide its observations on the allegations that the SYNCASS BDD officials have been unable to carry out their official duties and have been banned from leaving Bandundu.
- (d) The Committee requests the Government to hold an independent inquiry into the allegations that SYNCASS correspondence was intercepted by force on the orders of the provincial medical inspector and, if they are shown to be true, to take the necessary measures to punish those responsible in order to prevent any recurrence of such acts in future.
- (e) The Committee requests the Government to indicate whether the portable computer owned by the SYNCASS BDD committee has been returned to it and, if not, to take the necessary measures, in the absence of a judicial order to the contrary, to ensure that it is returned to the union without delay, and to ensure strict adherence in future to the principles recalled here with regard to searches of union assets and premises.
- (f) The Committee requests the Government to supply a copy of the Protocol of Agreement of 14 November 2007, in which it is claimed to give SYNCASS sole responsibility for managing payments of risk insurance premiums, and to provide an explanation regarding the change in practice of at-source deduction (check-off) of union membership dues.

95. The complainant organization, the National Union of Medical Practitioners, Health Service Management and Personnel (SYNCASS), has presented additional information in a communication dated 17 February 2010. Firstly, the complainant organization states that the situation has not changed with regard to the different aspects of the dispute between itself and the authorities which is the subject of the case. Secondly, SYNCASS highlights what it considers to be two key aspects of the case, namely anti-union and occupational discrimination in the health services in the country and interference by the authorities in regard to the deduction of union dues.

96. As regards discrimination in the health services, SYNCASS denounces the fact that the National Doctors' Union (SYNAMED) has been given responsibility for handling the payment of risk insurance premiums for the medical profession throughout the country, that SYNAMED has no trouble collecting its membership dues and that its demands are processed without delay, which is not the case for SYNCASS and other unions. Moreover, health-care staff other than doctors remain excluded from strategic decisions on the health care system, and people working in those occupations only have a very limited say in determining national health-care policies.

97. As regards interference by the Ministry of Health and provincial authorities in the distribution of membership dues among unions, SYNCASS would like the Government's attention to be drawn to the fact that it should not be involved in the distribution of union dues or decide which unions should benefit from such dues. The complainant organization points out that in the public sector, for the last three years union dues have been deducted at source for all employees and that the dues are distributed according to a share system agreed on among the unions.
98. As regards the legal and administrative proceedings referred to by the Committee, SYNCASS points out that none of the bodies with which proceedings have been filed, either by the union or by the authorities, have handed down a decision or court order in the matter. The complainant organization concludes from this that the accusations levelled against the provincial SYNCASS officials are unfounded.
99. Lastly, as regards the Committee's recommendations concerning the Protocol of Agreement of 14 November 2007 (recommendation (f)), SYNCASS points out that the Protocol does not deal with the health sector and hence does not assign SYNCASS sole responsibility for managing risk insurance premiums. The premiums are managed on the basis of a consensual practice implemented by SYNCASS since 2007 in the absence of relevant legislation and the Government's intention to avoid massive misappropriation of funds. There is thus no written agreement on that subject.
100. *The Committee notes the information provided by the complainant organization. It notes with regret that the Government has not sent the observations and information requested in its previous recommendations. It urges the Government to do so without delay in the light of the information provided by the complainant organization in its last communication.*
101. *The Committee recalls in particular that in this case, SYNCASS BDD officials Mr Mambu, Mr Ilwa and Mr Sukami were arrested, detained and subjected to administrative penalties starting in July 2007. In view of the time which has elapsed, the Committee expects the Government to provide information without delay on the status of the current legal or administrative proceedings against these union officials and the outcome of the inquiry requested on the circumstances of their arrest and detention (recommendations (a) and (b)). The Committee considers that an excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings in that regard, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned.*
102. *Lastly, the Committee urges the Government to send its observations in reply to the last communication from SYNCASS, in particular concerning anti-union and occupational discrimination in the health sector and interference by the authorities in the choice of system for distributing union dues.*

Case No. 2592 (Tunisia)

103. The Committee last examined this case at its November 2009 meeting. The case concerns the refusal by the authorities to recognize the representativeness of the General Federation of Higher Education and Scientific Research (FGESRS), anti-union discrimination against union leaders because of their union activities, and violations of the principles of collective bargaining [see 355th Report, paras 132–136]. On that occasion, the Committee trusted that final court rulings would be handed down very soon on the following cases: (1) the claim for nullity of the dissolution of the general unions of the Higher Education by the Tunisian General Labour Union (UGTT) unifying congress of 15 July 2006 (Case No. 71409/28 before the Court of First Instance of Tunis); (2) the legitimate representation

of the General Trade Union of Higher Education and Scientific Research (SGESRS) ; and (3) the assault against the trade unionist Moez Ben Jabeur.

- 104.** In a communication dated 27 April 2010, the Government sent a copy of the following court rulings handed down by the Tunis Court on 13 January 2010: a ruling rejecting the claim for nullity of the decision to dissolve the SGESRS taken by the UGTT unifying congress of 15 July 2006 (Case No. 71409/28) and a ruling rejecting the claim for nullity of the proceedings of the extraordinary congress held to establish the FGESRS to replace the SGESRS (Case No. 71888/28). *The Committee notes these court rulings and observes that the issue of legitimate representation of the SGESRS has been resolved by the latter judgment. It invites the Government to keep it informed of any action taken pursuant to the abovementioned rulings, and in particular to indicate whether any appeals have been lodged against them and the outcome of such appeals.*
- 105.** As regards the assault against the trade unionist Moez Ben Jabeur, the Government states that it will send any court ruling handed down in this case, but points out that no complaint or appeal has been found. *The Committee notes this information and recalls that during the previous examination of the case, it had noted that Mr Moez Ben Jabeur had been assaulted by the Director of the Tunis Preparatory Engineering Institute, for which a complaint for assault and battery had been filed with the Attorney-General of the Court of First Instance of Tunis under file No. 7005283/2007 of 25 January 2007 [see 350th Report, para. 1582]. The Committee requests the Government to ensure that the judicial proceeding is rapidly concluded and to keep it informed in that respect.*
- 106.** Lastly, the Government states that it has taken steps to develop objective criteria to determine the representativeness of the social partners pursuant to section 39 of the Labour Code, including collecting information on foreign legislation on the subject and seeking technical assistance from the International Labour Office. The Government indicates that in the absence of pre-established criteria, in the event of disputes concerning trade union representativity, it is the number of members which determines representativeness for the purposes of collective bargaining. *The Committee notes this information and requests the Government to keep it informed of any progress in this regard.*

Case 2605 (Ukraine)

- 107.** The Committee last examined this case, concerning registration of amendments to the statutes of the Federation of Employers of Ukraine (FEU), at its November 2009 meeting [see 355th Report, paras 137–139]. On that occasion, the Committee noted with interest that the amendments approved at the Fourth Congress of the FEU of 18 April 2008 were registered on 30 May 2008, and requested the Government to indicate whether the Supreme Administrative Court confirmed the decisions of the lower courts ordering the registration of the previous amendments to the statutes of the FEU, approved at the organization's Third Congress on 7 June 2007.
- 108.** In a communication dated 1 March 2010, the Government reiterates the information it had previously provided and indicates that the Ministry of Justice, by its order of 2 December 2009 registered amendments to the FEU's statutes and took note of the changes in the composition of its executive bodies, as approved by the resolutions of the Federations' Fifth and Sixth Congresses of 7 July and 22 October 2009.
- 109.** *The Committee notes this information with interest.*

Case No. 2428 (Bolivarian Republic of Venezuela)

110. In its previous examination of the case in March 2010, the Committee formulated the following recommendations on the issues that were still pending [see 356th Report, paras 197–199]:

- The Committee requests the Government to send the text of the revised Practice of Medicine Act as soon as it has been adopted and to take account of the Committee’s conclusions in the present case. The Committee also requests the Government to supply information on the outcome of the FMV elections convened for 20 January 2010 within the framework of the CNE. The Committee notes the FMV’s statement that for years it has met the legal requirements for holding such elections, that the Government maintains that there had been omissions and that the CNE called for rectifications to be made. The Committee observes, according to its understanding of the Government’s reply, that the FMV is an organization of doctors’ associations (and not a trade union federation) and as such it cannot engage in bargaining in accordance with the “purity principle” (as established by section 118 of the Organic Labour Act). This argument was previously examined by the Committee and the FMV indicated that the legislation in force gives it the right to engage in collective bargaining on behalf of its members.
- The Committee notes with regret that in this case, as in previous ones, the proceedings and appeals dealt with by the CNE and its decisions have resulted in the FMV elections being delayed for years. The Committee requests the Government once again to ensure that the CNE refrains from interfering in elections of organizations. The Committee reminds the Government that it previously asked it to promote collective bargaining between the FMV and doctors’ associations, on the one hand, and the medical sector employers, on the other, pending the amendment of the Practice of Medicine Act. The Committee again requests the Government to guarantee this collective bargaining and regrets that the Government has previously failed to do so.
- Finally, it is the Committee’s understanding (the Government has not sent any specific information in this respect) that the refusal to grant trade union leave to FMV officials is based on the same reasoning as the refusal to engage in collective bargaining. The Committee requests the Government to maintain the existing entitlement to trade union leave of FMV leaders.

111. In its communication dated 18 May 2010, the Government refers to the new rules adopted on 28 May 2009 by the National Electoral Council (CNE) on technical advice and logistical support for trade union elections and states that these rules define the parameters for action by the electoral authority in response to voluntary requests from trade unions for technical advice and logistical support for holding trade union elections. These provisions protect the principles and fundamental rights to active participation, trade union democracy, suffrage by men and women trade union members, free choice and re-election of trade union representatives, guaranteeing reliability, equality, impartiality, transparency, publicity of proceedings, good faith, procedural economy and efficiency, and respect for freedom of association. There is thus no interference of any kind by the CNE in the elections of the executive committees of the country’s trade unions. The Government requests the Committee to take due note of its arguments, as it has informed it repeatedly in previous replies that the recommendations of the different ILO bodies have been complied with by amending the former CNE rules to limit its action to providing support only when requested to do so by a trade union. The Government therefore fails to understand why the Committee continues to single it out for alleged interference in trade union elections even when its observations have been heeded and implemented.

112. The Government adds that the Venezuelan Medical Federation (FMV) is composed of doctors’ associations, which in turn consist of both workers and employers. Section 410 of the Organic Labour Act provides that trade unions may be for workers or employers, and section 118 of the regulations implementing the Organic Labour Act establishes the “purity principle” as follows:

Prohibition of mixed trade unions (purity principle). Section 118. Establishing a trade union which seeks to represent jointly the interests of workers and employers shall be prohibited ...

- 113.** The Government states further that the Organic Labour Act provides that five or more trade unions may establish a federation; however, as has already been mentioned, the FMV does not consist of trade unions, but of doctors' associations, and therefore does not have the status of a federation as stipulated by law, since doctors' associations are not trade unions. The FMV cannot claim to be a trade union as it is a professional association and, as such, applied to the CNE for registration on 31 May 2005. The Government accordingly requests the Committee to take due note of this argument.
- 114.** The Government states that in 2008, the authorities of the FMV, in a communication addressed to the CNE, requested its support in holding its elections. The FMV electoral committee subsequently sent a communication to the CNE in 2009 requesting the Trade Union Affairs Department of the CNE to assist it in preparing its election plan so that the new electoral committee of that Federation of professional associations could issue a call for elections. The CNE provided all the support that the FMV had voluntarily requested; however, according to the CNE itself, there is no information indicating that the Federation has set up an electoral committee to proceed with its elections. Neither does the CNE have any information as to whether the Federation has given up its declared intention to hold elections.
- 115.** In conclusion, the Government points out that all of the above attests to the fact that neither the CNE nor any Venezuelan state body has refused to support and further the election process for the executive committee of the FMV (consisting of doctors' associations and not trade unions, as affirmed by the Federation itself). On the contrary, it is common knowledge that the public institutions have abided faithfully and fully by the constitutional and legal framework in force.
- 116.** *The Committee recalls that the allegations in this case refer to refusal by the authorities to engage in collective bargaining with the FMV, refusal to grant trade union leave to its officials and obstacles by the authorities to trade union elections in the Federation despite its attempts over the years to hold such elections. When the Committee examined this case for the first time, it requested the Government to amend the Practice of Medicine Act so that, among other things, the FMV would not include both doctors and employers that are owners of medical establishments and, in the meantime, pending amendment of the Act, to promote collective bargaining between the FMV and the doctors' associations with the public employing bodies [see 340th Report, para. 1441], so that the Federation could continue to bargain collectively as authorized by law, as it had done. The Government informed the Committee that the revision of the Practice of Medicine Act was before the National Assembly and that it would keep the Committee informed in that regard [see 356th Report, para. 192].*
- 117.** *The Committee takes note once again of the Government's observations on the new rules of the CNE and the voluntary nature of its intervention, as well as the fact that the FMV consists of doctors' associations, not trade unions. The Committee notes that the Government denies that there has been any interference and states that the CNE has provided all the support requested by the FMV in 2009, but that the CNE does not have any information indicating that the FMV has set up an electoral committee or whether it has given up its intention to hold new elections.*
- 118.** *The Committee observes that the Government has not provided any information indicating that the authorities have engaged in collective bargaining with the FMV or that a solution has been found to the problem of the refusal by the authorities to grant trade union leave. The Committee observes that the Government has not informed it of any developments in*

the process of adoption of the draft Practice of Medicine Act. Lastly, as regards the intervention by the CNE and the elections for the executive committee of the FMV, the Committee notes that the Government had stated that the call for elections had been scheduled for 20 January 2010 [see 356th Report, para. 195] and now states that the CNE does not have any information as to whether the Federation has given up its intention to hold elections or whether an electoral committee has been set up.

- 119.** *The Committee recalls that, according to the complaint presented by the FMV, the Federation considers that the intervention by the CNE in its trade union elections violates trade union rights and that it submitted to it because it could not avoid it. Given that the Government states that intervention by the CNE is voluntary, the Committee invites the Government to inform the FMV in writing that it may hold its trade union elections without intervention or supervision (including in regard to appeals) by the CNE, to comply with its previous recommendations on the Practice of Medicine Act, and to ensure that collective bargaining takes place between the FMV and the authorities until such time as the Act is amended. Lastly, the Committee once again requests the Government to maintain the existing entitlement to trade union leave of FMV officials.*
- 120.** *The Committee requests the Government to keep it informed of any developments relating to these issues.*

* * *

- 121.** 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	–
1865 (Korea)	March 2009	–
1914 (Philippines)	June 1998	March 2010
1991 (Japan)	November 2000	March 2009
2086 (Paraguay)	June 2002	–
2169 (Pakistan)	June 2003	June 2010
2173 (Canada)	March 2003	June 2010
2192 (Togo)	March 2003	March 2007
2222 (Cambodia)	June 2004	March 2010
2227 (United States)	November 2003	March 2010
2229 (Pakistan)	March 2003	June 2010
2249 (Bolivarian Republic of Venezuela)	June 2005	June 2010
2317 (Republic of Moldova)	June 2008	March 2010
2362 (Colombia)	March 2010	–
2371 (Bangladesh)	June 2005	March 2010
2382 (Cameroon)	November 2005	June 2010
2395 (Poland)	June 2005	March 2010
2399 (Pakistan)	November 2005	June 2010
2400 (Peru)	November 2007	March 2010
2423 (El Salvador)	March 2007	March 2010
2433 (Bahrain)	March 2006	March 2010

Case	Last examination on the merits	Last follow-up examination
2460 (United States)	March 2007	March 2010
2478 (Mexico)	March 2010	–
2488 (Philippines)	June 2007	March 2010
2502 (Greece)	November 2007	June 2009
2522 (Colombia)	June 2010	–
2524 (United States)	March 2008	March 2010
2546 (Philippines)	March 2008	March 2010
2547 (United States)	June 2008	March 2010
2552 (Bahrain)	March 2008	March 2010
2557 (El Salvador)	March 2010	–
2565 (Colombia)	March 2010	–
2583 (Colombia)	June 2008	March 2010
2595 (Colombia)	June 2009	March 2010
2601 (Nicaragua)	March 2010	–
2611 (Romania)	November 2008	March 2010
2622 (Cape Verde)	November 2008	March 2010
2625 (Ecuador)	March 2009	June 2010
2637 (Malaysia)	March 2009	March 2010
2652 (Philippines)	March 2010	–
2658 (Colombia)	November 2009	–
2663 (Georgia)	March 2010	–
2667 (Peru)	March 2010	–
2669 (Philippines)	March 2010	–
2675 (Peru)	June 2010	–
2677 (Panama)	June 2009	June 2010
2678 (Georgia)	June 2010	–
2681 (Paraguay)	March 2010	–
2683 (United States)	June 2010	–
2690 (Peru)	June 2010	–
2693 (Paraguay)	March 2010	–
2698 (Australia)	June 2010	–
2701 (Algeria)	June 2010	–
2703 (Peru)	June 2010	–
2705 (Ecuador)	November 2009	–
2707 (Republic of Korea)	June 2010	–
2711 (Bolivarian Republic of Venezuela)	June 2010	–
2719 (Colombia)	June 2010	–
2722 (Botswana)	June 2010	–
2736 (Bolivarian Republic of Venezuela)	June 2010	–
2748 (Poland)	June 2010	–

122. The Committee hopes these governments will quickly provide the information requested.
123. In addition, the Committee has just received information concerning the follow-up of Cases Nos 2096 (Pakistan), 2160 (Bolivarian Republic of Venezuela), 2268 (Myanmar), 2291 (Poland), 2301 (Malaysia), 2383 (United Kingdom), 2470 (Brazil), 2474 (Poland), 2482 (Guatemala), 2490 (Costa Rica), 2506 (Greece), 2512 (India), 2518 (Costa Rica), 2540 (Guatemala), 2567 (Islamic Republic of Iran), 2575 (Mauritius), 2590 (Nicaragua), 2591 (Myanmar), 2604 (Costa Rica), 2626 (Chile), 2634 (Thailand), 2638 (Peru), 2642 (Russian Federation), 2647 (Argentina), 2654 (Canada), 2671 (Peru), 2676 (Colombia), 2679 (Mexico), 2680 (India), 2687 (Peru), 2692 (Chile), 2695 (Peru), 2697 (Peru), 2699 (Uruguay), 2700 (Guatemala), 2718 (Argentina), 2727 (Bolivarian Republic of Venezuela), 2744 (Russian Federation) and 2755 (Ecuador), which it will examine at its next meeting.

CASE NO. 2733

INTERIM REPORT

**Complaint against the Government of Albania
presented by
the Independent Trade Unions of Albania (BSPSH)**

Allegations: The complainant organization alleges that in 2007 both Albanian trade union confederations were expelled from their premises and not permitted to pursue their activities. The complainant further alleges that a bill to confiscate the assets of all Albanian trade unions was approved by the Council of Ministers and is expected to be passed for approval to the Parliament in September 2009

124. The complaint is contained in communications from the Independent Trade Unions of Albania (BSPSH) dated 4 and 29 September 2009.
125. The Government forwarded its partial response to the allegations in a communication dated 13 January 2010.
126. Albania 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

127. In a communication dated 4 September 2009, the complainant organization alleges that in 2007 both Albanian trade union confederations were expelled from their premises and not permitted to pursue their activities. The complainant further alleges that a bill to confiscate the assets of all Albanian trade unions was approved by the Council of Ministers and is expected to be passed for approval to the Parliament.

- 128.** As regards the chronology of events, the BSPSH indicates that on 5 June 1992, the President of the Republic issued Decree No. 204 concerning the assets of Albanian trade unions (hereinafter, the 1992 Decree). According to this Decree, the trade unions shared among them by agreement the assets of the former Union of Professions. On 6 May 1998, the 1992 Decree was repealed and Act No. 8340/1 to regulate the effects of the implementation of Decree No. 204 of 1992 was approved (hereinafter, the 1998 Act), recognizing the Albanian trade unions as the sole owners of these assets. The first act of violation occurred in August 2007, when both Albanian trade union confederations were expelled from their premises, and no longer permitted to exercise their normal activity. On 18 August 2009, the Albanian Prime Minister made public via the media a bill on the confiscation of the assets of all Albanian trade unions. The bill has been approved by the Council of Ministers without previous consultations with the trade unions.
- 129.** The complainant considers that the bill is a blow to the Albanian trade union movement, and illustrates a public fraud of the Albanian Prime Minister, who deliberately did not inform the public on the content of the 1998 Act. Having as a principle to solve disputes through social dialogue, the BSPSH has presented a request to the Government on 25 September 2009, with an open letter to the Prime Minister of Albania, to open the dialogue with the unions that have neither been notified nor consulted on the bill. So far, no response has been received. The National Council of the BSPSH has once again urged the Prime Minister to open the dialogue and start negotiations.
- 130.** In its communication of 29 September 2009, the complainant adds that, on 28 September 2009, the bill has passed for approval to the parliamentary Committee of Economy, and that it will not be reviewed by the parliamentary Committee for Labour and Social Affairs, which has direct contact with the unions, nor by any other parliamentary committee. Albanian trade unions have not been invited to any discussion of the bill nor to the sitting of the parliamentary Committee of Economy, where the bill has been examined. No prior consultations with the Albanian unions have been held, and the unions' request to open the dialogue has not been taken into consideration. The plenary session to review and approve the bill is scheduled on 8 October 2009. Both the parliamentary committees and the plenary sitting are operating only with MPs of the majority, as the MPs of the opposition do not recognize the results of the last parliamentary elections and are not present at the sittings of the Parliament.
- 131.** Highlighting the lack of transparency, the complainant believes that the Government's goal is the elimination of the Albanian trade union movement by unfairly acquiring union assets. The adoption of the bill by Parliament would beyond doubt lead to the significant weakening and even disappearance of the trade union movement given the socio-economic situation of Albanian workers and the fact that membership fees cannot possibly cover trade union activities. The acquisition of union assets would constitute a social injustice, since those assets have never been state property and belonged to the former Professional Union at the time of dictatorship; it would therefore be legitimate that the property of Albanian workers remains at their or their unions' disposal. Moreover, there is no compelling legal argument for the abrogation of the 1998 Act that has proclaimed the unions as the owners of these assets.
- 132.** The complainant organization also provides a legal evaluation of the situation. Accordingly, trade unions are legal persons established under the national legislation in force and thus have the right to own property, movable and immovable, and to conduct any legal action related to it. The 1992 Decree has been the first attempt for the legal regulation of the trade union's property, which needed to be ratified by Parliament. Although the Albanian Parliament decided not to ratify the 1992 Decree, the trade union has already (as of 1992 and following) become the owner of the former Professional Union's properties and has enjoyed and possessed them freely. Confronted with this situation, the Parliament,

on the same day of not ratifying the 1992 Decree, approved the 1998 Act to transfer the former Professional Union's property to the trade unions. This is clearly illustrated by the wording of several provisions of the 1998 Act. Section 1 provides that the trade union property earned by the implementation of the 1992 Decree comprises all the movable and immovable property and monetary value of the former Professional Union of Albania. Moreover, section 3 deals with the redistribution of the unions' property in case of the creation of trade unions other than the existing ones, section 4 refers to the immovable property earned by the unions, and section 5 concerns the land owned by the trade unions and the compensation of the former owners.

- 133.** The complainant organization considers that the bill it is now contesting violates both civil and constitutional principles for the following reasons. In its opinion, the terminology used in the 1998 Act proves that the trade unions have become the owner of the Professional Union's property and not only the possessor as claimed by the Minister of Justice. In addition, the legal restriction of the right of disposition/alienation for the immovable property of the union cannot be used to argue that the trade union is not entitled to the right of property. Article 149 gives the definition of ownership, according to which it is the right to enjoy and possess objects freely, within the provisions of the law. The right to possession is thus one of the owner prerogatives, which can, however, be restricted within the provisions of the law. The complainant refers to Albanian legislation restricting the right to property, such as the Act regarding the sale and purchase of land (1995), which limits the right of foreign natural or legal persons to buy public or private land for investment unless it triples the value of the land, and the Act regarding the transition in ownership of agricultural land, forests, meadows and pastures (1998), which denies to foreign natural or legal persons the right to buy agricultural land, forests, meadows and pastures. An *a contrario* interpretation of those provisions means that Albanians cannot sell agricultural land to foreigners and can only sell non-agricultural land to foreigners, if they realize an investment of the triple value of the land. Thus, the right to property of all nationals of the Republic of Albania, public or private, natural or legal persons, is limited in relation to foreigners. According to the Minister of Justice's argument, this restriction would bring about the loss of right to ownership for Albanians, turning them into mere possessors of their properties. This shows that the reasoning is unacceptable and legally absurd. The complainant concludes that the wording of section 4 of the 1998 Act rather intends to protect the property of trade unions from any eventual abuse until the financial consolidation of the organization, and not to deny the ownership right.
- 134.** Another argument used by the Minister of Justice is Decision No. 85/2001 of the High Court, which concerns a conflict born in 1996 and regulates clashes between Act No. 7698 of 15 April 1993 "On the restitution and compensation of former owners" and the 1998 Act. Since in 1996, the Act of 1993 on the restitution and compensation of former owners was already in force, the 1992 Decree was not approved and the 1998 Act was not yet adopted, it is normal that the right of the former owners prevailed. The High Court concludes that whenever the interests of former owners who benefit from restitution of buildings or void land under the Act of 1993 clash with the interests of trade unions that have acquired such buildings or land according to the 1992 Decree (the consequences of which are regulated by the 1998 Act), priority should be given to the interests of former owners. The 1998 Act is applicable to the extent that it does not conflict with the Act of 1993 on the restitution and compensation of former owners. The court stresses that it is understood that the issue is not whether the unions have earned ownership of the property that the State has decided to transfer to them.
- 135.** According to the complainant, the trade unions, in their quality as owners of the assets, have signed agreements in this regard. Consequently, all rights of credit or other rights to their benefit are exclusive rights, and the State cannot take over those rights as provided in the bill. Moreover, the bill creates an unfavourable financial situation for trade unions

(state of bankruptcy) because, invoking the legal institute of representation without rights (i.e. non-authorization by the creditor), it divests them of one of the main sources of funding, the revenues from immovable properties, and provides that the State has the right to cede to itself the right of credit, while obligations have been consigned to the unions.

- 136.** Furthermore, the complainant considers that the bill violates the Constitution as follows: (i) article 11(2), according to which private and public property is protected by law. In the present case, the trade union's property is concealed by the bill; (ii) article 17, according to which constitutional rights can only be limited for a public interest or for the protection of the rights of others, the limitation should be proportional to the situation dictating it and not infringe the essence of the right. In the present case, there is no public interest; the interests affected are both those of the former owners and of the unions. The limitation divests the unions of their property right and is not proportional to the objective, since the former owners' rights are already protected by restitution and compensation procedures, and the case of a clash between the two interests has already been decided by the High Court in favour of the former owners. The lack of State funds for compensation in case of impossibility to reconstitute the property should not serve as justification for the bill; (iii) article 41 guaranteeing the right to private property and allowing for expropriation only in the public interest and against fair compensation. In the present case, no public interest has been identified, and the bill does not provide for compensation of the union; (iv) article 42 providing for due process. In the present case, the bill does not provide any tool to file a claim; (v) principle of legal certainty. Property acquired by trade unions about 11 years ago is taken away through this bill, as if it had never existed before, which seriously aggravates their situation. The Constitutional Court, in its Decision No. 9/2007, has stated that legal certainty presupposes the reliance of citizens in the State and the constancy of law for regulated relations. Persons should not continuously be concerned about divergences or negative consequences of legal acts, which could affect their private or professional life, or aggravate a situation deployed by previous acts. The State should seek to change a situation previously regulated only if the change brought about positive consequences. If the measures taken led to deteriorating unreasonably legal situations, denying the rights acquired or ignoring legitimate interests and expectations, the constitutional principle of equality of rights would be violated; (vi) articles 116 and 81 regulating the hierarchy of legal norms. In the present case, the bill amends the Civil Code (legislation with a superior status) as regards credit transfer.

B. The Government's reply

- 137.** In a communication dated 13 January 2010, the Government indicates that, firstly, the conclusion of the BSPSH that since 1992 and up to now the unions have become owners of the assets is incorrect. The 1992 Decree has not been approved, not even by the 1998 Act, and has never acquired the force of law. Act No. 7491 of 29 April 1991 concerning the main constitutional provisions provides as a constitutional requirement that, in order for a decree of the President of the Republic to acquire force of law, it has to be countersigned by the President of the Council of Ministers or the Minister respectively, and it has to be deliberated by Parliament at its next session. It clearly appears, even according to the two unified decisions of the United Chambers of the High Court Nos 85/2001 and 5/2004, that those constitutional requirements have not been met. In the Government's view, as the 1992 Decree has never acquired the force of law, the unions have not obtained the right to own the relevant assets.
- 138.** On the same day as it repealed the 1992 Decree, the Parliament approved the 1998 Act. The Act provides that the agreements concluded between trade unions concerning the division of property up to the date of its entry into force should be legally valid unless otherwise provided in the Act, and that the disputes relating to such agreements should be settled by the courts. The real estate properties earned based on this Act cannot be disposed

of or alienated until 31 December 2020. The Government concludes from this provision that the unions have the right to enjoy and possess the property, but do not own the real estate assets, because they lack one of the prerogatives of the right to property, namely “the right of alienation”. According to the Government, the 1998 Act is transitory in nature – its title illustrates that its objective has been to regulate the effects of the Decree and not a positive definite regulation for the long term. None of its sections provides for a transfer of property from the State to the unions, and in section 6, the legislative authority explicitly uses the term “administration of property”. Also, the examples given in the document submitted by the BSPSH, namely the Act regarding the sale and purchase of land (1995) and the Act regarding the transition in ownership of agricultural land, forests, meadows and pastures (1998), do not concern the same situation as the issue of trade union property. The above laws deny to foreign natural and legal persons the right to buy public or private real estate, invoking the principle of public interest. This does not affect the right of legal owners to dispose of their property to Albanian persons and therefore does not limit their right to property.

- 139.** Secondly, the Government stresses that the 1998 Act expressly prohibits unions the right to alienate properties administered by them, until 31 December 2020, which demonstrates the willingness of the lawmaker not to transfer the right of ownership to the unions, but only to authorize the administration of certain assets of the State. The reason is that a democratic State has the obligation to support the labour movement as a cornerstone of democracy. Being unable to fund in cash, the Albanian State has chosen the path of transferring the administration of State property to trade unions, hoping that this would create enough revenue for the functioning of the labour movement. However, the administration of State property by the unions has to comply with the legislation in force, in particular section 4 of the 1998 Act (obligation to not alienate the property). As it appears, even according to official information requested by the Minister of Justice from the Local Offices of the Registration of Real Estate, the unions have infringed the principles of administration of State property, as stipulated in section 12 of Act No. 8743 of 22 February 2001 regarding State property: “The administration of public real estate shall ensure: (a) the maintenance and guarantee of public interest; (b) the protection of unique characteristics and values of the property; (c) the safeguarding and increasing of the economic value of the property; (d) the maintenance of ecological indices of the real estate unit, according to the principle of greatest public utility”. The breach of this obligation has even been recognized by the United Chambers of the High Court in Decision No. 5/2004, according to which the unions have benefited from the administration of property to ensure the conditions for vacation and recreation of workers, and subsequently, as in the present case, a considerable portion of property has been sold to third parties who have totally changed their destination. For the above reasons, the Ministry of Justice has prepared the bill and the Assembly of Albania has decided on the approval of the bill to repeal the 1998 Act and no longer grant unions the right to administer State property.
- 140.** Thirdly, the Government refers to the unifying Decisions Nos 85/2001 and 5/2004 of the United Chambers of the High Court and Decision No. 24/2002 of the Constitutional Court, which have rejected the claims of the BSPSH to recognize any legal effect to the 1992 Decree. In its view, this means that the courts have made a definitive interpretation that the unions never acquired the right to property and that the State is the sole owner of such property.
- 141.** Fourthly, the Government indicates that the bill regulates the legal effects arising from the repeal of the 1998 Act. Section 2 deals with the obligation relationships created by trade unions with third parties, including contracts signed between them, and refers to the Civil Code as regards the right to enjoy and possess immovable property. This is a general reference aimed to signal that the object of the bill is not to deviate from the general rules existing under the Civil Code, and does not infringe any, not even constitutional, property

rights. With reference to section 466 of the Civil Code, which allows for the execution of the obligation to another person than the creditor (creditor substitution), section 3 deals with trade union credits to ensure the execution of the obligation by third parties in favour of the real owner, the State. Up to now, via the 1998 Act, the State as a creditor has authorized the unions in their quality as persons authorized by the creditor, to debit the income generated by the assets. Cases of representation without right by the trade unions are taken into account, i.e. cases where unions have committed legal acts going beyond the rights granted to them by law on behalf of the State, which as a result has created credits to which the State is entitled. The wording of section 3 is in substance a subsequent approval of the credit and their collection. Regarding cases where the trade unions are the debtors, inasmuch as the unions have not been the de jure owners of the immovable property, every action undertaken by the third parties is invalid and does not create any legal effect for the State. The obligations arising need to be settled case by case in court against the unions at the request of third parties. Should the State be brought before the court as a party, the complaint would be irreceivable since the legal action creating the obligation is contrary to the law and thus null and void.

- 142.** Fifthly, all allegations of violation of the Constitution are based on the claim that the unions have acquired the right to property, which is not the case, as illustrated by Decision No. 24/2002 of the Constitutional Court, according to which the 1992 Decree is non-existent and thus has no legal effect. According to the Government, it is the right to administer State property that is being removed by the State as the legitimate owner, due to poor administration. The provisions mentioned in the complaint concern property rights and as a result cannot be used to argue the non-compliance of the bill, which does not affect the right to property.
- 143.** Regarding the alleged violation of the principle of legal certainty, the Government refers to the law of the European Union, according to which this important principle is closely linked to the principle of legitimate expectations and the prohibition of retroactivity, and enumerates certain cases recognized as infringing the principle: (1) lack of publicity of the law; (2) abuse arising from retroactivity; (3) ambiguity of legislation; (4) adoption of conflicting legislation; (5) adoption of legislation requiring contributions going beyond the possibilities of the persons concerned; (6) frequent changes of the law; (7) incompatibility between the objective of the lawmaker and those who apply the law; and (8) law of temporary character. In the Government's view, the bill does not meet any of these criteria.
- 144.** The Constitutional Court, in its Decision No. 26/2005, has considered that the principle of legal certainty presupposes the faith of citizens in the State and the invariability of laws as regards regulated issues. Citizens should not live in constant fear that normative Acts could change to the worse as compared to previous Acts. However, the principle is not applicable where the certainty regarding a legal situation is not justified and cannot possibly be met. Also, the Constitutional Court has emphasized that the principle cannot prevail in all cases, for instance a public interest can easily take priority. The principle of legal certainty cannot eliminate all negative consequences that might arise for individuals through new provisions because it is indivisible from the principle of the welfare state. The Government concludes that the bill is not unconstitutional, owing to the existence of a prevailing public interest and because the bill does not aggravate the property situation of the trade unions, since they have never acquired the right to the property but only the right to administer it. The benefit of a right granted by a legally invalid Act is not protected by the principle of legal certainty. The State has merely deprived subjects that have mismanaged its property of the right to administer it, in line with the principle of legal certainty which, in fact, demands to restore violated laws.
- 145.** Sixthly, the Government refutes the alleged violation of articles 116 and 81bis of the Constitution concerning the hierarchy of normative Acts, because section 3 of the bill

refers to the provisions of the Civil Code without deviating from it. The reference is appropriate, since through the withdrawal of the right of administration, the unions have lost their quality as “the person authorized by the creditor” provided for under the Civil Code, and thus the obligations have to be executed in favour of the creditor, i.e. the State.

C. The Committee’s conclusions

146. *The Committee notes that, in the present case, the complainant organization alleges that in 2007 both Albanian trade union confederations were expelled from their premises and not permitted to pursue their activities. The complainant further alleges that a bill to confiscate the assets of all Albanian trade unions was approved by the Council of Ministers and is expected to be passed for approval to the Parliament in September 2009.*
147. *The Committee notes that, on 5 June 1992, the President of the Republic issued Decree No. 204 concerning the property of Albanian trade unions (hereinafter, the 1992 Decree), which needed to be ratified by Parliament. According to this Decree, the movable and immovable property of the former Professional Union that served for trade union activity and professional education of employees, was to be owned by the trade unions and should be divided among them by agreement. On 6 May 1998, the Albanian Parliament decided not to ratify the 1992 Decree, and approved Act No. 8340/1 to regulate the consequences rising from the implementation of the 1992 Decree (hereinafter, the 1998 Act).*
148. *The Committee also notes that, according to the complainant, the objective of the new bill is to confiscate the property of Albanian trade unions. The BSPSH emphasizes that, although the Albanian Parliament decided not to ratify the 1992 Decree, the trade unions have, as of 1992, enjoyed and possessed freely the former Professional Union’s properties. In accordance with section 149 of the Civil Code, the right to enjoy and possess objects freely, within the provisions of the law, is an owner prerogative. According to the complainant, the trade unions therefore became owners of the property in 1992. As clearly illustrated by the wording of several provisions, the 1998 Act transfers the former Professional Union’s property to the Albanian trade unions and recognizes them as the sole owners of these assets. The complainant adds that the legal restriction of the right to alienation of the immovable property of the unions (section 4 of the 1998 Act) does not infer that the trade unions are not entitled to the right of property. In line with the definition of ownership in section 149 of the Civil Code, the right to possession can be restricted by law without entailing the loss of right to ownership. The complainant concludes that section 4 rather seeks to protect trade union property from any abuse until the financial consolidation of the organization. In addition, according to the complainant, Decision No. 85/2001 of the High Court provides that, when the interests of former owners who benefit from restitution of buildings or land under the Act of 1993 clash with the interests of unions that have acquired such buildings or land according to the 1992 Decree (the consequences of which are regulated by the 1998 Act), priority will be given to the interests of former owners, which means that the 1998 Act is applicable to the extent it does not conflict with the Act of 1993. The complainant maintains that the decision is based on the understanding that the ownership by the unions of the property that the State has decided to transfer to them is not at issue. Finally, the complainant contends that the principle of legal certainty is violated by the fact that property acquired by trade unions 11 years ago is taken away through this bill, as if the unions’ rights thereto had never existed before, which seriously aggravates the situation of the unions. The trade unions, in their quality as owners of the properties, have signed agreements giving rise to rights of credit or other rights to their benefit that are exclusive. The bill creates an unfavourable financial situation for trade unions (state of bankruptcy) because it divests them of one of their main sources of funding, i.e. the revenues from immovable properties, by providing that the State has the right to cede to itself the right of credit, while obligations are consigned to the unions.*

- 149.** *The Committee notes the Government's contention, however, that the conclusion of the BSPSH that the unions have become owners of the assets is incorrect. The Government adds that, under articles 28(19) and 29 of the 1991 Constitution, decrees of normative character issued by the President of the Republic in urgent cases need to be submitted for approval to the people's assembly at its nearest session and countersigned by the chairman of the Council of Ministers or by the respective minister. The Government stresses that neither of the two constitutional requirements were fulfilled in the case of the 1992 Decree. Thus, as illustrated by Decisions Nos 85/2001 and 5/2004 of the High Court and 24/2002 of the Constitutional Court, the Decree did not acquire the force of law. The courts have thus made a definitive interpretation that the unions have not acquired the right to property and that the State is the sole owner of such property. The Government also concludes from section 4 of the 1998 Act that the unions, while having the right to enjoy and possess the real estate properties, do not own them because they lack a prerogative of the right to property, "the right of alienation". The Act is transitory in nature, since its objective has merely been to regulate the effects of the 1992 Decree and not a positive definite regulation. None of its sections provide for a transfer of property from the State to the unions, and in section 6, the legislative authority explicitly uses the term "administration of property". These provisions demonstrate the decision of the lawmaker not to transfer the right of ownership to the unions, but only to authorize the administration of certain assets of the State to support the labour movement. In addition, the administration of State property by the unions had to comply with section 4 of the 1998 Act (obligation to not alienate the property). According to official information and High Court Decision No. 5/2004, the unions have infringed the principles of administration of State property and sold a considerable portion of the properties to third parties who have totally changed their destination. The right to administer State property is therefore being removed from the unions by the State as the legitimate owner, due to poor administration. According to the Government, the bill regulates the legal effects arising from the repeal of the 1998 Act. In cases of trade union credits, the obligations of third parties have to be executed in favour of the creditor and real owner (the State), since the unions lose their quality as "person authorized by the creditor" through the withdrawal of the right to administration. In cases where unions are the debtors, every action undertaken by third parties is null and void and does not create any legal effect for the State, as the unions were not the de jure owners of the property. Finally, regarding the alleged violation of the principle of legal certainty, the Constitutional Court has emphasized that the principle is not applicable where the certainty regarding a legal situation is not justified, and that it cannot prevail in all cases, for instance a public interest can easily take priority. The Government concludes that the principle is not infringed because there is a prevailing public interest and the bill does not aggravate the property situation of the trade unions, since they have not acquired the right to property but only the right to administer it, and the right granted by a legally invalid act is not protected.*
- 150.** *While both parties to the complaint agree that the 1992 Decree was not ratified by Parliament and has thus never acquired the force of law, as illustrated by Decisions Nos 85/2001 and 5/2004 of the High Court and No. 24/2002 of the Constitutional Court, their conclusions as to whether the unions have acquired the full rights to the property in question diverge. The Committee, however, notes the complainant's indication that a certain number of elements may have given rise to expectations on the part of the unions as to the validity of this first legal regulation of the ownership of assets of the former Professional Union, which was dissolved after the dictatorship, for example: according to its section 4, the 1992 Decree enters into force immediately; the required submission for approval to Parliament at its nearest session actually only occurred six years later; the title of the 1998 Act ("On the regulation of the circumstances rising from the implementation of the Decree") recognizes the existence of certain effects deployed by the Decree during the six-year period prior to its repeal; and the unions have freely enjoyed and possessed the relevant properties since 1992.*

151. *Looking at the historical background of this case going back to the dissolution of the Professional Union in 1992, the Committee wishes to recall that it has previously had the occasion to review questions of the assets of trade unions dissolved following transition periods. In this regard, the Committee has accepted the criterion that, when an organization is dissolved, its assets should be provisionally sequestered and eventually distributed among its former members or handed over to the organization that succeeds it, meaning the organization or organizations which pursue the aims for which the dissolved union was established, and which pursue them in the same spirit [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 706]. The Committee has repeatedly pointed out that, when a union ceases to exist, its assets could be handed over to the association that succeeds it or distributed in accordance with its own rules; but where there is no specific rule, the assets should be at the disposal of the workers concerned [see **Digest**, op. cit., para. 707]. With regard to the issue of the distribution of trade union assets among various trade union organizations following a change from a situation of trade union monopoly to a situation of trade union pluralism, the Committee has emphasized the importance it attaches to the principle according to which the devolution of trade union assets (including real estate) or, in the event that trade union premises are made available by the State, the redistribution of this property must aim to ensure that all the trade unions are guaranteed on an equal footing the possibility of effectively exercising their activities in a fully independent manner. It would be desirable for the Government and all the trade union organizations concerned to make efforts to conclude as soon as possible a definitive agreement regulating the distribution of the assets of the former trade union organization [see **Digest**, op. cit., 2006, para. 708].*
152. *The Committee now observes from the Government's reply that, since the filing of the complaint, the Assembly of Albania has approved the bill denounced by the complainant. The Committee also notes that both the complainant and the Government cite Decisions Nos 85/2001 and 5/2004 of the High Court and Decision 24/2002 of the Constitutional Court as relevant to the case. It requests the Government to supply the texts of the new law as adopted as well as of the relevant court rulings.*
153. *More generally, however, the Committee cannot but express its regret at the lack of consultations before and during the adoption process of this bill that could have an impact on workers' organizations, affecting their stability and their capacity to carry out trade union activities. Despite several attempts the complainant claims to have made to open the dialogue, national trade unions were apparently not able to give their views at the sitting of the parliamentary committee where the bill was examined. In this regard, the Committee wishes to emphasize the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights [see **Digest**, op. cit., para. 1074].*
154. *The Committee recalls that its mandate consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions. It is therefore not within its mandate to give an opinion as to the nature of the property right acquired by the complainant following the dissolution of the professional union, especially as regards the question of the right of alienation of the property. The Committee wishes to emphasize, however, that it would have been more conducive to harmonious labour relations in the country as well as to the stability of the trade union movement as a whole had the precise nature of these rights been determined at the time of transition and in full consultation with all the interested parties.*
155. *Given the contradictions between the complainant and the Government as to the nature of the rights acquired to the property in question, the Committee urges the Government, in keeping with the principles of tripartism and social dialogue, to enter into full and*

meaningful consultations with the relevant social partners with a view to finding a mutually acceptable and definitive solution with respect to the property in question, thus clarifying the rights and responsibilities and ensuring that the trade unions in the country may carry out their activities in full knowledge thereof. Given that the administration of property was likely to constitute an important means by which the trade unions were able to effectively function and defend the interests of their members, as stated by the Government itself in its reply, the Committee expects that the solution found with respect to the question of trade union property will ensure that the unions have available to them the necessary means to pursue their legitimate trade union activities. Bearing in mind the extremely negative consequences that a total and definitive removal of any rights to these assets entails for the complainant and for the Albanian trade union movement as a whole, the Committee requests the Government to undertake the necessary consultations without delay and to keep it informed of the outcome of these discussions.

- 156.** *The Committee further notes that the BSPSH alleges that in August 2007, the two national trade union confederations were expelled from their premises and have not been permitted to exercise their normal activity. Given the scarcity of the information available to it in relation to the alleged 2007 expulsion and any measures impeding the confederations from carrying out their legitimate trade union activities, it is unclear to the Committee whether the expulsion was in any way linked to the Government's contention that the confederations had acted beyond their lawful rights under the 1992 Decree and 1998 Act or wholly independent thereof. In view of the serious nature of these allegations and their relevance to the case as a whole, the Committee requests the complainant organization to provide supplementary and up-to-date information in this regard and urges the Government to reply fully in respect of both of these allegations.*

The Committee's recommendations

- 157.** *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 supply the texts of the new law relating to trade union assets as adopted, as well as of Decisions Nos 85/2001 and 5/2004 of the High Court and Decision No. 24/2002 of the Constitutional Court.*
 - (b) The Committee urges the Government, in keeping with the principles of tripartism and social dialogue, to enter into full and meaningful consultations with the relevant social partners, with a view to finding a mutually acceptable and definitive solution as regards the property in question, thus clarifying the rights and responsibilities and ensuring that the trade unions in the country may carry out their activities in full knowledge thereof. Given that the administration of property was likely to constitute an important means by which the trade unions were able to effectively function and defend the interests of their members, as stated by the Government itself in its reply, the Committee expects that the solution found with respect to the question of trade union property will ensure that the unions have available to them the necessary means to pursue their legitimate trade union activities. Bearing in mind the extremely negative consequences that a total and definitive removal of any rights to these assets entails for the complainant and for the Albanian trade union movement as a whole, the Committee requests the Government to undertake the necessary consultations without delay and to keep it informed of the outcome of these discussions.*

- (c) *Given the serious nature of the allegations that the two national trade union confederations were expelled from their premises in 2007 and have not been permitted to exercise their normal activity, and their relevance to the case as a whole, the Committee requests the complainant to provide supplementary and up-to-date information in this regard and urges the Government to reply fully in respect of both of these allegations.*

CASE No. 2660

INTERIM REPORT

Complaint against the Government of Argentina presented by

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

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

- 158.** The complaint is contained in a communication from the Congress of Argentine Workers (CTA) and the Association of State Workers (ATE) of July 2008. The CTA sent additional information in communications dated May 2009 and February 2010.
- 159.** In communications dated 22 September and 7 October 2008, and 20 July 2009, the Government requested additional information from the complainant organizations to enable it to send its reply. The said information was sent to the Government on 11 March 2010. As the Government has not replied, the Committee has had to postpone the examination of the case on two occasions. At its meeting in May–June 2010 [see 357th Report, para. 5], the Committee issued an urgent appeal to the Government, stating 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 even if the information or observations requested had not been received in due time. The Government has sent its observations in a communication dated August 2010.
- 160.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 161.** In their communication of July 2008, the CTA and the ATE allege that, on 23 June 2008, at around 11.15 p.m., Mr Pablo Micheli, Deputy Secretary-General of the CTA and Secretary-General of the ATE, was abducted for an hour and a half. On the aforementioned day, while at the entrance to his home in Lanús, in the province of Buenos Aires, he was approached by four well-dressed men, around the age of 30, with short hair and armed with guns, who forced him to leave his vehicle and get into another one being used by the kidnappers. After covering his head with a black cloth, they forced him to get into the van

with a group of them, while another group took the ATE's car, which had been allocated to the Secretary-General.

162. The complainant organizations add that Mr Micheli stated in the criminal complaint: "They made it clear that they knew the names of my wife and children. It was not an unplanned abduction; they clearly knew who I was and they warned me not to lodge a complaint." It was a crime carried out by professionals because they were armed and knew what they were doing. They were not drugged or drunk; they were well dressed and were in a four-wheel drive van. Threats were made to stop Mr Micheli from talking or taking any further action. One indication to suggest that this was not an ordinary criminal act was that they took his credit cards and the pin code and then returned them to him with nothing missing. Finally, Mr Micheli was left in Villa Domínico, a district in the south of Greater Buenos Aires.

163. The CTA and ATE indicate the most important passages of the complaint lodged with the Public Prosecutor of Investigation Unit No. 14 of the Judicial Department of Lomas de Zamora within whose area of jurisdiction Mr Pablo Micheli's home is located and where the events occurred, which read:

At that moment, I was cut off by a four by four from which at least three people got out, as far as I can recall, who pointed high-calibre weapons at me; I think that they were nine millimetre guns. I told them to take the car and not to shoot me. They told me that they wanted to take me with them and that is what they did, making death threats while I got into the four by four. The attackers were young people, did not look older than 30, were very well dressed, well spoken and did not seem drugged or drunk. They said that they knew me, that they knew who I was, that I was a "trade unionist" and that I should "stop ..." or something along those lines; they continuously referred to my work as trade unionist. They made it perfectly clear that they not only knew my daily movements but also those of my whole family and that I should "stop being such a nuisance", which I took to be a clear reference to my public work as a trade union representative. While this was going on, we were driving around in the van for about an hour and a half and this led me to fear what would happen to me as well as to my family. After about an hour and a half, they let me go in Villa Domínico, roughly 20 blocks from avenida Mitre.

I cannot understand the point of the attack as such because, although they took away my bank card and asked me for the pin code, it seems that they were not used and nothing was taken. That is why I think it was a crime of coercion to restrict my trade union activity, bearing in mind that my trade union independence – as the workers' representative – is not considered to be aligned with the Government or the sectors that oppose it, especially given the recent conflict with the agricultural organizations.

To date, these are the only conclusions I have been able to draw and that is why, once I recovered from the shock that this incident naturally caused, I went straight to the Public Prosecutor to report what had happened, given that it might be relevant to the investigation into the crime, since in my opinion it was not simply a theft but an act of grave coercion linked to my trade union activity.

164. The complainant organizations point out that, whatever the purpose ultimately put forward by the Government, the State must carry out the investigations and procedures sufficiently quickly in order to track down effectively those responsible for planning and perpetrating such acts; similarly, access to justice must be quick and effective in order to find the perpetrators. This is all the more important as it involves the Deputy Secretary-General of a workers' federation and Secretary-General of one of the most important trade unions in the country.

165. In its communication of May 2009, the CTA states that, although the case has been reported to the legal authorities and also the competent political authorities, who undertook to make available all the means and resources needed to resolve the case immediately, and despite the seriousness of the matter, no progress had been made in the case. Neither

Mr Pablo Micheli nor the CTA have received any kind of communication from the Executive Branch that might suggest that something is being done to resolve the case or that the government authorities are fulfilling their legal obligations or honouring the undertaking referred to above.

166. By means of a communication of February 2010, the CTA reports that the complaint lodged with the Prosecutor's Office No. 14 of the Judicial Department of Lomas de Zamora, in respect of the abduction of Mr Pablo Micheli on 23 June 2008, is being processed under preliminary criminal investigation No. 862519 by Supervisory Court No. 18 of the aforementioned judicial department.

B. The Government's reply

167. In its communications of 22 September 2008, 7 October 2008 and 20 July 2009, the Government states that information regarding the number of the case and the investigation into the complaint is required so that the Prosecutor's Office involved (which has already been consulted) can identify the act and submit the information it considers relevant. The Government adds that only if this information is provided will it be able to go ahead with the relevant consultations and provide a satisfactory reply concerning the complaint of the alleged infringement of trade union rights by the Argentine State. In its communication dated August 2010, the Government indicates that it has requested the Prosecutor's Office to provide it information about the case. However, the Prosecutor's Office responded that there was no individual file containing the information alleged by the trade union. The Government informed the CTA accordingly.

C. The Committee's conclusions

168. *The Committee notes that in this case the complainant organizations allege the temporary abduction (for an hour and a half) with the aim of causing intimidation because of his trade union activity of the CTA's Deputy Secretary-General and the ATE's Secretary-General, Mr Pablo Micheli, on 23 June 2008. The complainant organizations point out that the abduction took place at the entrance of Mr Micheli's home by an armed group, whose members said that they knew the names of his spouse and children, and that during the abduction they threatened him in order to stop him from talking or taking action.*
169. *The Committee notes that, since the complaint was referred to the Government, the latter requested the case number of the criminal complaint to enable it to submit the relevant information. The complainant organization sent the information concerning the number of the case in February 2010. Nevertheless, in its recent communication, the Government indicates that there is no individual file containing the information provided by the trade union.*
170. *Under these circumstances, taking into account the seriousness of the allegations, the Committee urges the complainant organization to provide precise information and further details about the complaint lodged with the Prosecutor's Office, in order to enable the Government to communicate information about any progress in the investigation that is said to be under way regarding the abduction of the trade union leader, Mr Pablo Micheli. Moreover, the Committee further requests the Government to carry out an investigation concerning the allegations and expects that those responsible for planning and perpetrating the abduction will be severely punished. Moreover, should Mr Micheli request it, the Committee requests the Government to provide him with the protection deemed necessary to guarantee his personal safety.*

The Committee's recommendation

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

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

CASE No. 2726

INTERIM REPORT

Complaint against the Government of Argentina presented by the Argentinean Building Workers' Union (UOCRA)

Allegations: The complainant alleges the violent occupation and theft of materials from its headquarters in the city of Comodoro Rivadavia, in the Province of Chubut, a firearms attack on the home of an UOCRA leader and on a union headquarters building, temporary detention of leaders and workers who took part in a protest, temporary kidnapping of a UOCRA leader, etc.

172. The complaint is contained in a communication from the Argentinean Building Workers' Union (UOCRA) dated 6 July 2009. UOCRA sent further information in a communication dated 16 July 2009 and more allegations in communications dated 14 August and 1 December 2009.

173. The Government sent its observations in a communication dated 27 May 2010.

174. 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 allegation

175. In its communication of 6 July 2009, UOCRA states that it is making a formal complaint against the Argentinean Government and the Province of Chubut for violation of the principles of freedom of association. UOCRA states that it is a primary trade union organization that operates throughout Argentina. The scope as to categories of persons and

geographical area covered by it come under the terms of the official trade union status, which was granted to the organization under section 17. Law No. 23551 and its regulatory Decree No. 467, both passed in 1988, are the source of regulation for workers' trade union associations. This legal agreement comes under the federal authority's regulatory powers and is applied in an exclusive and excluding manner throughout the country. UOCRA states that it is making this clarification because, for the purposes of the complaint, it should be pointed out that Argentina has a federal system and comprises 23 provinces and an autonomous city, which are autonomous districts that exercise all the powers that have not been delegated at the federal level. Standards relating to trade unions and trade union activities have remained under the competence and control of the federal authorities.

- 176.** UOCRA emphasizes that the scope of its representation is national. The legal basis for its representation originates in the standards mentioned and in the instrument registering official trade union status. This accords exclusive representation to UOCRA for all construction workers, and it has duly demonstrated that it is a sufficiently representative organization by the number of its members throughout Argentina. While no dispute has arisen that questions this status of being sufficiently representative, no other bodies or non-members of UOCRA can be authorized to carry out trade union activities under current legislation.
- 177.** UOCRA indicates that the alleged incidents were carried out at the request and instigation of the Chubut provincial authorities, and with their consent and participation. UOCRA states that, as will rapidly be deduced from the events described below, actions and practices that infringe on the exclusive rights of the organization have occurred and continue to occur at the provincial level, with the highest authority and Chubut provincial executive authority officials with competence in labour relations compromising trade union autonomy and, as a result, the principles and guarantees of freedom of association. This situation has been affected and made worse by the intervention of the representative of the federal administrative labour authority who, together with the provincial labour authority: (1) firstly adopted an administrative decision in an alleged labour dispute that was non-existent and was in fact a criminal offence of usurpation – the violent occupation of the headquarters of a branch of UOCRA; and (2) secondly, conferred de facto legitimacy to a group with no representation but which ended up being endorsed by the Chubut provincial authorities.
- 178.** The complainant adds, moreover, that the federal administrative authority representative was not authorized to receive the keys of a building owned by UOCRA, as there was a court order to return them to their legal owner, the trade union. Ultimately, the national Government should take responsibility and guarantee freedom of association to all extents and purposes, as stated by the Committee on Freedom of Association.
- 179.** UOCRA also states that actions aiming to discredit it and hamper the free exercise of its trade union functions originated at the highest levels of the provincial government. The malicious intention of such actions was to encourage the creation of a new local body to be organized and to act in conformity with the authorities' wishes. It should be mentioned that UOCRA respects the free expression and decisions of the workers, but it warns that this right is being manipulated by the authorities. Therefore, from the point of view of freedom of expression, this is illegal because the will of the workers has been distorted by the authorities because it was done through unlawful violent acts.
- 180.** According to the complainant, the provincial authorities have been involved, whether through action or negligence, in perpetuating an extreme situation, including by supporting the violent occupation of the headquarters building of a branch of UOCRA and by a series of actions and offences of varying magnitude, all aimed at excluding UOCRA from the provincial arena and preventing it from exercising legitimate rights to defence and

representation on behalf of its construction worker members. The Governor of the Province of Chubut, under the pretext of an objective analysis of the situation but actually in his own political interests, hampers the professional development of UOCRA, publically discredits its leaders and questions its actions and methods. He does not do this in a detached and disinterested way, however; he does it at the same time as encouraging the creation of a new trade union that acts in his interests. In this situation of abuse and suppression of freedom of association, the Governor has made public statements, saying: “Gone is the complicity between unscrupulous employers and trade union officials, trade unionists that negotiate behind the backs of the workers: they are the ones that discredit genuine trade union organizations acting in defence of the workers, unions formed of responsible and rational men who can feel on an equal footing with their employer and discuss relevant matters. Gone are unfair and arbitrary candidate selections, of whoever they may be. I have said this to Gerardo Martínez as it concerns him; he may be secretary of UOCRA, but I am the Governor of all the workers.” (These statements were published in the newspaper, the *Diario de Madryn*, on Friday, 26 June 2009.)

- 181.** UOCRA states that what he did not say was that he agreed to the violence, the coercion and the attack on the lawfully constituted trade union. UOCRA indicates that the Governor of the Province of Chubut seems to consider himself the “owner” of the workers of the province that he governs and that he has the right to decide “who” should represent them and “how that should be done”; as if that is not enough, he also offends UOCRA officials and trivializes the lawful representation of the officials elected directly by all UOCRA members, who account for 75 per cent of registered construction workers.
- 182.** UOCRA states that, because of the nature of the complaint, it should be categorized as serious and urgent, with the consequences that that implies. This is a serious violation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and of the 1952 resolution of the International Labour Conference concerning the independence of the trade union movement. UOCRA adds that it is a primary trade union organization (its members are individual workers throughout Argentina). In accordance with the provisions of Chapter XIV of the Social Statutes, its work in the different areas is done through its branches and divisions. In the Province of Chubut, the Comodoro Rivadavia branch, among others, has been in existence for a long time. This branch includes workers from that particular area of the province.
- 183.** The complainant alleges that the violent occupation of the building that functions as a trade union headquarters – located at Rawson 1405, Comodoro Rivadavia, Chubut Province – took place on 12 March 2009. This was promptly reported to the local criminal justice authorities and a claim – that the municipal, local and national officials have not acted on – was lodged with the authorities concerning illegal deprivation of liberty, usurpation and damage to property, all as actual concurrent offences, before the Criminal Court in case No. 20571, entitled *Muñoz, Sergio J. concerning UOCRA claim of usurpation*, court application No. 2493. It is worth mentioning that, as a result of this violent action, which lasted more than 30 days, the defence of the rights of the construction workers of the area was seriously compromised because of the unlawful and abrupt ceasing of trade union activities, caused by the non-permitted entry and continued presence of an armed group in the abovementioned headquarters and nearby streets.
- 184.** In addition to being deprived of the use and the enjoyment of its property, UOCRA suffered the following consequences as a result of the violent occupation of its headquarters: (a) discontent from the community over, among other things, the difficulties experienced by residents because of vandalism and police barriers; (b) the destruction and breakage of different items in its property, such as computers, furniture and the building itself; (c) the misappropriation of documents and valuables; and (d) the damage to other

institutions near the headquarters, which affected, for example, the daily running of a health-care institution providing services for construction workers and their families.

- 185.** The complaint draws attention to the local court's delay in ordering the eviction. The Public Prosecutor's Office requested an eviction order from the judge, but she turned it down. Faced with the provincial criminal courts' clear lack of willingness to evict the usurpers, an application for *amparo* (protection of constitutional rights) was brought (*UOCRA v. Fernández Darío and others* concerning application for *amparo*, dossier No. 141/2009, before Civil and Commercial Court No. 1 of the Comodoro Rivadavia district). As a precautionary measure, the court's presiding judge ordered the return of the building to UOCRA, instructing the head of the provincial police force accordingly. Following the operational difficulties expressed by the police, owing to a lack of staff and the impossibility of maintaining order for a period of time that could be extended or extensive, the action was carried out after a longer-than-usual delay, which once again revealed the provincial authorities acting in their own interest and interfering. Not satisfied with meddling in the business of the trade union, the authorities tried to do the same to the judicial body, even infringing the separation of powers, by doing everything possible to postpone the fulfilment of the judge's orders. No other conclusion can be arrived at if it is taken into account that, in order for an eviction to be carried out, the courts need the assistance of the provincial police, which is under the direct control of the provincial authorities.
- 186.** The eviction did not happen and UOCRA was badly affected when the usurpers gave the keys of the trade union premises, the building that had been vandalized by them, to the federal administrative labour authority. Subsequent legal action was necessary to make the Ministry allow access to the abovementioned building. UOCRA always requested a complete investigation of the events and the identification of the persons that had usurped the trade union headquarters building and it submitted all the evidence available to it, through the correct legal channels, to the judicial authorities. However, the provincial authorities did not have the same attitude, despite knowing that many of them were not construction workers, and that the reasons for the usurpation were clearly political and unrelated to the trade union. The usurpers clearly relied on the consensus and support of the authorities whose leader, confidently and in his own interest, promoted and used the press to demonstrate his liking and preference for that group, and did not condemn in any way the vandalism and unlawful criminal acts of the persons used to achieve his aim of chasing UOCRA from the province.
- 187.** Once again, the provincial labour authorities sanctioned this group, letting it take part in labour policy through site inspections that, shockingly, were not limited to the specific geographical area of its place of work, the Cerro Dragón, but which took place throughout Comodoro Rivadavia, in the Province of Chubut. Once again, this showed their clear intention of pushing out the UOCRA union. Showing his preference and allegiance, the Governor intervened directly into the trade union's activity in the province, in violation of all the rules of freedom of association, and encouraged the establishment of provincial trade unions that followed his political agenda.
- 188.** UOCRA adds that, at about the same time, and as another example that the authorities' endorsement of vigilante justice over the law causes more violence, on 10 June, the house of the head of the Comodoro Rivadavia branch of UOCRA, Mr Ricardo Luis Cheuquepal, was attacked. Unknown persons shot high-powered weapons at the house (located in the Trespinos area) while his youngest children were at home.
- 189.** UOCRA asks the Chairperson of the Committee on Freedom of Association to request a preliminary direct contacts mission to raise awareness of the relevant principles of freedom of association and the procedures of the International Labour Organization, and to gain an

informal overview, on the ground, of the circumstances that have been brought to the Committee's attention. At the same time, and separate from the conclusions reached with regard to the abovementioned request, UOCRA requests the Chairperson of the Committee on Freedom of Association, to communicate the above –without further delay and as a matter of utmost seriousness – and ask the Government of Argentina to agree to the sending of a direct contacts mission, which should focus its cooperation efforts on the situation of freedom of association in the Province of Chubut and, through the national authorities, ensures the full enjoyment of the rights and guarantees of freedom of association in Chubut, compensating for the consequences of past actions, immediately ceasing current actions, and ensuring that such actions do not happen again.

- 190.** In its communication of 16 July 2009, UOCRA alleges further actions linked with the violations of freedom of association duly communicated to the Committee. According to UOCRA, there are additional circumstances and further incidents that confirm the extreme seriousness of the account given, demonstrating the Governor's encouragement of the formation of violent groups and his support of them as part of an attempt to promote the establishment of a new trade union that acts in accordance with his local and national political interests.
- 191.** UOCRA adds that, in addition to the events reported in its submission of July 2009 and in view of the upcoming closure of a political campaign that he was directly involved in, the Governor of the Province of Chubut took part in a public event to support the campaign. During this event, the violent groups showed their support. These are the groups, duly reported above, that are trying to exercise de facto trade union representation of construction workers. He was probably thanking them for their support and showing his in turn, linking his policies with the new trade union. The political and economic support is obvious. Those that would accept the new trade union have shown it in public, as stated in this newspaper report: "The head of Los Dragones yesterday received the strong support of Governor Mario Das Neves to establish a new trade union for construction workers that will be separate from UOCRA" (as reported in the *Crónica* daily newspaper). Further on in this report it states: "The Governor was the only one who supported us until now and this is why we are confident that he will know how to resolve the issues that may arise in this difficult fight."
- 192.** UOCRA alleges that, in addition to the events described above, there has been a new development that is as much or even more serious. According to UOCRA, this was part of a plan to persecute its leader using political and trade union means, with the aim of excluding it from the Province of Chubut and replacing it with the trade union favoured by the local authorities, which is suggestible and acts in their interests. In a surprising move that shows the clear control that the authorities have over the judiciary, and their disregard for fundamental republican guarantees, there was an attempt to relaunch an old criminal case against members of the Puerto Madryn branch of UOCRA, which had been thrown out of court.
- 193.** In particular, at the instigation of the authorities, local criminal justice officials have infringed, in each and every headquarters building, guarantees under due process, reopening a criminal case that, at the time, was closed, with the single aim of politically persecuting the General Secretary of the Puerto Madryn branch of UOCRA and attempting to imprison him. In an attempt to justify such actions, the Public Prosecutor's Office argued that it had "made a previous error" and, going back on steps it had already taken, submitted the issue before a clearly incompetent judge, removing the case from the general jurisdictional court and disregarding other, extremely relevant, points, such as: full freedom of association; the existence of privileges for express constitutional and legal obligations; the need for specific and separate proceedings; and the powers of UOCRA, among others.

- 194.** As can be seen, the actions described amount no more and no less to an attempt to infringe the standards of the constitution of Chubut and the *non bis in idem* principle, which is enshrined in the national Constitution of Argentina. Aside from that, a shocking lack of impartiality and independence has been shown by the judiciary, which does not hesitate to demonstrate its functions and its loyalty to the authorities by assisting them in their assault, not only against a trade union, but against freedom of association itself. This cannot and must not be tolerated, especially since it is similar to suspect practices that have caused such harm in Argentina.
- 195.** According to UOCRA, it emerges from the facts described that the authorities know no limits in interfering and attempting to increase interference in its trade union autonomy. A campaign has been put together to persecute UOCRA and its leaders that involves interference by the justice system and inaction and a lack of collaboration by the political authorities in the face of violence towards the leaders and their families and trade union property. All of these actions are clearly aimed at promoting and establishing a new trade union that is controlled by the provincial government.
- 196.** UOCRA alleges that all of the conduct and practices discussed have had an immediate effect. Appeals by several prominent figures from the province, including employers, about the attempted discrediting and criminalizing of UOCRA in order to benefit a new trade union, led them to also falling victim to criminal acts of violence. In the absence of an investigation into or condemnation of the actions against UOCRA, and with the consent of the provincial authorities, who turned a blind eye, several businesses began to fall victim to the new trade union's violent practices that were aimed at imposing its so-called representatives. Even the Comodoro Rivadavia council did not escape the violence and vandalism by the groups associated with the new trade union who, brandishing firearms, invaded the municipal headquarters, destroyed furniture and detained people for a considerable period of time.
- 197.** According to UOCRA, all of these events clearly show that the local authorities' aim is nothing less than violating trade union autonomy, excluding UOCRA representation from the province and creating a trade union that is suggestible and sympathetic to its political interests and carries out violence that they cover up.
- 198.** In its communication of 14 August 2009, UOCRA states that, in addition to the events alleged in the complaint, a further event has occurred; namely the use of electronic means by someone identified as being from the Governor's office, referring to a hypothetical presentation given at the International Labour Organization, containing opinions and assessments that are not only damaging to UOCRA but also to members of executives, who have been elected by members in a direct, secret vote. UOCRA considers that this communication brings a very serious fact to the attention of the Committee because, up until the time in question, the violence had been carried out by groups with "official connections" and discussed by the Governor himself. However, in this case, it can be said that the violence originated at the State level and it confirms that the actions taken against UOCRA were orchestrated and covered up by the provincial authorities. According to UOCRA, the person in question is, and has been, a Chubut government official. That is to say, it is a "political commissar" of the Chubut provincial government, not even a senior official of the workers involved in the dispute, who is intensifying violations of freedom of association Conventions and institutions.
- 199.** In its communication of November 2009, UOCRA alleges further events that corroborate its complaint that the authorities of the Province of Chubut, at the request of their highest authority, the Governor of the Province, have planned and carried out a campaign of persecution against local UOCRA leaders and, in particular, the General Secretary of its Puerto Madryn branch.

- 200.** UOCRA indicates that the events, which were limited in number in its initial submission, have increased following the submission of the first complaint. This requires the immediate intervention of the Director-General, with due consultation with the Chairperson of the Committee on Freedom of Association, and a preliminary direct contacts mission should be carried out as a matter of urgency. The justification for this exceptional step is the unusual situation of the Province of Chubut where, not only does official interference in trade union activities take place, but it is becoming more widespread. UOCRA alleges that, on 11 November 2009, approximately 33 workers out of a total of 70 were dismissed. These were construction workers involved in the resurfacing of provincial road No. 2 for the company Dycasa. The workers affected by the company's arbitrary and unilateral decision were: Santiago Carrizo, Marco Ceballos, Mario Bisoso, Luca Paz Galván, Leandro Marfil, Luis Romero, Franco Secco, Orlando Tenorio, Milton Tolava, Darío Valenzuela, Omar Vallejo, Juan Vargas, Gabriel Villegas, Jorge Orrego, Nicanor Carlos, Catriel Pichun, Jorge Pérez, José Peredo, Jorge Franco, José Fuentes, Pablo Huenilian, Andrés Jofre, Rafael Loscar, Nelson Meruglia, César Olivares, Roberto Araya, Walter Busto, Fernández Díaz, Diego Sánchez, Pablo Rivero, Sergio Aciar, Iván Joi and Julio Arévalo.
- 201.** UOCRA states that, following this unilateral and arbitrary move by the company, the workers, honouring the principle of solidarity, decided to protest near the worksite along with their leaders, including Mateo Suárez, General Secretary of the Puerto Madryn branch of UOCRA. UOCRA alleges that the workers, who simply wanted to defend their jobs through this legitimate course of trade union action in the absence of a reply from the company or the government, were subjected to excessive and harsh police repression at the instigation of the provincial authorities. In this way, the right of the workers to assemble and petition was unfairly denied by the provincial authorities, which instructed the chief of the provincial police to suppress and disperse the protestors and imprison their leaders.
- 202.** The complainant indicates that, at this time, the trade union leader, Mr Suárez, who has already been persecuted by the provincial and judicial authorities, was detained, imprisoned and charged with several crimes, such as disregard for the law (article 239 of the Penal Code), blocking a road (article 194 of the Penal Code), and incitement to commit a crime (article 209 of the Penal Code). Mr Suárez was not the only one detained: the animosity of the police towards trade unions was demonstrated once again with the detention of ten other leaders and activists. They were also victims of an excessive police operation that included many officers and a special riot force, the special police operations group. The following persons have been detained: (1) Mateo Suárez, General Secretary of the Puerto Madryn branch of UOCRA; (2) Jonathan Suárez, trade union activist; (3) Benjamín Bustos, trade union activist; (4) Alejandro Jiménez, trade union activist; (5) Richard Villegas, Records Secretary of the Puerto Madryn branch of UOCRA; (6) Eliseo Amaya, Dycasa workers' representative; (7) Diego Paz, trade union activist; (8) Mario Bisoso, dismissed Dycasa worker; (9) Félix Díaz, Dragados y Obras Portuarias SA representative; (10) Carlos Muñoz, Dycasa worker; (11) Darío Valenzuela, dismissed Dycasa worker; and (12) Jorge Franco, dismissed Dycasa worker.
- 203.** UOCRA adds that all these leaders, activists and workers were also hit and shoved by the police. Given this unusual and violent response, and in view of the legitimacy of the demands, the General Confederation of Labour of the Rio Chubut Lower Valley, together with other major unions, expressed their disapproval and repudiation and demanded the release of the detained men in front of the local police station. They were freed as a result.
- 204.** The complainant indicates that, while these events were going on, the Governor of the Province (also the local police chief and controller) did not listen to the complaints or assist in resolving them, but instead ordered brutal suppression and tried to justify it under a pretext that not only turned out to be false, but also demonstrated his open and obvious

enmity towards UOCRA and its leaders. Added to the other events that have been reported in this dossier, this is clear evidence of his favouritism and preference for another trade union. At about the same time that the events described took place, the Governor stated that Mr Mateo Suárez “is not a trade union leader, he is a criminal”. In his attempt to justify his excessive and illegitimate actions, he stated that “we said that we were not going to let him block the road in any way. And for this, legal authorization is not required. Blocking the road is a crime and the police have to be called and they have to take action. If the police are resisted, what happened is an obvious consequence. He resisted the police and broke the law, and so he was arrested. The next step is up to the judge, who will probably release him” (see the 13 November 2009 edition of the newspaper *Diario el Chubut*).

- 205.** UOCRA adds that, following the abovementioned arrests, Mr Miguens, General Secretary of the Trelew branch, was kidnapped in public by persons unknown who held him at gunpoint and threatened the lives of his family. They forced him to make public statements on the radio against Mr Suárez. Once freed, Mr Miguens immediately retracted those statements and reported the events to the police and the court. He named the authorities as responsible for what had happened to him.
- 206.** Lastly, UOCRA states that the authorities tried to create chaos and confusion, facilitating action by armed groups unconnected with UOCRA, which brandished high-powered weapons and threatened the safety of UOCRA leaders, workers and activists. On 18 November 2009, the UOCRA headquarters in Puerto Madryn were attacked and in the afternoon of the same day, the UOCRA headquarters in Comodoro Rivadavia were shot at by supporters of the Governor called “Los Dragones” (“The Dragons”). All of these related events, of institutional importance, demonstrate that the trade union’s existence in the Province of Chubut is at risk and, for this reason, this case should be considered serious and urgent.

B. The Government’s reply

- 207.** In its communication of 27 May 2010, the Government states that this case clearly includes practical, social and labour-related aspects. It concerns an issue that, owing to the nature of the dispute, had consequences at both the federal and provincial levels. It is linked, above all, to the autonomy of the provinces and the relations between the national and provincial authorities; in particular, in this case, the executive authority.
- 208.** The Province of Chubut has been notified about these actions but there has not yet been any response about their exact nature and about the various different instructions arising from them, which should be followed up at the federal level. Therefore, the response is based on the files produced at the national level, but they will be completed when the province provides the relevant information.
- 209.** With regard to the action taken by the national Ministry of Labour, the initial intervention by the administrative labour authority was made at the request of the Governor of the Province, who was aware that the situation could not be controlled by political means. Moreover, it should be pointed out that, during the legal proceedings for usurpation launched by UOCRA, entitled Muñoz, Sergio J. concerning UOCRA claim of usurpation, case No. 20571, the provincial Public Prosecutor questioned the chief of the regional board of the national Ministry of Labour for Comodoro Rivadavia about whether the national Ministry of Labour had taken any action and, if so, what form that took and whether it had achieved any results.
- 210.** In compliance with the guidelines, this regional board replied, in a note of 18 March 2009, stating that the national Ministry of Labour had been unable to intervene in the situation

described, as it was within the “exclusive competence” of UOCRA to make decisions on the matter. The position of the Ministry fully complies with the provisions of ILO Convention No. 87. This did not prevent the Governor of the Province of Chubut requesting the assistance of the national labour authorities on the grounds that, given the complexity and sensitive nature of the events, mediation might be able to get the situation under control. The violence, with further damage, destruction and possible casualties, was a distressing situation, against the background of which the national labour authorities began taking unofficial steps to offer the workers occupying the trade union headquarters an opportunity for negotiation, with the result contained in the note replying to the request from the Public Prosecutor. This action by the Ministry meets international standards.

- 211.** It should be noted that the actions by the national Government did not violate the freedom of association of the complainant trade union at any time, given that UOCRA had lost the capacity to recover its trade union building, which was occupied by persons defined by the trade union as “unconnected to the organization”. Against the background of this distressing situation, events occurred that led to the national Ministry of Labour being identified as the mediator for a situation whose nature and scope were unconnected to it. Far from acting in a manner contrary to freedom of association, the Ministry took it upon itself to bring about social dialogue during the emergency. According to the Government, it acted in a way that promoted freedom of association by defending the complainant’s property and bringing about a controlled and peaceful ending to a highly tense political situation. The Government affirms that the course of action taken by the Ministry was also in accordance with the highest international standards, given that in the Resolution of 1970 concerning trade union rights and their relation to civil liberties it states that it is the duty of States to ensure the security of persons and the protection of the property of trade union organizations.
- 212.** The Government indicates that the situation became more complicated and the effects of the dispute increased and extended to several companies. The southern regional representative of the national Ministry of Labour, the regional national representative, the Secretary of Labour of the Province and several companies who proved that the dispute was affecting other areas all assisted in the surrender of the keys of the trade union premises and the relinquishing of the usurped building.
- 213.** Faced with the outsourcing of the dispute, the federal authorities classified the situation as falling under article 2 of Act No. 14786, and called for compulsory conciliation. This Act states that: “in the event that parties are unable to settle a dispute, either party, prior to taking direct action, should give notice to the administrative authorities for the launching of the compulsory conciliation procedure. The Ministry shall act ex officio if deemed appropriate, taking into account the nature of the dispute.” The Government wishes it to be made clear that, during this period, the national Ministry of Labour – which took charge in the dispute in accordance with the abovementioned international standards – complied with the legal requirements, making an inventory of the organization’s assets and depositing the keys within 24 hours of them being surrendered by the occupants, as ordered by the Civil and Commercial Court of First Instance No. 1 of the judicial district of Comodoro Rivadavia – secretariat No. 2.

C. The Committee’s conclusions

- 214.** *The Committee notes that, in this case, the complainant organization alleges that, against the background of a smear campaign initiated by the authorities of the Province of Chubut against UOCRA and their encouragement of the creation of a new trade union at the local level, the following acts were committed against the organization and its members: (1) on 12 March 2009, an armed group violently occupied its headquarters in Comodoro Rivadavia for more than 30 days, destroying furniture and computers and stealing*

documents and valuables (according to UOCRA, an eviction took place after it brought a legal application for amparo (protection of constitutional rights) and the keys of the premises were surrendered to the administrative labour authorities and UOCRA had to request their return with an injunction); (2) on 10 June 2009, the home of Mr Ricardo Luis Cheuquepal, a member of the Comodoro Rivadavia branch of UOCRA, was shot at; (3) at the request of the provincial authorities, a closed criminal case was reopened against members of the Puerto Madryn branch of UOCRA; (4) at the same time that UOCRA was being discredited and criminalized in order to promote a new trade union, with the assent of the provincial authorities, several businesses began to be attacked by this group and the Comodoro Rivadavia council was also subject to violent actions by armed persons; (5) a Chubut provincial government official used electronic means to express insulting opinions and assessments about UOCRA members and union officials; (6) workers members of UOCRA, accompanied by trade union leaders, including the General Secretary of the Puerto Madryn branch, Mr Mateo Suárez, protested against the dismissal of more than 30 workers and were violently repressed by the provincial police and 12 of the protestors (including Mr Suárez) were temporarily detained; (7) the General Secretary of the Trelew branch of UOCRA was kidnapped and, following death threats against his family, was forced to make radical statements against Mr Suárez; and (8) on 18 November 2009 armed groups known as “Los Dragones” (The Dragons) attacked UOCRA headquarters in Puerto Madryn and Comodoro Rivadavia.

215. *With regard to the alleged violent occupation by an armed group of the UOCRA headquarters on 12 March 2009 in Comodoro Rivadavia, that lasted more than 30 days and included the destruction of furniture and computers and the theft of documents and valuables, the Committee notes the Government’s statement that: (1) this case clearly includes practical, social and labour-related aspects and that it concerns an issue that, owing to the nature of the dispute, had consequences at both the federal and provincial levels that are related to the autonomy of the provinces and relations between the national and provincial authorities; (2) the Province of Chubut has been notified about the complaint but its reply has not yet been received, so the Government’s reply is based on the files produced at the national level; (3) given the complexity and sensitive nature of the events, the Chubut provincial authorities requested mediation by the national Ministry of Labour to get the situation under control; (4) the distressing violence led to the national labour authorities taking unofficial steps to offer the workers occupying the trade union headquarters an opportunity for negotiation; (5) the actions by the national Government did not violate the freedom of association of the complainant, given that UOCRA had lost the capacity to recover its trade union building, which was occupied by persons unconnected to the organization; (6) the national Ministry of Labour promoted freedom of association by defending the property of UOCRA and bringing about a controlled and peaceful resolution to the situation; (7) the dispute extended beyond the original dispute and extended to companies and, according to the statement of the regional delegation of the Ministry of Labour, Employment and Social Security that the Government sends with its response, the workers that occupied the UOCRA headquarters surrendered the keys of the premises to the representative of the national Ministry of Labour; (8) faced with the outsourcing of the dispute, the federal authorities called for compulsory conciliation; and (9) during this period, the Ministry of Labour, in compliance with legal requirements, made an inventory of the trade union’s assets and deposited the keys, as ordered by the Civil and Commercial Court of First Instance No. 1 of the judicial district of Comodoro Rivadavia – secretariat No. 2.*

216. *The Committee looks forward to receiving a response to these allegations from the Chubut provincial authorities. However, taking into account the date of the submission of the complaint, the Committee emphasizes that “the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights” and recalls that, when examining allegations of attacks carried out against trade union premises, it stated “that*

activities of this kind create among trade unionists a climate of fear which is extremely prejudicial to the exercise of trade union activities and that the authorities, when informed of such matters, should carry out an immediate investigation to determine who is responsible and punish the guilty parties” [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 178 and 184]. Under these circumstances, the Committee, noting that no judicial authority has ordered UOCRA to evict its trade union premises in Comodoro Rivadavia, expects that the judicial authority that received the keys to the trade union headquarters from the national Ministry of Labour has returned those keys to UOCRA and expects that UOCRA can once again use its headquarters in Comodoro Rivadavia. The Committee requests the Government to keep it informed in this regard. The Committee further urges the Government to take the necessary measures for carrying out a thorough investigation on the alleged destruction and misappropriation of UOCRA property and valuables during the occupation of the headquarters and requests the Government to keep it informed in this respect.

- 217.** Moreover, the Committee notes with concern the gravity of the rest of the allegations made in this case (violent repression of protestors, temporary detention of trade union leaders and protestors, firearms attacks on the home of a trade union leader and UOCRA headquarters, temporary kidnapping with the aim of intimidating a trade union leader and interference by the provincial authorities in the establishment of a trade union, etc.). The Committee notes the Government’s statement to the effect that this case includes practical, social and labour-related aspects and that it concerns an issue that, owing to the nature of the dispute, had consequences at both the federal and provincial levels that are related to the autonomy of the provinces and relations between the national and provincial authorities, and that the Province of Chubut has been notified about the complaint but its reply has not yet been received, as a result of which the Government’s reply is based on the files produced at the national level. In this respect, although it understands the difficulties of sending a complete response, owing to the different judicial authorities (provincial and national) involved in the case, the Committee regrets that, despite the time that has passed and the gravity of the allegations, the Government has only sent its response to one of the allegations made. In these circumstances, the Committee deeply regrets the climate of violence that emerges from the allegations, and urges the Government to take immediate action to ensure that investigations are carried out into all the allegations and to send its observations and those of the Chubut provincial authorities thereon.
- 218.** Lastly, the Committee notes that, at the time of submitting its complaint, the complainant requested that a preliminary direct contacts mission be carried out to transmit to the competent authorities the concern to which the events described in the complaint have given rise and to explain to these authorities the principles of freedom of association involved and, at the same time, given the serious nature of the allegations, requested that the Government be encouraged to agree to a direct contacts mission that should focus its cooperation efforts on the situation of freedom of association in the Province of Chubut. The Committee requests the Government to send its observations in this respect.

The Committee’s recommendations

- 219.** *In the light of its foregoing interim conclusions, the Committee requests the Governing Body to approve the following recommendations:*
- (a) *The Committee notes with concern the gravity of the allegations made in this case (violent repression of protestors, temporary detention of trade union leaders and protestors, firearms attacks on the home of a trade union leader and UOCRA headquarters building, temporary kidnapping with the aim of*

intimidating a trade union leader and interference by the provincial authorities in the establishment of a trade union, etc.), deeply regrets the climate of violence that emerges from the allegations, and urges the Government to take immediate action to ensure that investigations are carried out into all the allegations and to send its observations and those of the Chubut provincial authorities thereon.

- (b) The Committee expects that UOCRA can once again use its headquarters in Comodoro Rivadavia. The Committee asks the Government to keep it informed in this respect. The Committee further urges the Government to take the necessary measures for carrying out a thorough investigation into the alleged destruction and misappropriation of UOCRA property and valuables during the occupation of the headquarters and requests the Government to keep it informed in this respect. The Committee awaits the response of the Chubut provincial authorities on these allegations.*
- (c) The Committee requests the Government to send its comments on a possible direct contacts mission that should focus its cooperation efforts on freedom of association in the Province of Chubut.*
- (d) The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2732

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

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

Allegations: The complainant organization alleges the dismissal of a trade union leader further to the establishment of a trade union in a mining company

- 220.** The complaint is contained in a communication from the Confederation of Argentine Workers (CTA) dated August 2009.
- 221.** The Government sent its observations in communications dated November 2009, June, August and 3 November 2010.
- 222.** 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

- 223.** In its communication of August 2009, the CTA states that the present complaint is being brought against the Government of Argentina for multiple violations of freedom of association and the rights of workers' organizations and representatives, as guaranteed by Conventions Nos 87, 98 and 135 and Recommendation No. 143, committed in the form of acts of discrimination and dismissals of trade union leaders, delegates and activists. The CTA points out that the case covered by the present complaint is just one of many in which the rights of workers and their organizations have been violated. The CTA notes with concern the systematic repetition of practices harmful to freedom of association. Consequently, the present complaint is being brought against the Government of Argentina for failure to guarantee the exercise of the rights of members, officials and delegates of unions, whether already registered or applying for registration, because they do not belong to unions which enjoy legal recognition.
- 224.** The CTA alleges that the Government, which has been reluctant to adapt national law to the minimum standards of freedom of association established by ILO Conventions Nos 87 and 98 and the extensive doctrine originating from the opinions of its supervisory bodies, gave rise by omission to the acts of anti-union discrimination and conduct against Mr José Vicente Leiva, representative of the CTA and founder of a union.
- 225.** The CTA states that the Barrick Gold Corporation is the biggest gold-mining multinational in the world, with its headquarters in Toronto. It has more than 27 mines operating in Argentina, Australia, Canada, Chile, Peru, United Republic of Tanzania, and United States. In 2001, the company merged with Homestake and thus established its presence in Argentina, which was marked by the acquisition of Veladero in San Juan province. Apart from the current operations and projects, South America is a strategic area for the future growth of the company.
- 226.** The CTA states that Mr José Leiva is a worker with many years of service in the company who, in addition to demonstrating leadership qualities and engaging in union activism, is a member of the executive committee of the Argentine Miners' Union (OSMA-CTA), whose application for registration as a union is currently being processed by the Ministry of Labour, Employment and Social Security, file No. 1340646. Veladero employs more than 1,500 persons, of which 850 are permanent staff while the rest are subjected to various forms of labour malpractice through the subcontracting of services. The work at the mine face, currently at an altitude of 4,600 metres, is carried out under appalling conditions (in winter temperatures fall below minus 20°C). As a result of the lack of oxygen and the dust raised by the excavations, the air is full of silica particles, which lodge in the lungs and cause the incurable disease of silicosis. The lack of oxygen is also damaging inasmuch as it causes serious circulatory problems, which lead to heart disease and neurological disorders.
- 227.** Even under these working conditions the workers are not provided with suitable medication or preventive medical treatment, let alone special clothing to provide protection against the low temperatures of the high mountains. The monthly work schedule is 14 days' work followed by 14 days' leave. Daily working time exceeds 12 hours, calculated from arrival at the mine gallery entrance. To this must be added another two hours for travel to and from the hotel in which the workers stay while employed at the mine. The food provided both at the workplace and later at the lodgings is inadequate in view of the physically demanding nature of the work and the prevailing climatic conditions at high altitude.
- 228.** One year ago, the workers conducted a work stoppage in protest against the death of two workers in the mountains. When the death of the two workers was confirmed, an

immediate search for the bodies was launched, against a background of shock that the deaths were certainly the result of non-existent safety measures and inappropriate working conditions for mining. The body of Mr Muñoz Leonardo was found but there were obstacles to recovering the body of Mr Aguilera Mauricio. The company therefore sent a representative, who held a meeting with the workers and ordered them to call off the search and resume work immediately, since the stoppage was causing the mine to lose revenue. The outrage that this provoked resulted in Mr José Vicente Leiva informing the representative of the multinational on behalf of the workers that nobody would return to work until the missing body was found.

- 229.** The CTA states that because of the loss of purchasing power and the company's refusal to award a pay rise on the pretext that negotiations were being held with the AOMA, a meeting was convened in 2008 and it was decided to take vigorous action in the form of a strike with the downing of tools and pickets posted near the mine entrance. The strike lasted 48 hours. These events precipitated the need to form a new type of trade union in view of the lack of response from the branch trade union.
- 230.** Given the lack of response to the abovementioned complaints regarding working conditions, the workers decided to organize and form the Argentine Miners' Union (OSMA), with Mr José Vicente Leiva the focal point for the workers. More than 200 workers met in various groups to decide on the structure of the union, which was finally established on 30 June 2009 with Mr José Vicente Leiva appointed as general secretary. At the same assembly the workers decided to affiliate to the CTA.
- 231.** The CTA alleges that at the same time that the certification of the constituent documents in the presence of a notary was taking place, on 24 July 2009, the company, having learned of the establishment of the OSMA-CTA, ordered the wrongful dismissal of Mr José Vicente Leiva on account of his status as focal point in the conflict at the mine and his election as general secretary of the new union. The company, violating the principle of trade union autonomy and its obligation of non-interference, was proactive in imposing a different representative body on the union from the one that had been elected.
- 232.** According to the CTA, it is clear that the grounds for the dismissal of union leader Mr José Vicente Leiva were his union activity and his constant demands for improved working conditions, as well as the establishment of the Argentine Miners' Union. This is also a clear abuse of power designed to have a disciplinary and inhibitory effect on the exercise of collective rights by all the workers and constitutes a discriminatory dismissal prohibited by law.
- 233.** On 11 August, in relation to the conduct of the company, representatives of the CTA held a joint press conference with Mr José Vicente Leiva and decided to institute proceedings for reinstatement in the labour court and also, in connection with the anti-union dismissal, to lodge a complaint with the Labour Commission of the Chamber of Deputies of the Nation, with the ILO and with the OECD, since a multinational corporation is concerned.

B. The Government's reply

- 234.** In its communication of November 2009 and June 2010, the Government states that, on account of the complaint, the Ministry of Labour summoned the president of the corporation in question to a hearing. The hearing took place on 1 October 2009 and the Ministry of Labour urged the company to review the situation, proposing that a solution be sought through the administrative authority. On 19 October the company reported supposed irregularities in the establishment of the union of which Mr José Vicente Leiva is the general secretary, further to which the CTA had ten days in which to reply, but there have been no new developments in this regard. With regard to the registration of the trade

union, the National Directorate for Trade Union Associations indicates that the relevant proceedings were initiated in August 2009, that it was decided in November to verify the compliance with the requirements stipulated in national legislation, and that the relevant file was requested on 23 December 2009 by the Federal Court No. 2 of the Province of San Juan and submitted to it. Moreover, aware that proceedings have been instituted in the national labour court, the Government considers it appropriate to wait for a ruling to be issued and keep the Committee informed accordingly.

- 235.** In its communications of August 2010, the Government informs that proceedings for *amparo* (constitutional protection) are currently ongoing before the National Labour Court of First Instance, which have been initiated by Mr Leiva and that the court decided on his preventive reinstatement in the identical grade and under the same working hour arrangements as an interim measure.
- 236.** In a communication dated 3 November 2010, the Government forwards a communication made by the Government of the Province of San Juan mentioning the following: (1) the responsibility for managing matters related to trade union organizations is a federal power; (2) no complaints have been lodged before the Provincial Administration on the issue mentioned in the request; (3) complainants may have access to judicial proceedings if they so wish; (4) the federal judge of the Province of San Juan examines a complaint (that is still pending) on issues related to the official status (*personeria gremial*) lodged by an organization against another organization called AOMA, which has also requested that a criminal case be initiated against Mr José Vicente Leiva.

C. The Committee's conclusions

- 237.** *The Committee observes that in the present case the complainant organization alleges the wrongful dismissal on 24 July 2009 of Mr José Vicente Leiva, the general secretary of the OSMA – whose application for registration as a union is being processed – by the Barrick Gold Corporation (which merged with the Homestake company). The Committee also notes the CTA's claim that the union leader was dismissed on the same day that the constituent documents for the OSMA were being certified in the presence of a notary and that the grounds for the dismissal were his trade union activity and his constant claims for improved working conditions, as well as the actual establishment of the union.*
- 238.** *The Committee notes the Government's statement that: (1) the Ministry of Labour summoned the president of the corporation in question to a hearing on 1 October 2009, in the course of which the company was urged to review the situation and it was proposed that a solution be sought through the administrative authority; (2) on 19 October 2009 the company reported supposed irregularities in the establishment of the union and the CTA had ten days in which to reply but has not done so to date; (3) the National Directorate for Trade Union Associations informs that the proceedings for the registration of the union were initiated in August 2009, and that the Federal Court No. 2 of San Juan requested and received the file in December 2009; (4) proceedings for *amparo* (constitutional protection) are currently ongoing before the National Labour Court of First Instance, which have been initiated by Mr Leiva, and the court decided on his preventive reinstatement in the identical grade and under the same working hour arrangements as an interim measure; and (5) aware that proceedings have been instituted in the national labour court, the Government considers it appropriate to wait for a ruling to be issued in this respect. According to the provincial Government, a competing trade union organization has started a civil judicial proceeding against the official status (*personeria gremial*) of OSMA-CTA and a criminal action against Mr José Vicente Leiva.*
- 239.** *In this regard, taking into account that the Government does not refer to the grounds of the dismissal of the trade union leader, the Committee requests the Government to take*

measures to ensure the reinstatement of union leader Mr José Vicente Leiva in his post as decided by the judicial authority in the framework of the judicial proceeding regarding his dismissal. The Committee requests the Government to inform it of the final ruling.

- 240.** *Finally, observing that: (1) the complainant states that the application for registration of the OSMA is being processed by the Ministry of Labour, Employment and Social Security; (2) the Government states that it was the company in question that reported supposed irregularities in the constitution of the union, and that the file concerning the registration of the union was submitted to Federal Court No. 2 of San Juan; and (3) a trade union organization has started a civil judicial proceeding against the official status (personería gremial) of the OSMA (pending) and a criminal action against union leader Mr José Vicente Leiva, the Committee requests the Government to proceed with the registration of the OSMA, provided no irregularities have been found and, in any case, not to prevent its functioning. Furthermore, the Committee requests the Government to keep it informed of the outcome of the abovementioned judicial proceeding.*

The Committee's recommendations

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

- (a) *The Committee requests the Government to take measures to ensure the reinstatement of union leader Mr José Vicente Leiva in his post as decided by the judicial authority in the framework of the judicial proceeding concerning his dismissal. The Committee requests the Government to inform it of the final ruling.*
- (b) *The Committee requests the Government to proceed with the registration of the OSMA, provided no irregularities have been found and, in any case, not to prevent its functioning. The Committee requests the Government to keep it informed of the outcome of the abovementioned judicial proceeding.*

CASE NO. 2742

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

**Complaint against the Government of
the Plurinational State of Bolivia
presented by
the National Federation of Social Security
Workers of Bolivia (FENSEGURAL)**

***Allegations: the complainant organization
alleges that following a strike declared illegal
criminal proceedings were started against eight
trade union officials***

- 242.** This complaint is contained in a communication from the National Federation of Social Security Workers of Bolivia (FENSEGURAL) dated 9 October 2009.

243. The Government sent its observations in a communication of 6 April 2010.
244. The Plurinational State of Bolivia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

245. In its communication of 9 October 2009, the FENSEGURAL states that in March 2007, the Single Union of Social Security Workers of the National Health Fund of the Cochabamba Region (CASEGURAL–CBBA), affiliated to FENSEGURAL, made a number of representations to the employer about, inter alia, irregularities in temporary contracts related to cases of nepotism, violations and abuse of power by the then head of personnel of the Hospital Obrero Number 2 of the Cochabamba region, demanding that administrative procedures be respected.
246. Until the beginning of April 2007, the administration of the National Health Fund of the Cochabamba Region (CNS–CBBA) dragged its feet concerning these complaints. This is why CASEGURAL–CBBA, in its capacity to represent the interests of its members, as well as those of other workers of this health institution, announced on 5 April that it would be holding a strike from 11 April 2007. On 11 April 2007 the strike was held, initially as a go-slow strike, but as no solution was found to CASEGURAL–CBBA's demands, it was extended to a work stoppage on 12 April. Members of this trade union, which include administrative workers, nurses' aides, and service and paramedical staff, partook in these actions without, however, medical care being suspended in the various CNS–CBBA health centres for which the medical staff were responsible.
247. The complainant organization indicates that a meeting between CASEGURAL–CBBA and representatives of the CNS–CBBA, with the participation of the Departmental Workers' Confederation of Cochabamba (COD–CBBA), which started on 12 April and went on to the next day, made it possible for negotiations to take place so as to find solutions to the demands which led to the protest actions described above. The institutional agreement was sent to the Departmental Labour Office.
248. As a result of the fact that prior to these negotiations CNS–CBBA's administration had filed for a declaratory judgment regarding the illegality of the strike held on 11 and 12 April before the Departmental Labour Office, this government department ruled shortly after, on 20 April, that: "even if the workers' claims are legitimate, the legal precepts had, nevertheless, been obviated before the declaratory judgement of the measure, thus rendering the staged stoppage illegal". The effects of this declaratory judgment from the labour authority were deductions from wages for the days of strike; CASEGURAL–CBBA, in line with common labour practices in the Plurinational State of Bolivia, on 7 May 2007 signed another institutional agreement with the regional administration of the CNS–CBBA to compensate by working one extra hour per day so as to make up for the 16 hours of strike on 11 and 12 April.
249. Despite the agreements reached with the administration of the CNS–CBBA not only to resolve the cases of nepotism and abuse of power by the then head of personnel at the Hospital Obrero Number 2 but also to compensate for the hours of strike, the CASEGURAL–CBBA trade union members felt deceived as first a resolution to dismiss the said head of personnel (on 7 May 2007) was issued and then the reinstatement order for the same head of personnel (16 May 2007) was issued. In this context, on 28 May, a group of leaders requested an official explanation from the head of personnel at the time when he resumed his duties. This formal request was tendentiously used to start a series of actions intended to intimidate the CASEGURAL–CBBA trade union board, especially by means

of judicial persecution, which to date have not been ruled on and which in fact has led to the social protest described here being criminalized.

- 250.** The complaint brought by the then head of personnel of the Hospital Obrero Number 2 as an individual called for the intervention of the Public Prosecutor to prosecute for the following alleged offences: preventing and obstructing a public official from exercising his functions (section 161 of the Criminal Code of Bolivia); preventing, obstructing or limiting the freedom to work, profession or occupation, whether in trade or industry (section 303 of the Criminal Code of Bolivia); promoting any lockout, strike or stoppage declared illegal (section 234 of the Criminal Code of Bolivia); and undertaking any other act which in some way affects the health of the population (section 216(9) of the Criminal Code of Bolivia). In this context, CASEGURAL–CBBA demanded an explanation before the Departmental Labour Office regarding the behaviour of the employer with whom the institutional agreements were signed which resolved the dispute, restricting the event to its real scope to suitably try the case, i.e. exclusively as a labour issue.
- 251.** The complainant adds that despite CASEGURAL–CBBA’s efforts to restart proceedings of the event as a labour issue and in relation to the repudiation and public complaint made by the Departmental Workers’ Confederation of Cochabamba for this unfair and improper criminal prosecution of trade union officials (7 September 2007), as well as for the national meeting of the Bolivian Workers’ Confederation (17 September 2007), eight trade union officials of CASEGURAL–CBBA had restrictive measures imposed on their trade union activity through the intermediary of the prosecutor’s office and a court for preventive measures (the prosecutor’s office had requested the preventive detention of the trade union officials). As the weeks went by, the vicious attacks against the trade union continued relentlessly. On 23 February 2008, the prosecutor’s office brought the organization before the Supreme Court of Justice. In the accusation, which violates the legal principles establishing that the prosecutor’s office should be objective, the prosecutor’s office went so far as to change the chronology of the facts, stating that: “noting the resolution for dismissal (7 May 2007) and as it was not possible to change who held Juan Carlos Ayala’s position (head of personnel), [the trade union officials] immediately called for and initiated an illegal strike on 11 and 12 April 2007”. This way of distorting the sequence of events together with other incongruities, starting from the end of May 2007 until the formal accusation was made on 23 February 2008 (nine months), suggest the systematic intimidation of CASEGURAL’s trade union officials.
- 252.** The complainant organization indicates that currently – more than a year and a half after the formal accusation was made – the oral hearing has still not been held. The prosecutor in charge of the case and who started proceedings has changed as she went to work at the Prefecture of the Cochabamba Department following the intervention of the central Government in the government of the Department. After a final attempt to again set a date for the oral hearing of the case by Trial Court No. 4, the hearing was postponed until January 2010, which may yet change because, with advance notice, the technical judge of the court left his post to go and work as a deputy minister of the current Government and the President of this Trial Court has applied for a position as a deputy for the party in Government. The complainant organization thinks that – bearing in mind that the competent prosecutor who started criminal proceedings and the technical judge have gone on to hold posts in political bodies of the Government and that the President of the Trial Court has recently applied for a political position in next parliament – the case with regard to the peculiar way in which it has been handled has with reason become a rather sensitive issue, especially given the absence of guarantees to safeguard the principles of objectivity and impartiality, despite these being stipulated in the new Political Constitution of Bolivia.
- 253.** In the complainant organization’s opinion, the trade union officials concerned are being subjected to criminal prosecution simply for having exercised their rights to represent the

interests of their members, to petition and to collective bargaining in this respect, and finally the right to strike as a legitimate form of social protest given the stalling of the then administration of the CNS–CBBA. The current criminal proceedings reported and the risk of a conviction could lead to an unfair criminalization of CASEGURAL–CBBA’s trade union actions and affect the effective enforcement of freedom of association in the Plurinational State of Bolivia.

B. The Government’s reply

- 254.** In its communication of 6 April 2010, the Government informed through communication No. MTEPS/DGTHSO/037/10 of 1 February 2010 that the Director-General of Labour and Occupational Health and Safety of the Ministry of Labour, Employment and Social Security submitted technical report No. MTEPS/DGTHSO/TL/JC 011/10, publishing the information provided by the Departmental Labour Office of the city of Cochabamba in relation to the complaint presented by the FENSEGURAL. The report on the substantial activity from 9 to 13 April 2007 of the Departmental Labour Office of Cochabamba points out that the workers in the administrative sector and nurses declared an indefinite go-slow strike organized by CASEGURAL from 10 April 2007, giving as the reasons for this measure the supposed contracting by the administrator of his relatives and the change of head of personnel of the Hospital Obrero Number 2. Following a long meeting on 12 April 2007, a consensus was reached on the first point and the other points were left for discussion on Friday, 13 April 2007, as the work stoppage was suspended and a recess declared until 16 April 2007.
- 255.** The regional administrator of the National Health Fund (CNS) requested the Departmental Director of Labour of Cochabamba in memorandum No. SN/2007 of 11 April 2007 to declare that the go-slow strike was illegal, indicating that the case was referred to a higher body to resolve the initial issues, which according to CASEGURAL were not resolved, and as usual by using the term “others”, CASEGURAL tried to make out that there were problems where there were none. In this context, the regional administrator of the CNS endorsed the solutions put forward in writing. The regional administrator also indicated that the indefinite go-slow strike was thought to breach labour and institutional regulations, which was why he requested, through the Departmental Directorate of Labour, that the case concerning the illegality of the stoppage, which adversely affected 454,000 members of the CNS–CBBA, be heard and tried.
- 256.** It is necessary to highlight that in the reference memorandum it was stated that on the day of the go-slow strike many people were prevented from doing their jobs because, among other entrances, the main entrance on calle Esteban Arce and later the administration’s entrance were blocked, thereby invalidating the so-called go-slow strike and constituting a violation of section 303 of the Criminal Code, “violation of rights to the detriment of the freedom to work”. In light of this violation, the regional administrator of the CNS reported the event to the police so that there would be a record.
- 257.** The report of 12 April 2009 of the labour inspectorate enabled the complaints of the regional administrator of the CNS to be verified as the report clearly identified the officials who partook in the strike and forced a number of offices to be closed by blocking free access to the administrative offices as well as other entrances.
- 258.** Because of the alleged lack of solutions supposedly proposed by the administrator of the CNS, CASEGURAL announced another 24-hour stoppage in memorandum No. SC-19/2007 of 11 April 2007. The administrator again requested the Departmental Directorate of Labour to declare the strike of 12 April 2007 illegal by means of memorandum No. SN/2007 of 12 April 2007, stating that he had felt threatened because a group of workers of CASEGURAL had prevented him from entering, as well as the

administrative staff throughout the day and night, by blockading the entrances; this event was stated in memorandum SN/2007 of 11 April 2007.

- 259.** Despite the administrator confirming his position regarding the dialogue without conditions, he did not receive either an oral or written reply from CASEGURAL. In fact, they changed their petition, which apparently could not be resolved, with another which was written on the administration's notice board on 11 April 2007: (1) claim regarding nepotism and functional incompatibility; (2) the initiation of internal administrative proceedings against the head of personnel of the Hospital Obrero Number 2; (3) Mr Fernández's case for an alleged irregularity in the reinstatement to his previous position because of his and the legal counsel's negligence; (4) the immediate termination of temporary contracts of his relatives for which there is no hard evidence; (5) immediate change of head of personnel; and (6) breach of the administrative procedures.
- 260.** Like in memorandum SN/2007 of 11 April 2007, the administrator informed the Departmental Director of Labour that the work stoppage continued to breach labour and institutional regulations which is why he requested that the case concerning the illegality of the second stoppage, which adversely affected 454,000 members of the CNS-CBBA for the second day running, be heard and tried. The Departmental Director of Labour was also told that early on 12 April 2007 the main entrance to the offices on calle Esteban Arce had been blockaded, preventing any official from entering, which shows the wrongful use and exercise of the go-slow strike, taking into consideration the violent measures employed by CASEGURAL. The administrator also stated in the same memorandum that "with the intention of resolving these 'problems', which are in fact whims and personal quarrels, I request that you appoint another inspector in order that he or she may be present at the meeting in the regional administration today, 12 April 2007, at 3 p.m. at which five trade union representatives of CASEGURAL, four executives of the CNS-CBBA and one representative of the Departmental Workers' Confederation will be present to discuss the matters at hand; I suggest that this meeting is recorded in full by the Inspector of the Ministry of Labour so that there is a factual report, evidence and proof of the agreement reached".
- 261.** The report of 13 April 2007 of the labour inspectorate, addressed to the Departmental Head of Labour, confirmed – after the second visit to the offices of the CNS-CBBA and consultation with various workers, who identified the officials who had organized the stoppage – that the latter had caused various offices to be closed by blockading free access to the administration's offices.
- 262.** On 13 April 2007, the ad interim general manager of the CNS was informed of the legal implications of the work stoppage by the worker trade union members of CASEGURAL of Cochabamba in report No. CITE 266 of the legal department of the CNS-CBBA, stating that:
- based on the background of the Single Union of Social Security Workers of Cochabamba (CASEGURAL), it can be ascertained that article 159 of the Political Constitution of the Plurinational State of Bolivia, although it establishes the right to strike, also provides that the strike must be carried out after all the legal requirements have been fulfilled, which is not the case for the present situation;
 - the regional officials of Cochabamba are in contravention of section 105 of the General Labour Act which reads: "in no enterprise may work be stopped unannounced by either the employer or the workers before having exhausted all means of conciliation and arbitration provided for in this Chapter, otherwise the movement shall be deemed illegal";

- as CASEGURAL (Cochabamba) has not complied with the aforementioned legal provisions, this Office suggests requesting, based on the legal opinion of the regional state administration of Cochabamba, that the strike of 11 April 2007 be declared illegal.

- 263.** In accordance with the points made by the legal department of the CNS, the Ministry of Labour was requested, through the regular and appropriate channels and within the framework of its mandate, to hand down a decision as to whether the strikes and work stoppages were legal or not. Once the request was made officially, the Ministry of Labour replied through the intermediary of the Departmental Office of Cochabamba to the request in memorandum No. MT/JEF/DEPTAL/TRAB/CBBA/CITE 003/2007 of 20 April 2007, stating after assessing the issues that “the legal provisions of Chapter X and those of section 105 of the General Labour Act have not been complied with and the legal criteria set out in the General Labour Act have been circumvented. Even if the workers’ claims are legitimate, the legal precepts had, nevertheless, been obviated before the declaratory judgment of the measure, thus rendering the staged stoppage illegal, taking into account that this office was not informed of any complaint or demand.”
- 264.** In accordance with the above, there are two letters dated 11 and 12 April 2007 signed by the administrator of the CNS. The Labour Office did not receive any letter from CASEGURAL supposedly informing it about the complaints or demands; the Labour Office only has one letter from CASEGURAL addressed to the regional administrator of the CNS of 2007, bearing the Departmental Labour Office’s stamp. On 12 and 13 April 2007 meetings were held with representatives from the Departmental Workers’ Confederation (COD), CASEGURAL and the regional authorities of the CNS in order to sign an institutional agreement with the aim of maintaining good relations and continuous dialogue. It was also decided through the intermediary of the regional administration that a copy of the agreement should be sent to the Departmental Directorate of Labour which was informed by the Labour Office on 16 April 2007.
- 265.** Finally, on 10 May 2007, an institutional agreement was signed between CASEGURAL of Cochabamba and the regional administration of the CNS–CBBA at the Departmental Labour Office of the city of Cochabamba. An observer from COD and the Departmental Labour Head was present at the signing of this agreement, which sets forth the following:

Official decision by the Ministry of Labour regarding the illegal strike held by CASEGURAL which states “in view of the non-compliance with the legal provisions of Chapter X and those of section 105 of the General Labour Act and in view of the circumvention of the legal criteria set out in the General Labour Act, even if the workers’ claims are legitimate, the legal precepts have, nevertheless, been obviated before the measure was announced thus rendering the staged stoppage illegal, taking into account that this Office was not informed of any complaint or demand”.

The administrator and all parties reached the agreement which is favourable to the workers by not making deductions for the two days not worked under the arrangement of working one hour from the first working day of the second semester of the current financial year (2007) as compensation, in line with the details which various centres sent, for the days of strike of 11 and 12 April 2007 which for administrative workers who work eight hours a day corresponds to 16 working hours and for administrative workers who work six hours a day corresponds to 12 working hours for the days of strike, which shall be checked in the staff monitoring system which use either biometric devices or swipe cards.

- 266.** As can be seen, at no point did CASEGURAL act within the framework of the national legislation in force, which was acknowledged by the trade union itself. This is why they accepted the compensation arrangement for the days they did not work because of the illegal stoppage by the trade union members. The Government indicates that the new Political Constitution of 2009, article 51(III), stipulates “trade unionization is recognized

and guaranteed as a means of defence, representation, assistance, education and culture of both rural and city workers”. Furthermore, article 51(VI) establishes that “trade union leaders shall enjoy trade union immunity, they shall not be dismissed in the year after their mandate has finished and their social rights shall not be reduced; they shall not be subjected to persecution or deprivation of liberty for acts carried out in the context of their trade union activity”. Furthermore, the new Political Constitution of 2009, article 256(I), provides that “the international treaties and instruments on human rights that have been signed, ratified or to which the State is party, which establish rights that are more favourable than those contained in the Constitution, shall take precedence”, article 256(II) establishes that “the rights recognized in the Constitution shall be interpreted in accordance with international human rights treaties where these establish more favourable standards”.

- 267.** It is important to note that the new Political Constitution of 2009 establishes a new hierarchy of legislation, ranked second after the Constitution are the international treaties, that is to say ILO Conventions ratified by the Plurinational State of Bolivia take precedence over national law, which was not the case under the previous Political Constitution of 1967. Among the Conventions ratified by the Plurinational State of Bolivia are Conventions Nos 87 and 98.
- 268.** The Government notes that, in relation to the alleged criminal and political prosecution of trade union officials of CASEGURAL by the Government as a result of the complaint brought as an individual by the head of personnel of the Hospital Obrero Number 2, the Prosecutor’s Office was called to intervene in labour disputes apparently in a court of first instance. This is in line with report number MT-DSI of 26 July 2007 signed by the Departmental Labour Inspector of Cochabamba of the Ministry of Labour in charge of the report of the conciliation hearing between CASEGURAL of Cochabamba and the CNS, which highlights in the last part: “in the statements that were reviewed it is clear that Juan Carlos Ayala brought the said request or complaint as an individual and not in his capacity as an official of the CNS”. As a result, it is possible to conclude that although there was a labour dispute, the Ministry of Labour through its Departmental Labour Office of the city of Cochabamba intervened on the fundamental premise of defending the rights of the workers of this institution. This was shown by the fact that they managed to draw up an agreement between the employer and the workers thus resolving the labour dispute.
- 269.** The Government highlights that the problem is a situation specific to Juan Carlos Ayala, who on 27 March 2008 under the legal arrangements entitling him by law to do so, filed as an individual accusation and complaint against Freddy Puente Camacho and others for the offences of preventing and obstructing the exercise of duties and for violations of the freedom to work, which can definitely not be limited or controlled by an administrative labour body. This, therefore, clearly shows that the complaint was filed by an individual and was in no way institutional. Hence the Government cannot prevent or restrict any person from requesting the application of the law, in this case the Criminal Code, when it is within the remit of the judicial body to resolve and decide whether or not it is right that an individual file a criminal complaint against certain individuals, regardless of whether they are guilty or not of the alleged offences.
- 270.** On 22 February 2008, the Prosecutor of Cochabamba in charge of the case, after analysing the documentary and witness evidence, decided to formally accuse Freddy Puente Camacho, Wilma Alcocer Mayorga, Raúl Limachi Choque, María Rosalía Orellana, Jiménez and José Maldonado Gremio of committing offences under sections 161, 216, 234 and 303 of the Criminal Code and formally accuse Jonny Calani, Marlene Ortiz Flores and Jeny Vilma Camacho Águila of committing offences punishable under sections 161 and 303 of the Criminal Code.

- 271.** The substantiation of the accusation indicates that the offences of preventing or obstructing or, where relevant, restricting the freedom to work, as stipulated in sections 161 and 303 of the Criminal Code, are considered de jure to be intentional wrongdoings and are enforceable when the mere act of preventing, obstructing or, where relevant, restricting labour activity occurs.
- 272.** In this case, by illegally imposing a general strike at the CNS with the aim of preventing the activity legally carried out by Juan Carlos Ayala as the head of personnel of the Hospital Obrero Number 2, the accused parties prevented and obstructed the normal performance of his duties as a public official, thus infringing on his fundamental right to work as enshrined in the Political Constitution of 1967, their actions thereby constituting the offences stipulated and punishable under sections 161 and 303 of the Criminal Code.
- 273.** The accusation also states: “it is clear that Freddy Puente Camacho, Raúl Limachi Choque, María Orellana Jiménez, José Maldonado Gremio, and Wilma Alcocer Mayorga, by way of carrying out a supposed mandate from their rank and file, planned and staged a strike declared illegal by the Departmental Directorate of Labour (Cochabamba) with the aim of keeping Juan Carlos Ayala away from his source of work, without taking into account the harm they were causing a considerable number of patients who receive medical care through the CNS–CBBA, and committed the offences which are set forth in section 216(9) of the Criminal Code; this has been proven by the reports and attestations issued by various directors of health centres which are dependent on the CNS, all of which stated that the illegal strike affected the normal provision of care contributing to the deterioration and to the detriment of the health of insured persons”.
- 274.** Given the above, the Prosecutor of the case requested the President and the sitting members of the Trial Court to set a date and time for the oral hearing of the case after the relevant formalities had been met. The report submitted by the President of the Supreme Court of Justice of Cochabamba states that the order initiating the trial of 13 June 2008 establishes that the oral hearing would be on 15 December 2008. However, after the date for the oral hearing had been set, the hearing had to be suspended because the defence lawyer resigned. A new date was set for a hearing on 15 June 2009, which was also suspended because none of the lay judges appeared despite having been legally informed. On 6 January 2010, the hearing had to be suspended because Trial Court No. 4 did not have a technical judge in office.
- 275.** In relation to this, it is important to highlight that none of the oral hearings were suspended as a result of “political meddling” as some members of CASEGURAL try to make out, quite to the contrary, it was first of all because its lawyer resigned and in such events it is the State’s duty to guarantee and safeguard due process at all times. Second, the failure to appear by the lay judges also led to the suspension of the hearing, for which the executive branch was not responsible, as this is not within the competences conferred on it by the Political Constitution.
- 276.** The Government concludes that: (1) the Departmental Labour Office of Cochabamba handed down a decision in a memorandum establishing that the stoppage was illegal because the provisions of section 105 of the General Labour Act were not taken into account, as well as because the Labour Office was not informed of the complaints and demands and because a go-slow strike was carried out on 11 and 12 April 2007 without complying with the procedure established by law; (2) with the intervention of the Ministry of Labour, Employment and Social Security it was possible for both parties in the labour dispute to reach an agreement, which facilitated the signing of the institutional agreement establishing that no deductions would be made for the days of strike of 11 and 12 April and that these days would be made up by working one extra hour until all the hours of strike were accounted for; (3) in the labour dispute, the Ministry of Labour, Employment and

Social Security intervened in accordance with its competences and powers which are established by law, enforcing compliance with the law in order to resolve the conflict essentially to the benefit of the workers despite non-compliance with the established procedure for organizing and/or staging a strike; (4) the Political Constitution enacted on 7 February 2009 establishes that the rights recognized under the Political Constitution are inviolable, universal, interdependent, indivisible and progressive and it is the State's duty to promote, protect and respect them.

C. The Committee's conclusions

277. *The Committee notes that in this case the complainant organization alleges that despite the Single Union of Social Security Workers of the National Health Fund of the Cochabamba Region (CASEGURAL–CBBA) and the administration of the National Health Fund of the Cochabamba Region (CNS–CBBA) reaching an agreement after the strikes on 11 and 12 February 2007, the authorities of the Hospital Obrero Number 2 were requested verbally by trade union officials to give an explanation in relation to the head of personnel of the hospital (who had been dismissed and then exonerated, and was therefore allowed to be reinstated in his post), and notes that the authorities started criminal proceedings – which to date are not closed and, according to the complainant, suggest systematic intimidation – against eight members of CASEGURAL's board.*

278. *The Committee notes that the Government refers in its reply to the agreement reached by the parties after the strike and that it states with regard to the alleged criminal prosecution of CASEGURAL trade union officials that: (1) the head of personnel of the Hospital Obrero Number 2, Juan Carlos Ayala, filed, as an individual and not as an official of the CNS, a complaint and charge against Freddy Puente Camacho and others for the offences of preventing or obstructing the exercise of duties and for violations of the freedom to work; (2) the Government cannot prevent or restrict an individual from appealing, if he so wishes, to the judicial authority requesting the law be applied; (3) on 28 February 2008 the Prosecutor of Cochabamba, after reviewing the evidence, decided to formally accuse Freddy Puente Camacho, Wilma Alcocer Mayorga, Raúl Limachi Choque, María Rosalía Orellana Jiménez and José Maldonado Gremio of committing offences punishable under sections 161 (obstruction or prevention of the exercise of duties), 216 (crimes against public health), 234 (illegal lockout, strikes and stoppages) and 303 (violation of the freedom to work) under the Criminal Code and to formally accuse Jonny Calani, Marlene Ortiz Flores and Jeny Vilma Camacho Águila of committing offences punishable under sections 161 and 303 of the Criminal Code; (4) the substantiation of the accusation indicates that the offences of preventing, obstructing or, where relevant, restricting the freedom to work, as stipulated in sections 161 and 303 of the Criminal Code, are considered de jure to be intentional wrongdoings and are enforceable when the mere act of preventing, obstructing or where relevant restricting labour activity occurs; (5) in this case, by illegally imposing a general strike at the CNS with the aim of preventing the head of personnel from carrying out his work, the accused parties prevented and obstructed the normal performance of his duties as a public official, thus infringing on his fundamental right to work, and their actions thereby constituted the offences stipulated in sections 161 and 303 of the Criminal Code; (6) the proceedings were started on 13 June 2008; the oral hearing was fixed for 15 December 2008 but had to be suspended because the defence lawyer resigned; later the hearing fixed for 15 June 2009 was suspended because none of the judges appeared; on 6 January 2010 the hearing was again suspended because Trial Court No. 4 did not have a technical judge in office; (7) the executive branch was not responsible for the suspensions of the oral hearings; and (8) with the intervention of the Ministry of Labour, Employment and Social Security an agreement was reached between the parties of the labour dispute, establishing that the days of strike would not be deducted.*

279. *In this respect, the Committee, like the Committee of Experts on the Application of Conventions and Recommendations, considers that criminal sanctions should not be imposed on any worker for participating in a peaceful strike and therefore, measures of imprisonment should not be imposed on any account; such sanctions may only be imposed if during a strike violence against persons or property or other infringements of common law are committed for which there are provisions set out in legal instruments and which are punishable thereunder. The Committee also recalls that the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike [see **Digest of decisions and principles of the Freedom of Association Committee**, 2006, para. 667]. The Committee highlights that according to the Government criminal actions against the trade union officials were not brought by the Hospital Obrero Number 2 but by the head of personnel as an individual and that the trade union and employer reached an agreement which brought to an end the dispute. In these circumstances, the Committee expects the Government to forward the present report as well as the abovementioned principles to the relevant judicial authority. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendation

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

The Committee requests the Government: (1) to keep it informed as to the ruling that is handed down in respect of the trade union officials Freddy Puente Camacho, Wilma Alcocer Mayorga, Raúl Limachi Choque, María Rosalía Orellana Jiménez, José Maldonado Gremio, Jonny Calani, Marlene Ortíz Flores and Jeny Vilma Camacho Águila; and (2) to forward the present report and the abovementioned principles to the relevant judicial authority.

CASE No. 2646

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

**Complaint against the Government of Brazil
presented by
the National Federation of Metro System Transport
Enterprise Workers (FENAMETRO)**

Allegations: The complainant organization alleges the dismissal of trade union officials and members for participating in a strike as well as other anti-union acts in the transport sector

281. The complaint is contained in a communication of the National Federation of Metro System Transport Enterprise Workers (FENAMETRO) of 9 May 2008. 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, approved by the Governing Body at its 306th meeting in November 2009, paras 301–326]. At its meeting in June 2010, the Committee issued an urgent appeal to the Government drawing its attention to the fact that,

in accordance with the procedural rules established in paragraph 17 of its 127th Report, approved by the Governing Body, it might present a report on the substance of the case at its next meeting even if the requested information and observations had not been received in full and in due time.

282. The Government sent its observations in a communication dated 2 June 2010.

283. Brazil has not ratified the Freedom of Association and Protection of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

284. At its meeting in November 2009, the Committee made the following recommendations [see 355th Report, para. 326]:

- (a) The Committee requests the Government to take without delay all measures within its power to ensure as a matter of priority the reinstatement without loss of wages of the trade union officials and workers dismissed from the Companhia do Metropolitano de São Paulo enterprise for having participated in the work stoppages of 23 April and 1, 2 and 3 August 2007, as well as the reinstatement of those trade union officials dismissed from the Oportrans SA enterprise on the eve of a collective bargaining process in April 2007; if the competent authorities determine that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests the Government to keep it informed of any developments in this respect.
- (b) The Committee requests the Government to take all necessary measures to carry out an investigation into the allegations regarding: (1) the recruitment of workers in the abovementioned company in the transportation sector in São Paulo enterprise to replace any workers participating in future strikes; and (2) the refusal by the abovementioned company in the transportation sector in Rio de Janeiro to recognize the members of the executive committee of the SIMERJ as trade union officials, and to keep it informed in this respect.

B. The Government's reply

285. In its communication of 2 June 2010, the Government reports that it requested the Labour Relations Departments of the Regional Labour and Employment Authorities of the states of São Paulo and Rio de Janeiro to call mediation meetings between the parties in relation to the Committee's recommendations and to keep it informed on the outcome of these meetings.

C. The Committee's conclusions

286. *The Committee recalls that when it examined this case, concerning the allegations of dismissal of union officials and members for participating in a strike as well as of other anti-union acts in the transport sector, at its meeting in November 2009, it requested: (1) the Government to take without delay all measures within its power to ensure as a matter of priority the reinstatement without loss of wages of the trade union officials and*

workers dismissed from the *Compañía do Metropolitano de São Paulo* enterprise for having participated in the work stoppages of 23 April and 1, 2 and 3 August 2007, as well as the reinstatement of those trade union officials dismissed from the *Opportrans SA* enterprise on the eve of a collective bargaining process in April 2007; if the competent authorities determine that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination; (2) the Government to take all necessary measures to carry out an investigation into the allegations regarding: (a) the recruitment of workers in the abovementioned company in the transportation sector in São Paulo to replace any workers participating in future strikes; and (b) the refusal by the abovementioned company in the transportation sector in Rio de Janeiro to recognize the members of the executive committee of the *Union of Metro System Transport Enterprise Workers of Rio de Janeiro (SIMERJ)* as trade union officials, and to keep it informed in this respect.

- 287.** *In this regard, the Committee notes that the Government reports that it has requested the Labour Relations Departments of the Regional Labour and Employment Authorities of the states of São Paulo and Rio de Janeiro to call mediation meetings between the parties in relation to the Committee's recommendations and to keep it informed on the outcome of these meetings. The Committee draws the Government's attention to the need to urgently find a solution and points out that the meetings referred to by the Government should not delay the implementation of recommendations made by the Committee at its previous examination of the case. Under these circumstances, bearing in mind that the last examination of the case was in November 2009, the Committee firmly expects that the mediation proceedings mentioned by the Government cover all the pending allegations, are held without delay and allow satisfactory solutions to be found. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendations

- 288.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee firmly expects that the mediation proceedings between the National Federation of Metro System Transport Enterprise Workers (FENAMETRO) and the enterprises Compañía do Metropolitano de São Paulo and Opportrans SA of Rio de Janeiro convened by the Government cover all pending allegations, are held without delay and allow satisfactory solutions to be found. The Committee requests the Government to keep it informed in this respect.*
 - (b) The Committee draws the Government's attention to the need to urgently find a solution and points out that the meetings referred to by the Government should not delay the implementation of recommendations made by the Committee at its previous examination of the case.*

CASE NO. 2739

INTERIM REPORT

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

- **Syndicalist Force (SF)**
- **New Trade Union Centre Brazilian Workers (NCST)**
- **General Union of Workers (UGT)**
- **Unitary Centre of Workers (CUT)**
- **Brazil Workers' Centre (CTB)**
- **General Centre of Workers of Brazil (CGTB) and**
- **World Federation of Trade Unions (WFTU), which supported the complaint**

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

289. The complaint was presented in a communication dated 2 November 2009 from the Syndicalist Force (SF), the New Trade Union Centre of Brazilian Workers (NCST), the General Union of Workers (UGT), the Unitary Centre of Workers (CUT), the Brazil Workers' Centre (CTB) and the General Centre of Workers of Brazil (CGTB). The World Federation of Trade Unions (WFTU) supported the complaint in a communication dated 27 November 2009.

290. The Government sent its observations in communications dated 18 December 2009 and 11 October 2010.

291. Brazil has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

292. In their communication dated 2 November 2009, SF, the NCST, the UGT, the CUT, the CTB and the CGTB state that the State Labour Prosecutor (MPT) (an independent body separate from both executive and judiciary) has been interfering in the affairs of primary, secondary and tertiary level trade unions through administrative and judicial channels. They further allege that the Office of the Public Prosecutor has initiated legal proceedings against trade unions. Moreover, the judiciary has been handing down rulings that constitute acts of interference and interference in trade union affairs. The complainants assert that

through this interference and intervention the entire judicial and allied apparatus is seeking actively to dismantle workers' organizations without any apparent reason.

- 293.** The complainants state that article 127 of the Constitution stipulates that the MPT is a permanent institution and an essential jurisdictional projection of the State; as such, it is responsible for defending the legal system, democratic order and the interests of society and of the individual. They claim that the MPT, in disregard of the mandate conferred on it by the legislature, has been extending its authority beyond the limits of its competence and reinterpreting workers' rights. Specifically, the MPT is interpreting freedom of association from the pseudo-utilitarian standpoint of "Brazilian-style freedom of association" and has been initiating court proceedings against workers' organizations and calling on the judiciary to revoke clauses that were the product of collective bargaining.
- 294.** These measures are accompanied by requests for penalties that are so high as to oblige trade unions to close down. The complainants cite numerous examples of the MPT's anti-union interference in collective agreement clauses concerning union contributions, in the fining of trade unions, in decisions that look upon the payment of assistance contributions as violating the principles of freedom of association, etc. In their opinion, the MPT, in bringing cases before the judiciary that are designed to interfere with the financial viability of trade unions, is acting neither in accordance with the law nor with the Constitution, but on the basis of decisions handed down by the judiciary – such as Federal Supreme Court's *súmula* No. 666 (a "*súmula*" is a summarization of case law of the higher courts that is intended to standardize the interpretation of the law) and the earlier standard No. 19 issued by the Higher Labour Court. The complainants contend that the judiciary's interference in trade union affairs is a violation of the principle of freedom of association embodied in the ILO's Conventions and in article 8 of the Brazilian Constitution, as well as of the principle of the separation of the three state powers. The MPT, the Office of the Public Prosecutor and the judiciary are undermining and debasing the principle of freedom of association by interfering directly in the continued existence of the trade union and in their internal management. Such state intervention violates the principle of freedom of association both nationally and internationally.
- 295.** The complainants state that, in addition to the MPT's initiation of court proceedings in order to weaken trade unions and prevent them from functioning by meddling in their financial administration, the Office of the Public Prosecutor of São Paulo is trying to prevent them from engaging in strikes and protest action by taking them to court, where the State is invariably awarded damages.
- 296.** The complainants add that the judiciary is encouraging the MPT and the Public Prosecutor in their crusade by handing down sentences that threaten trade unionism as a whole. For instance, the Federal Supreme Court has issued *súmula* No. 666, in which it states that the contribution to trade union confederations referred to in article 8.IV of the Constitution is applicable only to members of the relevant trade unions. The Higher Labour Court, for its part, has issued decision No. 119 concerning assistance contributions, which reads as follows: "Articles 5.XX and 8.V, of the Constitution guarantee freedom of association and the right to join trade unions. Any clause in an accord, collective agreement or standard which provides for the payment to a trade union by non-unionized workers of a confederation tax, assistance contribution, promotional contribution or suchlike shall be deemed to be in contravention of such freedom or right. Any provision that does not conform to this restriction is hereby declared null and void, and any sums irregularly withheld shall be returned to the workers concerned." The complainants state that regional courts have issued rulings to the same effect. (They cite a number of regional court rulings declaring null and void the clauses of collective agreements that provide for the payment of assistance contributions by non-unionized workers, in which the MPT is cited as plaintiff.)

- 297.** The complainants state that the evidence put forward shows that the rulings completely ignore the decisions adopted at general assemblies, which are the supreme, sovereign trade union bodies. The method adopted by the MPT is to convene the presidents of the trade unions for a hearing at the MPT, at which they are presented with a procedural adjustment agreement. Then, somewhere between blackmail and bullying, the union officials are pressured into signing the agreement, often without even a lawyer present to explain the situation or to defend them against the threat that they will be charged with all kinds of misdemeanours if they do not sign, and fined accordingly. These procedural adjustment agreements impose a number of commitments, such as not claiming contributions from members and non-members of the “trusteeship” of union activities. The complainants emphasize that the general meeting that authorizes the workers’ representatives to engage in negotiations with the employers’ organizations was attended by the workers in the industry and not only the union members, since all the workers benefit from the concessions obtained. For a union leader to go to the MPT and renounce these concessions without the consent of the rank and file is therefore absurd.
- 298.** The complainants feel that this way of proceeding shows how weak the case is for arguing that the payment of a contribution violates freedom of association, since general meetings are open to all workers of the category concerned and every vote has the same weight as that of union members. Besides, all the concessions obtained over the years thanks to the efforts of the union benefit all the workers in the category, whether or not they attend the meetings and whether or not they are union members, which proves that the payment of an assistance contribution by all the workers, irrespective of union affiliation, is necessary for the smooth conduct of the discussions that unions engage in and in their efforts to defend the interests of a professional category.
- 299.** The complainants add that the assistance contributions referred to are scheduled under article 513(e) of the Consolidated Labour Laws Act and are governed by collective agreements and union by-laws. Article 513 stipulates that it is a prerogative of the trade unions to require contributions from all workers of the economic or professional categories and of the liberal professions that they represent. For the complainants, the assistance contributions are clearly legitimate and are recognized in the Consolidated Labour Laws Act as well as in article 8 of the Constitution concerning collective labour agreements.
- 300.** Moreover, they consider that the MPT is violating the sovereign right of the general meeting of workers’ organizations to take such a decision, as they are legally protected under article 8.IV of the Constitution. The MPT’s interference is a violation of freedom of association, in that it directly inhibits the ability of trade unions to adopt their own financial regulations and assure their financial viability. The judiciary and the MPT refuse to recognize that each union defends a whole category of workers, whether or not they are union members.
- 301.** The complainants emphasize that unions in Brazil represent categories of workers, as laid down in article 511 of the Consolidated Labour Laws Act and article 8 of the Constitution. Representation by category presupposes that all the concessions and benefits obtained – whether higher salaries or better working conditions – are extended to all the workers concerned irrespective of union membership. This is a significant achievement, as it means that workers who cannot join trade unions because of their employers’ opposition enjoy the same advantages as union members, thanks to the *erga omnes* effect of collective bargaining. The same, therefore, should apply to the unions’ financial support, though the State authorities that the present complaint is directed at contend that the unions’ costs should be borne only by their members. This is a source of anti-union discrimination which encourages affiliated workers to cancel their membership.

302. The anti-union practices engaged in by the MPT and by the judiciary are intended to undermine the decision of the workers' general meeting, whereas employers' organizations are at liberty to set whatever contributions they wish without any state interference. The complainants conclude by requesting the Committee to contemplate sending a direct contacts mission to collect information, engage a dialogue and help resolve the issues raised in the allegations.

B. The Government's reply

303. With its communication dated 18 December 2009, the Government attaches the observations of the MPT. Through its representative, the MPT states that under the Labour Laws Consolidation Act of 1943 the main features of Brazil's labour legislation were: excessive state intervention in both legislative and administrative affairs, trade union monopoly with a mandatory "union tax", severe restrictions on the right to strike, and the standard-setting power of the labour courts. The emphasis on the individual protection of workers' interests through the labour legislation meant that the collective protection of their interests by trade unions was given less importance. The political opening up that began in the years prior to the adoption of the 1988 Constitution has to be seen from the standpoint of the country's external debt, the succession of economic crises and the pressure of the global market. The Government's response was to introduce measures to make labour law more flexible, and trade unions were expected to adapt to the new rules and regulations while at the same time avoiding the kind of abuses that could lead to a decline in working conditions at a time when the State was focusing on its economic woes. To be able to assume these new responsibilities, trade unions needed to be free and strong and their leaders had to adopt a fresh approach.

304. Brazil's 1988 Constitution, based as it is on the dignity of the human person and on democratic principles, modified significantly the union structure that had existed for decades past. The MPT assumed a leading role in defending the workers' inalienable social and individual interests, especially their fundamental rights. So it is completely untrue, and contrary to the MPT's very mandate, to accuse it of violating a basic right such as freedom of association. According to the MPT, the complainant organizations are trying to do away with any kind of check that might be imposed on them in order to prevent some of their leaders from going off the rails.

305. The MPT asserts that article 8 of the Constitution guaranteed union autonomy vis-à-vis the State and protection from "negative" freedom of association, while maintaining the ban on the establishment of more than one union for each economic activity (i.e. the principle of trade union monopoly) as the basis of the union movement, the existence of federations and confederations as the higher level organizations and the levy of union membership dues in addition to the mandatory contribution required from all workers, irrespective of union membership. The maintenance of a trade union monopoly for each category and the introduction of a mandatory contribution were designed to prevent the break up and weakening of the Brazilian unions. However, this cannot continue indefinitely to be the juridical framework for trade unionism in Brazil, since it is not in conformity with the fundamental principles of freedom of association as laid down by the ILO. So long as the Constitution maintains the principle of trade union monopoly and of a mandatory contribution, there is always the possibility that unions will negotiate unfavourable conditions for the workers in exchange for special benefits for the union leaders and that membership dues will be used for the latter's personal benefit or to finance partisan political objectives.

306. The MPT explains that, in addition to state financing of the trade union movement by means of the mandatory contribution payable by all workers, unions continue to levy the union dues provided for in article 8.IV of the Constitution, as well as an assistance

contribution. This was originally meant to function like the solidarity contribution that is found in some European countries, the idea being that non-unionized workers contribute to a union that negotiates better working conditions for them, i.e. an expression of their solidarity with union members and with the union itself in recognition of the services it renders. According to the Federal Supreme Court, which is the highest authority for interpreting the Constitution, union dues are not strictly speaking a tax and can therefore be levied only on a union's members. The assistance contribution was examined by the Higher Labour Court, the country's highest labour court, which decided that it should be paid by union members (standard No. 119 mentioned above and case law guideline No. 17 relating to collective labour disputes). The case law cited was not intended to restrict the ability of trade unions to defend the workers but, on the contrary, sprang from the need to prevent the practice frequently indulged in by certain "shadow" trade unions which have no members, serve merely as a screen for obtaining financial resources, have no commitment to the rank and file and can easily be manipulated by enterprises to make the provisions of labour law more flexible.

- 307.** The MPT states that, there are of course a significant number of militant representative trade unions that call strikes and obtain concessions for the workers. When the MPT comes across practices or clauses that contravene the laws and regulations in force, some of its attorneys feel duty bound to enforce compliance in line with the interpretation handed down by the courts. Often it is the workers themselves (who pay their assistance or compulsory contribution through the MPT where the collective labour agreements are registered) who request the MPT's intervention. In these cases the MPT is simply following the court's guidelines. Currently, the MPT's officials are trying to introduce a process of formal dialogue with the trade unions to resolve the various issues surrounding the proper exercise of freedom of association.
- 308.** The MPT states that on 28 May 2009, a National Coordinating Body for the Promotion of Freedom of Association (CONALIS) was set up with the participation of representatives of the MPT's units throughout the country. One of the CONALIS' strategic objectives is to guarantee freedom of association and to resolve collective labour disputes. For the MPT, a genuinely democratic society is possible only if all sectors comply with the principles embodied in the Constitution, and especially with one as important as the matter of labour relations. Hence, the need for the MPT to contribute to the democratization of the trade union movement and for its strategy of strengthening both the organizations themselves and the collective bargaining process and of striving to eliminate anti-union discrimination. On 25 August 2009, CONALIS held its first nationwide meeting, which the presidents of all the trade union confederations were invited to attend. Participants were thus able to express their views on what the movement, as a whole, expected from the new body and on the MPT's handling of the whole issue since its creation. Through this process of dialogue a large number of contacts and meetings were organized with the leaders of the union confederations to discuss a broad range of issues, including the assistance contribution, the banning of strikes and the threats on the lives of union officials.
- 309.** The MPT emphasizes that it has been discussing a range of issues of concern to the workers and to society by promoting ongoing social dialogue and holding bipartite or tripartite meetings before it reaches its decisions. It considers that the complaint under examination is extremely important, as it provides the ILO with an overall picture of the problem of trade unionism in Brazil. The State must, at all times, consider the consequences of its actions and make sure that it is achieving its goals, even if this means reviewing its approach in the matter. Unless there is a change of culture in the trade union movement and a change of perspective by its leaders, it is the workers themselves who will suffer most. The complaint under examination could serve as a means of convincing union leaders to agree to Brazil's ratification of Convention No. 87, which the unions' opposition has so far unfortunately prevented from taking place.

- 310.** In its communication dated 11 October 2010, the Government states that great progress has been achieved for the working class and that employment and growth are at record highs every month. It indicates that these achievements are the fruit of the struggle of workers, represented by their unions, who sought to avoid lay-offs in times of crisis and to obtain better working conditions.
- 311.** The Government adds that the single paragraph of article 1 of the Federal Constitution of Brazil states that the power emanates from the people and will be exercised on its behalf. For this reason, the constituents who drafted the Federal Constitution in 1988 were supported by the popular vote and were required to draft a democratic constitution that takes into account the immediate and medium-term needs of the Brazilian people. Thus, the provisions on freedom of association and unity, which restrict the territorial base to at least a municipality, aim to prevent the formation of trade unions against the interests of workers and weaken the combative entities. In the same vein, article 8 of the Constitution provides several progressive measures, such as the prohibition of intervention and state interference in trade union affairs, freedom of association – maintaining trade union unity at the territorial level corresponding to at least one municipality, compulsory trade union dues to continue to ensure the independence of unions and the recognition of the right to strike and the trade right to officials.
- 312.** Regarding the assistance contributions, the Government indicates that it is not a tax, since, if that had been the case, workers would not have been able to oppose it. The Government acknowledges the existence of conflicts in relation to such contributions and reaffirms its willingness to improve the dialogue with the unions and organizations representing employers in order to find a legal mechanism to effectively regulate this matter. The Government states that, in the framework of the National Labour Forum (FNT), the creation of a negotiated contribution has been proposed, pursuant to which all workers in the same category should pay in case of concluding a collective agreement, thereby eliminating the compulsory contribution in the Constitution. The Government states that, due to lack of consensus and the fact that this issue is a source of conflict in itself, this proposal was not acted upon. The Government adds that, in order to refine and strengthen democracy in industrial relations, it proposed the creation of a Council of Industrial Relations of tripartite composition where these types of issues could be examined.

C. The Committee's conclusions

- 313.** *The Committee observes that the complainant organizations raise objections to the measures adopted by the MPT and to the decisions handed down by the judiciary revoking clauses in collective agreements with respect to the payment of assistance contributions by all workers covered by an agreement, including non-unionized workers, because of the erga omnes effect of collective bargaining. They also allege that the Office of the Public Prosecutor of São Paulo has initiated legal proceedings to prevent trade unions from engaging in protest action.*
- 314.** *The Committee notes that the Government has sent the observations of the MPT, whose representative states that: (1) under the Labour Laws Consolidation Act of 1943, the main features of Brazil's labour regulations were: excessive state intervention in both legislative and administrative affairs, trade union monopoly with a mandatory "union tax", severe restrictions on the right to strike, and the standard-setting power of the labour courts; (2) the political opening-up that began in the years prior to the adoption of the 1988 Constitution have to be seen from the standpoint of the country's external debt, successive economic crises and the pressure of the global market and, consequently, measures have been introduced to make labour law more flexible and trade unions are expected to adapt to the new rules and regulations while at the same time avoiding the kind of abuses that could lead to a decline in working conditions at a time when the State was focusing on its*

economic woes; (3) if they are to assume their new responsibilities, trade unions need to be free and strong and their leaders have to adopt a fresh approach; (4) Brazil's 1988 Constitution, based as it is on the dignity of the human person and on democratic principles, modified significantly the union structure that had existed for decades past; (5) the MPT has assumed a leading role in defending the workers' inalienable social and individual interests, especially their fundamental rights, and so it is completely untrue, and contrary to the MPT's very mandate, to accuse it of violating a right as fundamental as freedom of association; (6) the maintenance of a trade union monopoly for each category and the introduction of a mandatory contribution were designed to prevent the break up and weakening of the Brazilian unions, but this cannot continue indefinitely to be the juridical framework for trade unionism in Brazil, since it is not in conformity with the fundamental principles of freedom of association as laid down by the ILO; (7) with the maintenance of trade union monopoly and of a mandatory tax, there is always the possibility that unions will negotiate unfavourable conditions for the workers; (8) the assistance contribution was examined by the Higher Labour Court, which decided that it should be paid by union members; (9) case law cited was not intended to restrict the ability of trade unions to defend the workers but, on the contrary, sprang from the need to prevent the practice frequently indulged in by certain "shadow" trade unions which have no members, serve merely as a screen for obtaining financial resources, have no commitment to the rank and file and can easily be manipulated by enterprises to make the provisions of labour law more flexible; (10) when the MPT comes across practices or clauses that contravene the laws and regulations in force, some of its attorneys feel duty bound to enforce compliance in line with the interpretation handed down by the courts, and it is often the workers themselves (who pay their assistance or compulsory contribution through the MPT where the collective labour agreements are registered) who request the MPT's intervention; (11) the MPT's officials are currently trying to introduce a process of formal dialogue with the trade unions to resolve the various issues surrounding the proper exercise of freedom of association, and the CONALIS accordingly held a meeting in August 2009, which the presidents of all the trade union confederations were invited to attend so that they could express their views on what the movement, as a whole, expected from the new body and on the MPT's handling of the whole issue since its creation; (12) through this process of dialogue, a large number of contacts and meetings have been organized with the leaders of the union confederations to discuss a broad range of issues, including the assistance contribution, the banning of strikes and the threats on the lives of union officials.

- 315.** *The Committee notes that the Government adds that: (1) the assistance contribution is not a tax, since in that case workers would not have been able to oppose it; (2) it recognizes the existence of conflicts with regard to this type of contribution and reaffirms its willingness to improve the dialogue with the unions and the representative organizations of employers to find an effective legal mechanism to regulate this matter; (3) a proposal was made within the framework of the FNT, for the creation of a negotiated contribution that all workers in the same category would pay in case of concluding a collective agreement, thus removing the compulsory contribution in the Constitution. The Government indicates that this proposal was not acted upon due to lack of consensus and the fact that this issue remains a source of conflict; and (4) to refine and strengthen democracy in industrial relations, the Government proposes the creation of a Council of Industrial Relations, a tripartite body where these types of issues could be examined.*
- 316.** *The Committee recalls that it has on many occasions ruled on union security clauses, including those which provide for the payment of contributions by non-unionized workers as an expression of solidarity with unions that conclude a collective agreement. In dealing with this issue, the Committee has referred to the discussions that took place at the International Labour Conference when it adopted the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). On that occasion, the Committee on International*

Relations of the International Labour Conference, taking into consideration the debate which it had held on the issue of union security clauses, finally agreed to recognize that the Convention should not be interpreted as authorizing or prohibiting union security arrangements, such matters being matters for regulation in accordance with national practice [see 281st Report of the Committee, Case No. 1579 (Peru), para. 64, quoting ILO, Record of Proceedings, ILC, 32nd Session, 1949, p. 468]. In the light of that ruling, the Committee considers that problems arising out of union security clauses must be resolved at the national level, according to the practice and labour relations system of each country. In other words, both situations where union security clauses are authorized and those where these are prohibited can be considered to be in conformity with ILO principles and standards on freedom of association [see 284th Report, Case No. 1611 (Bolivarian Republic of Venezuela), paras 337–339].

- 317.** *Regarding the question of salary deductions agreed to in a collective agreement that is applicable to non-unionized workers who benefit from a union's activities, the Committee has stated in the past that, when legislation admits trade union security clauses, such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 480].*
- 318.** *Bearing in mind that the Government recognizes the existence of conflicts in relation to this type of assistance contribution, as well as the apparent contradiction between the interpretation of the legislation by the judiciary and the statement of the complainant organizations to the effect that it is legally permissible to impose an assistance contribution on non-unionized workers who benefit from a collective agreement, and observing that the CONALIS of the MPT has held meetings with representatives of the union confederations to discuss various issues such as those arising from the assistance contribution, the Committee requests the Government to keep it informed of the outcome of the aforementioned meetings, as well as of the initiatives to establish a tripartite Council of Industrial Relations. The Committee reminds the Government that it may call upon ILO assistance in seeking solutions that are satisfactory to all the parties concerned and that are in conformity with the principles of freedom of association. Finally, the Committee invites the Government to consider taking the necessary measures for the ratification of Convention No. 87.*
- 319.** *Regarding the allegation that the Office of the Public Prosecutor of São Paulo has initiated legal proceedings to prevent trade unions from holding strikes and engaging in protest action, the Committee requests the Government to send its observations on the subject without delay and, since it is a matter of concern to the country's trade union confederations, to initiate a dialogue with the most representative employers' and workers' organizations on the issue. The Committee also requests the complainant organization to provide additional information and examples concerning its allegations.*

The Committee's recommendations

- 320.** *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 keep it informed of the outcome of the meetings between the CONALIS of the MPT and the representatives of the union confederations to discuss various issues such as those arising from the assistance contribution, and requests the Government to keep it informed with regard to the initiative to establish a tripartite Council of*

Industrial Relations. The Committee reminds the Government that it may call upon ILO assistance in seeking solutions that are satisfactory to all the parties concerned and are in conformity with the principles of freedom of association.

- (b) *The Committee requests the Government to send its observations without delay on the allegation that the Office of the Public Prosecutor of São Paulo has initiated legal proceedings to prevent trade unions from holding strikes and engaging in protest action and, since it is a matter of concern to the country's trade union confederations, to initiate a dialogue with the most representative employers' and workers' organizations on the issue. The Committee also requests the complainant organization to provide additional information and examples with regard to its allegations.*
- (c) *The Committee invites the Government to consider taking the necessary measures for the ratification of Convention No. 87.*

CASE NO. 2318

INTERIM REPORT

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

Allegations: The murder of three trade union leaders; the continuing repression of trade unionists in Cambodia

- 321.** The Committee has already examined the substance of this case on five occasions, most recently at its June 2009 session where it issued an interim report, approved by the Governing Body at its 305th Session [see 354th Report, paras 258–271].
- 322.** The Government provided its observations in a communication dated 14 September 2009.
- 323.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

- 324.** In its previous examination of the case, the Committee made the following recommendations [see 354th Report, para. 271]:
- (a) As a general matter regarding all the subsequent issues, the Committee once again strongly urges the Government to take measures to ensure that the trade union rights of all workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives, and that of their families.

- (b) The Committee urges the Government to ensure that the investigation into the murder of Chea Vichea is prompt, independent, and expeditiously carried out, so as to ensure that all available information is brought before the courts with a view to determining the actual murderers and the instigators of the assassination of this trade union leader, punishing the guilty parties and thus bringing to an end the prevailing situation of impunity as regards violence against trade union leaders. The Committee requests to be kept informed of developments in this respect.
- (c) The Committee once again strongly urges the Government to ensure that a full and independent investigation into the circumstances of trade union leader Ros Sovannareth's murder is finally carried out so as to bring all relevant information before the courts. It also urges the Government to ensure that Thach Saveth may exercise his right to a full appeal as soon as possible, before an impartial and independent judicial authority, and requests to be kept informed of developments in this respect.
- (d) As concerns trade union leader Hy Vuthy, the Committee strongly urges the Government to immediately institute or reactivate a full and independent inquiry into his murder and to keep it informed of all progress made in this regard.
- (e) The Committee insists that the Government indicate the steps taken for capacity building and the institution of safeguards against corruption necessary for the independence and effectiveness of the judicial system.
- (f) The Committee strongly urges the Government, once again, to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of the results of these inquiries.
- (g) The Committee strongly requests the Government to indicate the steps taken to prevent the blacklisting of trade unionists.
- (h) With regard to the dismissals of Lach Sambo, Yeom Khun and Sal Koem San following their convictions for acts undertaken in connection with a strike at the Genuine garment factory, the Committee requests the Government to inform it of the status of their appeals proceedings and, if their convictions have been overturned, to indicate their current employment status.
- (i) The Committee continues to express its profound concern with the extreme seriousness of the case and the repeated absence of information on the steps taken to investigate the above matters in a transparent, independent and impartial manner, a necessary prerequisite to creating a climate free from violence and intimidation necessary for the full development of the trade union movement in Cambodia.
- (j) The Committee, after careful consideration of all the circumstances, calls the Governing Body's special attention to the situation.

B. The Government's reply

325. In its communication of 14 September 2009, the Government indicates that on 17 August 2009 the Appeal Court issued a judgement ordering the release of Born Samnang and Sok Sam Oeun on bail and further investigation into the murder of trade union leader Chea Vichea.

C. The Committee's conclusions

326. *The Committee recalls that in previous examinations of this case it had repeatedly emphasized the seriousness of the allegations pending which refer, inter alia, to the murder of trade union leaders Chea Vichea, Ros Sovannareth and Hy Vuthy, and had*

drawn the Government's attention to the fact that a climate of violence leading to the death of trade union leaders is a serious obstacle to the exercise of trade union rights. The Committee further recalls that in its last examination of this case it had welcomed the 31 December 2008 decision of the Supreme Court that ordered the release of Born Samnang and Sok Sam Oeun, pending the re-hearing of their case by the Appeal Court, as well as the reopening of the investigation into Chea Vichea's murder. In this regard, the Committee notes the Government's information that the 17 August 2009 decision of the Appeal Court, which, as had the Supreme Court's decision, ordered the release of Born Samnang and Sok Sam Oeun on bail and further investigation into the murder of Chea Vichea. In view of the decisions of the Supreme Court and the Appeal Court, the Committee requests the Government to take the necessary measures to ensure that Born Samnang and Sok Sam Oeun are exonerated of the charges brought against them and that the bail be returned to them. Additionally, and recalling that two years have elapsed since the Supreme Court first ordered the reopening of the investigation into Chea Vichea's murder, it once again urges the Government to ensure that a thorough and independent investigation is carried out expeditiously, so as to ensure that all available information will finally be brought before the courts in order to determine the actual murderers and instigators of the assassination of this trade union leader, punish the guilty parties and thus bring to an end the prevailing situation of impunity as regards violence against trade union leaders. The Committee requests to be kept informed in this regard.

327. The Appeal Court's decision notwithstanding, the Committee is bound to deplore that the Government has once again failed to provide any information regarding the other aspects of the case. As a general matter, therefore, the Committee once again urges the Government to take measures to ensure that the trade union rights of workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives, and that of their families. In respect of Thach Saveth, who the Committee recalls was sentenced to 15 years in prison for the murder of Ros Sovannareth, in a trial that lasted one hour and was characterized by breaches of procedural rules and the absence of full guarantees of due process of law, the Committee once again urges the Government to ensure that he may exercise his right to a full appeal as soon as possible, before an impartial and independent judicial authority, and to keep it informed of any pending appeals. Furthermore, and emphasizing once again that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the greatest extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 48], the Committee firmly expects that a full and independent investigation into the circumstances of the murder of Ros Sovannareth will finally be carried out so as to bring all relevant information before the courts.
328. The Committee deplores that, in respect of the murder of Hy Vuthy, no information has been provided as to any progress made in investigating the circumstances of this murder or the determination of any guilty parties; such circumstances can only reinforce the feeling of impunity in relation to the murder of trade union leaders. The Committee once again urges the Government to immediately institute or reactivate a full and independent inquiry in this regard and to keep it informed of all progress made.

- 329.** *The Committee once again urges the Government to provide information on the steps taken to implement the rest of its recommendations. In particular, it requests the Government to indicate the steps taken for capacity building of the judiciary and the institution of safeguards against corruption necessary for the independence and effectiveness of the judicial system.*
- 330.** *Recalling the allegations concerning acts of violence committed against several trade unionists, the Committee once again strongly urges the Government to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of developments in this respect.*
- 331.** *The Committee, recalling its previous recommendation, once again requests the Government to indicate the steps taken to prevent the blacklisting of trade unionists.*
- 332.** *Finally, the Committee once again requests the Government to inform it of the status of the appeal proceedings of Lach Sambo, Yeom Khun and Sal Koem San, as well as to indicate their current employment status.*
- 333.** *The Committee continues to express its profound concern with the extreme seriousness of the case and the repeated absence of information on the steps taken to investigate the above matters in a transparent, independent and impartial manner, a necessary prerequisite to creating a climate free from violence and intimidation necessary for the full development of the trade union movement in Cambodia. Given the lack of progress on these very essential points, the Committee is bound once again to call the Governing Body's special attention to the extreme seriousness and urgency of the issues in this case.*

The Committee's recommendations

- 334.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *As a general matter regarding all the subsequent issues, the Committee once again strongly urges the Government to take measures to ensure that the trade union rights of all workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives, and that of their families.*
- (b) *The Committee requests the Government to take the necessary measures to ensure that Born Samnang and Sok Sam Oeun are exonerated of the charges brought against them and that the bail be returned to them. Furthermore, the Committee once again urges the Government to ensure that a thorough and independent investigation into the murder of Chea Vichea is carried out expeditiously, so as to ensure that all available information will finally be brought before the courts in order to determine the actual murderers and instigators of the assassination of this trade union leader, punish the guilty parties and thus bring to an end the prevailing situation of impunity as regards violence against trade union leaders. The Committee requests to be kept informed in this regard.*

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- (c) *The Committee once again strongly urges the Government to ensure that a full and independent investigation into the circumstances of trade union leader Ros Sovannareth's murder is finally carried out so as to bring all relevant information before the courts. It also urges the Government to ensure that Thach Saveth may exercise his right to a full appeal as soon as possible, before an impartial and independent judicial authority, and requests to be kept informed of any pending appeals.*
- (d) *As concerns trade union leader Hy Vuthy, the Committee once again urges the Government to immediately institute or reactivate a full and independent inquiry into his murder and to keep it informed of all progress made in this regard.*
- (e) *The Committee insists that the Government indicate the steps taken for capacity building and the institution of safeguards against corruption necessary for the independence and effectiveness of the judicial system.*
- (f) *The Committee strongly urges the Government, once again, to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of the results of these inquiries.*
- (g) *The Committee strongly requests the Government to indicate the steps taken to prevent the blacklisting of trade unionists.*
- (h) *With regard to the dismissals of Lach Sambo, Yeom Khun and Sal Koem San following their convictions for acts undertaken in connection with a strike at the Genuine garment factory, the Committee once again requests the Government to inform it of the status of their appeals proceedings and to indicate their current employment status.*
- (i) *The Committee continues to express its profound concern with the extreme seriousness of the case and the repeated absence of information on the steps taken to investigate the above matters in a transparent, independent and impartial manner, a necessary prerequisite to creating a climate free from violence and intimidation necessary for the full development of the trade union movement in Cambodia.*
- (j) *Given the lack of progress on these very essential points, the Committee is bound once again to call the Governing Body's special attention to the extreme seriousness and urgency of the issues in this case.*

CASE NO. 2704

INTERIM REPORT

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

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

- 335.** The complaint is contained in a communication dated 23 March 2009 from the United Food and Commercial Workers Union – Canada (UFCW Canada). In communications dated respectively 30 March and 6 April 2009, the Canadian Labour Congress and UNI Global Union associated themselves with the complaint.
- 336.** The Government sent its observations in communications dated 9 October 2009 and 8 October 2010.
- 337.** Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 338.** In a communication dated 23 March 2009, the UFCW Canada alleged that the Ontario Agricultural Employees Protection Act, 2002 (AEPA), violates ILO principles concerning freedom of association and collective bargaining as embodied in the ILO Constitution, 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 ILO Declaration on Fundamental Principles and Rights at Work of 1998. The complainant alleged that, under the AEPA, agricultural employees could join and form an association but are denied the right to collective bargaining. Moreover, agricultural employees cannot unionize under the Ontario Labour Relations Act (OLRA) since the Act does not apply to employees within the meaning of the AEPA.
- 339.** The complainant stated that the right to unionize and to bargain collectively are guaranteed to workers since the Collective Bargaining Act of 1943. These rights remain guaranteed for all Ontario workers under the OLRA adopted in 1995. Workers with specific labour relations statutes have more or less the same statutory protection concerning their collective bargaining rights. However the complainant asserted that agricultural workers have been, and continue to be, denied both the right to unionize and to bargain collectively.
- 340.** The UFCW Canada recalled that agricultural workers were granted rights in line with those of agricultural workers throughout Canada when the Ontario Government enacted the Agricultural Labour Relations Act (ALRA) SO in 1994. The ALRA gave agricultural workers the right to organize and to bargain collectively under a comprehensive statute

administered by the Ontario Labour Relations Board. This Act was adopted after two years of consultation conducted by a task force on agricultural labour relations with the Government, employers' groups and workers' representatives. These consultations led to a consensus that unionization and collective bargaining were possible in the agricultural sector. The ALRA came into force in June 1994 but was repealed in November 1995 by a newly elected Provincial Government which at the same time enacted the OLRA denying to agricultural workers the right to unionize and to bargain collectively.

341. The repeal of the ALRA and farm workers' exclusion from the OLRA were the subject of a decision by the Supreme Court of Canada in December 2001. The Court ruled that, under the Canadian Charter of Rights and Freedoms, the Government had a duty to enact legislation that provides the protection which is necessary to ensure that farm workers can meaningfully exercise their freedom of association. The Court gave 18 months to the Government to remedy the legislation. As a result, the Government of Ontario enacted the AEPA, which came into force in June 2003. According to the complainant, in introducing the new Act, the Minister of Agriculture and Food confirmed that the proposed legislation did not extend collective bargaining rights to agricultural workers.
342. The complainant specified that, under the AEPA, agricultural employees had the right to join or to form an employees' association, the right to participate in lawful activities of an employees' association as well as the right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment. However the UFCW Canada denounced the fact that, while the AEPA provides that the employer shall give an employees' association "a reasonable opportunity to make representations", the employer only has the obligation to listen to the representation if made orally or read to them if made in writing. The complainant regretted that the AEPA does not impose any obligation on an employer to bargain at all.
343. The UFCW Canada indicated that in 2004 it launched a court challenge against the AEPA on behalf of 300 agricultural workers of a mushroom factory in the town of Kingsville, Ontario, when the employer refused to engage in a collective bargaining process. The complainant also referred to the ruling of the Supreme Court of Canada in the decision delivered on 8 June 2007 concerning British Columbia's Health and Social Services Delivery Improvement Act. The complainant underlined that on that occasion the Supreme Court made a clear assertion that the Government of Canada has not only a moral but a legal obligation to live up to its international commitments as enshrined in ILO Conventions and Declarations.
344. Finally, while it referred to principles established by the Committee of Freedom of Association concerning the promotion of collective bargaining as an essential element of freedom of association, the complainant recalled the conclusion reached in a previous case examined by the Committee against the Government of Ontario and concerning the exclusion of a number of workers from collective bargaining and involving the Government of Ontario (see Case No. 1900, Report No. 308, paragraphs 139–194). The Committee ruled that such exclusion violated ILO standards.

B. The Government's reply

345. In its communication of 9 October 2009, the Government transmits a communication from the Provincial Government of Ontario which first indicated that a case is before the Supreme Court of Canada on behalf of the UFCW Canada to have the AEPA declared unconstitutional on the grounds that it infringes freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms. The Provincial Government explained that the appeal was scheduled to be heard on 17 December 2009. The Provincial Government considered that, in light of the similarities of the issues involved in both the

domestic constitutional challenge and the complaint brought before the ILO, as well as the evolving nature of freedom of association in Canadian constitutional law, the ruling of the Supreme Court of Canada may affect the nature of the Government's response to the complaint and possibly its approach to the issue in general. Therefore, the Provincial Government requested the Committee to defer its examination of the case until after the Supreme Court of Canada has rendered its decision.

- 346.** The Provincial Government indicated that, in light of its request to defer consideration of the complaint, it did not intend to provide a comprehensive response to the complaint, but would outline briefly the rationale for the AEPA and point out some inaccuracies contained in the complaint.
- 347.** With regard to the allegation that the AEPA contravenes Conventions Nos 87 and 98, the Provincial Government reminded that Canada has not ratified Convention No. 98. As concerns the purpose of the AEPA, the Provincial Government indicated that the Act provides an alternative labour policy that suits the circumstances of farm labour and the sector's unique characteristics. The AEPA contains provisions very similar, if not identical, to the OLRA provisions that establish the right to organize and that prohibit unfair practices from the employer that would interfere. In addition, the Act compels employers to consider the representations of employees' associations and allows for an application to be made for an order allowing access to farm property where employees reside for the purpose of attempting to persuade them to join an employees' association.
- 348.** Contrary to the allegations of the complainant, the Provincial Government asserts that nothing in the AEPA impairs any collective bargaining between employees' associations, including trade unions, and farm employers. Parties in the agricultural sector in the Province of Ontario are free to collectively negotiate terms and conditions of employment without interference. Furthermore, the Provincial Government specified that employees are free under the AEPA to choose whatever form of association best represents their interests and are free to cooperate with other associations or unions since the AEPA does not give one association the exclusive right to represent all agricultural employees. The Provincial Government underlined that the AEPA is consistent with the principle of the voluntary nature of collective bargaining as an essential aspect of freedom of association established by the Committee on numerous occasions.
- 349.** The Provincial Government concluded in expressing the hope that, should the Committee decide to proceed with the examination of the complaint, the clarification made will assist the Committee in providing interim conclusions pending a further submission once the domestic appeal before the Supreme Court of Canada is resolved.
- 350.** In a communication of 8 October 2010, the Government of Ontario confirmed that the Supreme Court of Canada heard the appeal on 17 December 2009; however it was unknown when the Court would release its decision. The Provincial Government reiterated that it reserved the right to provide a comprehensive response following the decision of the Supreme Court.

C. The Committee's conclusions

- 351.** *The Committee notes that this case concerns the alleged exclusion of agricultural workers from access to collective bargaining through the adoption of the AEPA. The Committee observes from the complainant's communication that it had also launched a court challenge against the AEPA in 2004 on behalf of agricultural workers of a mushroom factory when the employer refused to engage in a collective bargaining process. The key issue of the domestic court challenge is whether the AEPA infringes freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms.*

352. *The Committee notes the Provincial Government's statement that presently the case is before the Supreme Court of Canada which heard the appeal on 17 December 2009. However, it was unknown when the Supreme Court would render its decision. Therefore, given the similarity of the issues involved in the two proceedings and the fact that the result of the appeal heard by the Supreme Court may affect the nature of the Government of Ontario's approach to the issue in general, the Provincial Government requested that the Committee defer its consideration of the complaint until after the Supreme Court of Canada has rendered its decision.*
353. *As concerns the Provincial Government's request that the full examination of this case be postponed pending the outcome of the constitutional challenge raised by the UFCW Canada and which, at that time, was about to be heard by the Supreme Court of Canada, the Committee wishes to recall that, although the use of internal legal procedures is undoubtedly a factor to be taken into consideration, it has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, Annex I, para. 30].*
354. *However, the Committee had been sensitive to the Provincial Government's arguments and decided to postpone the examination of the case until its November 2010 session with the expectation that in the meantime the Supreme Court of Canada would render its decision on the constitutionality of the AEPA. The Committee recalls that the initial Court challenge was brought in 2004 and has yet to be resolved. It also considers that its examination of the present case on the basis of long-established principles can be of assistance in the national consideration of the issues in question. It is in this spirit, and in accordance with its earlier decision not to postpone the case beyond its November 2010 meeting that the Committee will proceed with its examination of the substantive points raised in the case.*
355. *The Committee notes the complainant's allegations that the rights to unionize and to bargain collectively have been guaranteed to workers in the Province of Ontario since the Collective Bargaining Act of 1943. These rights remain guaranteed for all Ontario workers under the Labour Relations Act enacted in 1995. While workers with specific labour relations statutes have more or less the same statutory protection concerning their collective bargaining rights, agricultural workers are alleged to have been and continue to be denied both the right to unionize and to bargain collectively. In particular, the complainant alleged that the AEPA violates ILO principles concerning freedom of association and collective bargaining as embodied in the ILO Constitution and relevant Conventions. While taking due note of the Provincial Government's reminder that Canada has not ratified Convention No. 98, the Committee recalls that the purpose of the procedure on freedom of association is to promote respect for trade union rights in law and practice, therefore complaints lodged with the Committee can be submitted whether or not the country concerned has ratified the freedom of association Conventions [see **Digest**, *op. cit.*, para. 5].*
356. *The Committee takes note of the complainant's allegations that under the AEPA agricultural employees have the right to join or to form an employees' association, the right to participate in lawful activities of an employees' association as well as the right to make representations to their employers, through employees' associations, respecting the terms and conditions of their employment. However, the Committee observes that, according to the complainant, the AEPA only provides that the employer shall give a reasonable opportunity for representations and listen to or read them, without any obligation imposed by the AEPA to bargain at all. The Committee notes that the Provincial Government for its part considers that the AEPA provides an alternative labour policy that suits the circumstances of farm labour and the sector's unique characteristics. The*

Committee notes the Provincial Government's statement that the AEPA contains provisions very similar, if not identical, to the OLRA that establishes the right to organize and prohibit unfair practices from the employer that would interfere. Finally, the Committee notes that in the Provincial Government's view nothing in the AEPA impairs any collective bargaining between employees' associations, including trade unions, and farm employers. Parties in the agricultural sector in the Province of Ontario are free to collectively negotiate terms and conditions of employment without interference. The Committee notes that for the Provincial Government's part the AEPA is consistent with the principle of the voluntary nature of collective bargaining as an essential aspect of freedom of association established by the Committee on numerous occasions.

- 357.** *As concerns the allegations of exclusion of agricultural workers from collective bargaining established by virtue of the AEPA, the Committee notes the complainant's contention that the employers concerned are not under any legal obligation to bargain with employees' associations or to engage in any bargaining whatsoever regarding the terms and conditions of employment of agricultural workers. The Committee recalls that it had already examined a case concerning the denial of the right to collective bargaining to certain categories of workers in the Province of Ontario, including agricultural and horticultural workers (see Case No. 1900, 308th Report, paragraphs 139–194). In this regard, the Committee referred to the preliminary work for the adoption of Convention No. 87 which clearly indicated that "one of the main objects of the guarantee of freedom of association is to enable employers and workers to form organizations independent of the public authorities and capable of determining wages and other conditions of work by means of freely concluded collective agreements" [see **Digest**, *op. cit.*, para. 882]. It consequently requested the Government to take the necessary measures to ensure that these workers enjoy the protection necessary, either through the OLRA or by means of occupationally specific regulations, to establish and join organizations of their own choosing, and to take the necessary measures to guarantee for them access to machinery and procedures which facilitate collective bargaining. Fully recognizing the importance it places on the voluntary nature of collective bargaining, the Committee recalls that the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association. [see **Digest**, *op. cit.*, para. 925]. The Committee also recalls that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. Finally, in many instances the Committee has pointed out the importance which it attaches to the right of representative organizations to negotiate, whether these organizations are registered or not [see **Digest**, *op. cit.*, paras 880 and 884].*
- 358.** *The Committee, observing in particular that neither the Government nor the complainant have referred to any successfully negotiated agreement since the Act's adoption in 2002, nor even to any good faith negotiations engaged in, continues to consider that the absence of any machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principal objectives of the guarantee of freedom of association – the forming of independent organizations explicitly capable of concluding collective agreements. It requests the Government to take the necessary measures to ensure that the Provincial Government puts in place appropriate machinery and procedures for the promotion of collective bargaining in the agricultural sector and requests it to keep it informed of the progress made in this respect. Appropriate machinery can be adapted to national circumstances provided the principles reflected above are fully respected.*

- 359.** *Furthermore, the Committee notes that an appeal was lodged by the UFCW Canada challenging the constitutionality of the AEPA before the Ontario Court of Appeal which gave rise to a ruling acknowledging the right for Ontario farm workers to a legislation that protects their ability to bargain collectively, and that ruling has been appealed by the Ontario Government to the Supreme Court of Canada. The Committee requests the Government to provide the decision of the Supreme Court of Canada concerning the constitutionality of the AEPA as soon as it is handed down and to indicate any implications this decision may have on the question of bargaining rights in the agricultural sector of Ontario.*
- 360.** *The Committee notes that the complainant made reference to the decision rendered on 8 June 2007 by the Supreme Court of Canada concerning British Columbia's Health and Social Services Delivery Improvement Act, which the Committee has noted during its examination of Case No. 2173. At that time, the Committee duly noted the conclusions reached by the Supreme Court that "the protection of collective bargaining under section 2(d) of the Canadian Charter of Rights and Freedoms is consistent with and supportive of the values underlying the Charter and the purposes of the Charter as a whole" and that "recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirm the values of dignity, personal autonomy, equality and democracy that are inherent to the Charter" and expressed the hope that the settlement reached in one sector following the decision of the Supreme Court would serve as an inspiration for the settlement of grievances in other sectors. The Committee therefore hopes that the explicit linking of these fundamental rights by the Supreme Court will assist in the development of appropriate mechanisms for the guarantee of collective bargaining in the agricultural sector of Ontario.*

The Committee's recommendations

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

CASE NO. 2644

DEFINITIVE REPORT

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

- **the National Union of Food Workers
(SINALTRAINAL) and**
- **the General Confederation of Workers (CGT)**

Allegations: (1) The National Union of Food Workers (SINALTRAINAL) alleges the dismissal of three workers protected by trade union immunity, the suspension of the employment contract of a trade union official, refusal to bargain collectively and failure to apply the collective agreement in force; (2) the General Confederation of Workers (CGT) alleges collective dismissal on grounds of restructuring, of cleaning staff at the University of Caldas, and the collective dismissal of 31 workers of the Trade Union of Official Workers of Armenia Quindío Municipality (SINTRAMUNICIPIO)

- 362.** The Committee last examined this case at its November 2009 meeting at which time it submitted an interim report to the Governing Body [see 355th Report, approved by the Governing Body at its 306th meeting (November 2009), paras 521–552].
- 363.** The Government sent its observations in communications dated 14 July and 3 and 14 September 2010.
- 364.** 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. Previous examination of the case

- 365.** On examining this case at its November 2009 meeting, the Committee made the following recommendations [see 355th Report, para. 552]:
- (a) As regards the allegations made by SINALTRAINAL concerning the dismissal of Fajardo Rueda and the company's refusal to bargain collectively, the Committee requests the Government to keep it informed of the judicial proceedings still under way and any developments with regard to the Government's invitation to refer these pending issues to the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT).
 - (b) As regards the allegations concerning the dismissal of the workers at the University of Caldas as part of a restructuring process, which resulted in the disappearance of the Trade Union of Employees and Workers of Caldas University, the Committee requests the Government to indicate whether the workers' trade union rights were respected during the process of restructuring.

- (c) As regards the allegations presented by the CGT concerning the collective dismissal in November 2001 of 31 workers of the Trade Union of Official Workers of Armenia Quindío Municipality, without regard to the collective agreement in force which guarantees employment security for the workers, the Committee notes the Government's failure to send its observations, and requests it to do so without delay.

B. The Government's reply

- 366.** In its communication of 14 July 2010, the Government states that, as a result of the work carried out by a preliminary contacts mission which visited the country in July 2010, SINALTRAINAL and the enterprise Lechesan SA reached an agreement under which they declared that: (1) a pre-agreement had been signed regarding the conclusion of a new collective labour agreement to be signed and registered on 13 July 2010; (2) the parties undertook to continue to negotiate in good faith in order to ensure the development of collective relations within the enterprise; (3) they had agreed to establish a permanent dialogue forum on labour relations to address any matters of common interest, for example, issues regarding recruitment or paid leave for trade unionists (this forum can also be turned to with regards any allegations of violation of trade union rights); and (4) SINALTRAINAL was to renounce the complaint presented to the Committee on Freedom of Association.
- 367.** In its communications of 3 and 14 September 2010, the Government indicates that the University of Caldas informed the Ministry of Social Protection, on 9 March 2007, that a wide consultation with trade union representatives had taken place regarding the technical study on modernization and restructuring of the organization and administrative staff. The Government adds that, in August 2007, all of the relevant members of the trade union organizations, along with the entire staff of the university, were informed of the recommendations and conclusions of the technical study carried out by the Higher School of Public Administration (ESAP) and the Higher Education Development Fund (FODESEP) regarding the organic structure and technical staff. Furthermore, the abovementioned study was published on the university's website in August 2007. The Government states that it was clearly established that the trade union organization would be participating in the restructuring process.
- 368.** As to the allegations pending regarding the collective dismissal of 31 workers of SINTRAMUNICIPIO in November 2001, the Government states that the national constitution makes provision for processes aimed at modernizing the Colombian State through the improvement of activities carried out by public bodies in order to accomplish the essential objectives of the State while respecting the principles of effectiveness, efficiency and timeliness.
- 369.** In this regard, the Government states that, in a ruling of the Labour Decision Chamber of the Superior Court of Armenia (file No. 2003-2008), reporting judge Luís Fernando Dussán referred to a ruling of 17 July 1998, in which reporting judge Dr Rafael Méndez Arango stated: "It would not make sense, on the one hand, in accordance with constitutional powers and through legal acts fully in force, to order the restructuring of a local authority and the abolition of posts while on the other hand to have a legal ruling determining the re-establishment of the employment contracts terminated under that authorization, because such a decision, as well as causing administrative problems and not being viable given the lack of substance (the posts no longer physically exist), would involve the disregard of these precise constitutional powers, the exercise of which in no case may be suspended, much less subordinated to certain eventualities which might arise from the existing labour relations with those working for the bodies whose restructuring has been ordered by law".

- 370.** As to the CGT's complaint regarding the collective dismissal of 31 workers of SINTRAMUNICIPIO, the Government states that the Mayor of Armenia initiated the fiscal consolidation of the local authority through Municipal Decree No. 098 of 2001, which provided for the abolition of 33 posts and the unilateral termination of an equal number of employment contracts. As a result of this decision only 12 members of the trade union remain on the payroll of the municipality, with 29 of them having been removed from their posts as a result of the restructuring process. As to the reorganization of the organic structure of the municipal staff, ordered through Municipal Decree No. 098, the aim of the decree is not to affect the legal existence of a trade union (thus committing anti-union persecution). Rather, the local authority is obliged to make progress regarding the modernization process set out by the Government through Act No. 617 of 2000 and to carry out restructuring in order to render public service provision more effective and efficient thereby controlling spending within the criteria of rationality, proportionality and the prevalence of the general interest.
- 371.** In the light of the guidelines set out under Act No. 617 of 2000 and the Transfers Act, Act No. 715 of 2001, the abolishment of posts under the austerity policy cannot be disguised under another name. There are no grounds for the claims that an attempt was made to destroy the trade union through a massive wave of dismissals with compensation. With regard to the present case, the municipality of Armenia issued municipal decree No. 098 of 2001 based on the requirements set out under Act No. 617 of 2000 regarding fiscal consolidation, and therefore there were no ulterior motives behind the action.
- 372.** The Government adds that, furthermore, a public conciliation hearing was held between the municipal mayor and the official workers before the Local Directorate of the Ministry of Social Protection, at which the workers freely and voluntarily expressed their intention to terminate the contractual employment relationship with the municipality of Armenia as of the date of the signing of the agreement. The municipality of Armenia recognized the anticipated right of the employees to receive their retirement pensions in the corresponding amounts and agreed to pay the pension up until the moment when the workers qualify under law for the State old-age pension, paid for through social security or the respective body to which they are linked at that time. Thus, the conciliatory agreement creates res judicata with regards the termination by mutual agreement of the employment relationship and the recognition of the anticipated retirement pension under the terms agreed and therefore actions cannot be initiated which would encompass the points already agreed on. However, the trade union filed an ordinary labour claim with the Labour Court of the Armenia Circuit, with the latter finding against the plaintiffs.
- 373.** In this regard, the Government considers it appropriate to transcribe a few paragraphs of the ruling (file No. 2003-2008) issued by reporting judge Lu s Fernando Duss n of the Labour Decision Chamber of the Superior Court of Armenia, upholding the ruling issued by the Second Labour Court of the Circuit on 6 December 2002:

The plaintiffs' claim that the dismissals carried out by the municipality of Armenia "had a significant effect on the structure of the trade union organization, constituting an act of trade union persecution ..." (fifth paragraph of page 250 of the first file).

With regard to this matter, the Chamber wishes to point out that the Political Constitution of 1991 establishes as a fundamental guarantee of the workers and employers the possibility of establishing or creating trade union associations, free of State intervention, and only subject to the legal system and the provisions of their statutes, but it must also be understood that the right referred to here is not absolute, given that although it essentially covers those workers coming together to achieve better working conditions that will allow them to obtain labour justice within a spirit of economic cooperation and social equilibrium, this right cannot be allowed to obstruct the process of reorganization of the State. In this case, the municipality of Armenia is not attempting to disregard the rights of the workers to continue to associate within the trade union movement. Basically, the administration was

seeking to optimize its administrative activities while using fewer resources. Consequently, the aims of the State take precedence over this worker-specific right when the State's objective is to protect the general interest.

The Honourable Constitutional Court has stated on a number of occasions that the structure of the public administration is not untouchable, but rather that it can be subject to reforms, including the adaptation of the physical infrastructure and staff, and for this reason the State is not obliged to maintain posts occupied by its employees ad infinitum, given that there may exist reasons and situations which justify the abolition of said posts and given that the aim of the changes is to ensure the general satisfaction of the public while guaranteeing effective and efficient public services.

- 374.** Finally, the Government states that as a result of the dismissals and the consequent loss of membership base, the trade union organization does not have the minimum number of members required under section 359 of the Substantive Labour Code (CST) which states that any worker trade union must have no less than 25 members in order to be established or if it is to survive as an entity. For this reason, the Labour Court of the Armenia Circuit, through a ruling, stated that there were grounds for the dissolution of the trade union under section 401(d) of the CST: “(d) For reduction of membership to less than twenty-five (25) members, in the case of a workers’ trade union”. Consequently, the trade union was liquidated and dissolved by judicial proceedings, through a ruling dated 31 July 2002, upheld in the second instance on 15 December 2004. The ruling was implemented and resulted in the cancelation of the trade union’s registration before the Ministry of Social Protection, through resolution No. 003144 of 14 September 2005, eliminating the legal identity of SINTRAMUNICIPALES. Thus, the trade union officials and other members of the trade union covered by trade union immunity will lose this protection, given the fact that the trade union organization has been dissolved and that only two official workers who, to date, continue to work for the municipality of Armenia enjoyed this right.

C. The Committee’s conclusions

- 375.** *The Committee recalls that on examining this case at its November 2009 meeting, it requested the Government: (1) as regards the allegations made by SINALTRAINAL concerning the dismissal of Fajardo Rueda and the company’s refusal to bargain collectively, to keep it informed of the judicial proceedings still under way and any developments with regard to the Government’s invitation to refer these pending issues to the CETCOIT; (2) as regards the allegations concerning the dismissal of the workers at the University of Caldas as part of a restructuring process, which resulted in the disappearance of the Trade Union of Employees and Workers of Caldas University, to indicate whether the workers’ trade union rights were respected during the process of restructuring; (3) as regards the allegations presented by the CGT concerning the collective dismissal in November 2001 of 31 workers of SINTRAMUNICIPIO, without regard to the collective agreement in force which guarantees employment security for the workers, to send its observations [see 355th Report, para. 552].*
- 376.** *As to the allegations presented by SINALTRAINAL, the Committee notes with satisfaction that having benefited from a preliminary contacts mission carried out in July 2010 within the framework of the Committee procedure, SINALTRAINAL and the enterprise Lechesan SA concluded an agreement in which they stated that: (1) a pre-agreement had been signed regarding the conclusion of a new collective labour agreement to be signed and registered on 13 July 2010; (2) the parties undertook to continue to negotiate in good faith in order to ensure the development of collective relations within the enterprise; (3) they had agreed to establish a permanent dialogue forum on labour relations to address any matters of common interest, for example, issues regarding recruitment or paid leave for trade unionists (this forum can also be turned to with regards any allegations of violation*

of trade union rights); and (4) SINALTRAINAL was to renounce the complaint presented to the Committee on Freedom of Association.

- 377.** *As to the allegations regarding the dismissal of the workers of the University of Caldas within the framework of a restructuring process, the Committee notes that the Government states that the University of Caldas reported that, in March 2007, a wide consultation with trade union representatives had taken place on that issue and that, in August 2007, all of the relevant members of the trade union organizations, along with the entire staff of the university, were informed of the recommendations and conclusions of the technical study carried out by ESAP and the FODESEP regarding the organic structure and technical staff.*
- 378.** *As regards the allegations presented by the CGT concerning the collective dismissal in November 2001 of 31 workers of SINTRAMUNICIPIO, without regard to the collective agreement in force which guarantees employment security for the workers, the Committee notes that the Government states that: (1) the mayor of Armenia initiated the fiscal consolidation of the local authority through Municipal Decree No. 098 of 2001, leading to the abolition of 33 posts and the unilateral termination of an equal number of employment contracts; (2) this decision affected 29 trade union members, with only 12 members of the trade union remaining on the payroll of the municipality; (3) the aim of the reorganization of the organic structure of the municipal staff, ordered through Municipal Decree No. 098, was not to affect the legal existence of a trade union and thus committing anti-union persecution, rather, the local authority was obliged to undertake the modernization process set out by the Government through Act No. 617 of 2000 and to carry out restructuring in order to render public service provision more effective and efficient, thereby controlling spending within the criteria of rationality, proportionality and the prevalence of the general interest; (4) a public conciliation hearing was held between the municipal mayor and the official workers before the local directorate of the Ministry of Social Protection, at which the workers freely and voluntarily expressed their intention to terminate the contractual employment relationship with the municipality of Armenia as of the date of the signing of the agreement; (5) despite this agreement, the trade union filed a claim with the labour courts of the Armenia Circuit, with the latter finding against the plaintiffs; and (6) it was decided that there were grounds for the dissolution of the trade union under section 401(d) of the CST (reduction of membership base to less than twenty-five (25) members). Consequently, the trade union was liquidated and dissolved by judicial proceedings, through a ruling dated 31 July 2002, upheld in the second instance on 15 December 2004. The ruling was implemented and resulted in the cancellation of the trade union's registration before the Ministry of Social Protection, through Resolution No. 003144 of 14 September 2005, eliminating the legal identity of the trade union.*
- 379.** *The Committee observes that the allegations relating to the University of Caldas and the municipality of Armenia, Quindío, refer to the dismissal of trade unionists as the result of restructuring processes and that the information provided does not suggest that these processes were anti-union in nature. On previous occasions, the Committee has highlighted the principle that rationalization and staff reduction processes should involve consultations or attempts to reach agreement with the trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees. The Committee takes note that the Government states that it carried out these consultations.*
- 380.** *Under these circumstances, in the absence of any new information in relation to the allegations regarding SINTRAMUNICIPIO (in the city of Armenia Quindío in 2001), the Committee will not pursue its examination of these allegations.*

The Committee's recommendation

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

CASE No. 2710

INTERIM REPORT

Complaints against the Government of Colombia presented by

- the World Federation of Trade Unions (WFTU) and
- the Single National Union of Workers in the Mining, Energy, Metallurgical, Chemical and Allied Industries (FUNTRAENERGETICA)

Allegations: Violent repression of a trade union meeting, banning of a strike, anti-union dismissals and arrest of trade unionists

382. The complaint appears in a communication from the World Federation of Trade Unions (WFTU) dated 4 May 2009 and a communication from the Single National Union of Workers in the Mining, Energy, Metallurgical, Chemical and Allied Industries of Colombia (FUNTRAENERGETICA) dated 8 July 2009.

383. The Government sent its observations in a communication dated 22 October 2009.

384. 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. Allegations of the complainant organizations

385. In its communication dated 4 May 2009 the WFTU alleges that the Santa Marta branch of the Union of the Workers in the Metal Engineering, Machinery, Metallurgical, Railways Industry and in the Allied Marketing and Transport Sector (SINTRAIME), an affiliate of FUNTRAENERGETICA in Colombia, informed the Committee of incidents that occurred on 3 and 19 April 2009, whose gravity warrants their consideration by the Committee on Freedom of Association.

386. According to the WFTU, members of the anti-riot police squad, on orders from their superior officers, brutally aggressed the workers of the north Colombian railway company, Ferrocarriles del Norte de Colombia (FENOCO SA), who since 24 March 2009 had been holding a permanent assembly in the company's plants in several municipalities which had brought the coal transport activities of the Drummond and Glencore companies to a standstill.

387. The WFTU states that the incidents occurred between 8 and 9 a.m. on 3 April at the FENOCO plant in Bosconia (Cesar Department), when anti-riot police burst into the area where the workers were meeting, broke up the assembly and dispersed the participants, striking and injuring six people in the process, one of whom (Gustavo García) ended up with his arm broken, another (Wilfrido Cantillo) had his face punched and ear injured and

two (Alfredo Vargas and another worker) received multiple bruises. A housewife and a minor who were members of the community supporting the workers were also beaten. Schoolchildren, residents of an old people's home and neighbours in the area likewise suffered from the effects of tear gas. One of the older men suffered a minor heart attack. The police punctured tyres, broke windows and caused other damage that they then blamed on the workers to justify their brutal tactics. The complainant organization states that the workers had from the start, on 24 March, kept their demonstration peaceful, protected the company's assets and complied with the law. The WFTU adds that, at the same time as the police attack, the trains of the Drummond company started working again, which shows that the incidents were coordinated and that FENOCO and the holding companies (Drummond and two companies belonging to Glencore, Prodeco and Carbones de la Jagua) were directly responsible.

388. The complainant states that FENOCO's 600-plus workers were demonstrating because, although on 4 November 2008 they had joined the union SINTRAIME, an affiliate of FUNTRAENERGETICA, and had simultaneously presented a list of demands, FENOCO refused to recognize that the union represented the workers and to negotiate their list of demands. Subsequently, on 19 April 2009, the WFTU had received a further communication from SINTRAIME (which is attached) stating that on the morning of 19 April, when FENOCO and SINTRAIME were on the verge of reaching an agreement, some 700 members of the national police violently broke up the permanent assembly which the workers of FENOCO's plants in Bosconia, Sevilla, Fundación and Santa Marta, who were guarding their various places of work, had decided to hold because of the outright refusal of their employer – the Drummond and Glencore monopolies that are FENOCO's principal shareholders – to sit down and negotiate the modest list of demands that had been presented on 4 November 2008, in accordance with the Constitution, Colombian law and the ILO's Conventions.

389. The complainant organization states that armoured vehicles were used in the course of the police assault to knock down the walls of the workshops, thus injuring any number of workers, including the president of the Santa Marta branch of SINTRAIME, José de Jesús Orozco H., who was arrested along with his fellow workers, Aníbal Pérez, Reinaldo Sánchez, David Jiménez and Deivis Calletano. Two of them were held in Sevilla and two in Valledupar, while the president's whereabouts remain unknown. It adds that the workers had been holding a peaceful demonstration to demand an improvement in their precarious working, economic and social conditions, for themselves, for their families and for the impoverished local communities. However, the companies, which are monopolies, unfairly and illegally refused to discuss the list of demands that had been presented six months earlier, even though the Ministry of Social Welfare had registered the Santa Marta branch of SINTRAIME as a trade union. FENOCO had gone so far as to propose quite unreasonably that the branch should join another union because it would not negotiate with SINTRAIME and that they should thus be at the mercy of the owners who could accept or refuse whichever trade union they chose.

390. In its communication dated 8 July 2009, FUNTRAENERGETICA alleges that 14 workers belonging to SINTRAIME and the president of its Santa Marta branch had been dismissed on anti-union grounds on 7 July 2009, without FENOCO complying with the labour regulations set out in the Labour Code.

B. The Government's reply

391. In its communication dated 22 October 2009 the Government observes that, in the allegations, the WFTU refers to the following incidents: police violence against members of SINTRAIME, a collective work stoppage and FENOCO's refusal to negotiate a list of demands.

- 392.** In the first place, the Government states that in its complaint the WFTU fails to mention the requirements for the Committee to be able to examine the case; in fact, it provides no evidence to back up its claims, and this alone is sufficient for the complaint to be considered inadmissible. Specifically, the Committee has established as one of its principles that complaints “must be as fully supported as possible by evidence ...” Secondly, the Government states that the allegations do not refer to specific infringements by FENOCO of ILO Conventions Nos 87 or 98, thus failing to comply with another of the Committee’s requirements: “Complaints must be presented in writing duly signed by a representative of a body entitled to present them and they must be as fully supported as possible by evidence of *specific infringements of trade union rights*” [see para. 43 of the 1996 *Digest*, Annex I]. The WFTU merely makes a series of claims without any evidence that would provide the Committee with sufficient grounds to analyse the substance of the allegation. That being so, and since the complaint does not meet the minimum requirements for its admissibility, the Government respectfully requests the Committee, before it makes any recommendation, to call on the complainant organization to provide relevant evidence, failing which it will refrain from analysing the case since to do so would infringe the Colombian State’s right to defend itself and to refute the accusations.
- 393.** With regard to the alleged acts of violence, the WFTU states in its complaint that the national police attacked FENOCO’s workers but that, according to information supplied by the company, the workers affiliated to SINTRAIME used force to take over state-owned public property administered by FENOCO, to which they caused major structural damage, and that the police therefore were bound by their constitutional and legal duty to intervene.
- 394.** As to the behaviour of the police, the Government states that its prime function and duty is to ensure that the necessary conditions exist for the country’s inhabitants to exercise their rights and freedoms and to live together in peace, by guaranteeing the maintenance of public order. In practice, as stated in the document entitled *La policía nacional por el camino de la eficiencia, la transparencia y el buen uso de la fuerza* (Towards an efficient and transparent national police and a proper use of force), the police – as the servant of the State and community and a friend of the people, and so as to maintain a good image – have to refrain from any actions that might undermine their social and professional prestige, as well as that of the institution they represent. They must, on the contrary, be the guarantor of public order so that citizens can exercise their rights and duties and live together peaceably. They are empowered to use force in exceptional circumstances to prevent the disturbance of the peace and to restore public order, in which case they may use only such force as is permitted by law, preferably such as is liable to cause the least damage to people’s physical integrity and property and complies with international standards.
- 395.** The Government adds that members of the police may make use of physical force or firearms for the sole purpose of ensuring compliance with the law, restoring public order and/or protecting the community’s rightful assets, and that on no account may they violate human rights. The police are empowered to resort to physical force in the exercise of their duties where it is impossible to restore law and order by other means such as dialogue, persuasion or warning. The degree of permissible force must in all cases be limited to what is necessary and reasonable in terms of the prevailing circumstances.
- 396.** The Government stresses that, without exception, the public authorities observe the Constitution and the law, and that the national police thus operate within legal bounds and on the principle that their primary concern is the people, the rule of law, human rights and the efficient and transparent performance of the duty of each one of its officers. In Colombia workers who believe that their rights have been violated have access to appropriate machinery to bring the matter before the competent judicial authorities in order to clarify the situation and identify those who they believe are responsible. The legal and constitutional duty of the police force to maintain and restore law and order takes

precedence over the right of trade unions to hold demonstrations, especially in the present instance where, according to FENOCO, the work stoppage called by SINTRAIME was not peaceful, since the company's plant suffered severe damage.

- 397.** The Government states that it has sought information from the competent authorities on the alleged incidents.
- 398.** With regard to the material and economic damage sustained by FENOCO, the Government states that the company has lodged an administrative complaint against SINTRAIME with the Cundinamarca Territorial Directorate of the Ministry of Social Welfare in connection with the damage to its installations and to state property it administers which occurred during the work stoppage.
- 399.** With regard to the claim that the whereabouts of the branch's president, José de Jesús Orozco H., remain unknown, the Government points out that the payroll supplied by the company and attached to its reply shows that that is not true and that after the work stoppage he was back at work as normal. Moreover, Mr Orozco served as president of SINTRAIME's Santa Marta branch on several occasions after 19 April 2009. The Government therefore stresses that the WFTU's claims do not correspond to the facts, since in fact Mr Orozco never disappeared.
- 400.** The Government adds that it has requested information from the competent authorities on the matters raised in the allegation, which it will duly forward to the Committee as soon as it is received.
- 401.** With regard to the work stoppage itself, the Government states that under national laws and regulations "work stoppage" refers to the unscheduled suspension of a company's activities. Article 431 of the Labour Code stipulates that, "whatever the reason, there can be no collective suspension of work until the procedure has been fully complied with as stipulated." The text goes on to specify that the procedures and requirements that must be complied with are stipulated in articles 432 (appointment of a delegate to negotiate at the direct agreement stage), 433 (initiation of dialogue) and 434 (duration of the dialogue), 436 (failure to reach agreement) and 444 (declaration and conduct of a strike), all of which are part of the procedure for declaring a strike where no agreement has been reached in the negotiation of a list of demands.
- 402.** The Government states that, according to information supplied by the Directorate of Inspection, Surveillance and Monitoring, the legal representative requested on several occasions that the work stoppage be officially noted and that a series of labour inspectors verified, and placed on record, the complete cessation of activities. The Government also refers to the efforts deployed by the Directorate to resolve the dispute.
- 403.** The Government points to the fact that the WFTU says nothing about the real motives for the work stoppage and the violent turn it took, with the workers aggressively and illegally taking over the plants, and that it was this that prompted the labour administration inquiry conducted by the Territorial Directorate of Cundinamarca.
- 404.** As for the banning of SINTRAIME's work stoppage, the Government observes that Act No. 1210 stipulates that the decision to declare a strike unlawful is taken not by the Ministry of Social Welfare but by the judiciary, in this case the Supreme Court of Justice (the highest judicial authority in labour matters), which declared the work stoppage unlawful on 3 June 2009.
- 405.** The Government states that, to begin with, when SINTRAIME first called the strike the Supreme Court of Justice pointed out that, when strike action has been voted and

approved, the strike has to take place within the following two to ten days (article 445 of the Labour Code) – that being in accordance with the Committee on Freedom of Association’s principle that “The obligation to give prior notice to the employer before calling a strike may be considered acceptable” [see *Digest*, 2006, para. 552]. Since the general assembly at which SINTRAIME declared a collective work stoppage was held on 28 February and 1 March 2009, the strike should therefore have started between 4 and 13 March. In fact, however, the strike began on 24 March, after the deadline, and was therefore illegal. Moreover, regarding the allegation that it was the employer’s actions that led to the illegal work stoppage, the Court stated that “it is not immediately clear that the company’s intention has been to withhold trade union dues for no motive, since it gives its reasons for doing so”.

- 406.** Secondly, with regard to SINTRAIME’s list of demands, the Labour Chamber of the Supreme Court of Justice considered that SINTRAIME’s decision to call for a collective work stoppage to protest against the employer’s failure to engage in direct talks with the trade union was “likewise unjustifiable”. The Court further stated that SINTRAIME should have waited until a ruling had been handed down on its appeal against the Ministry of Social Welfare’s resolution No. 000616 of 16 March 2009 – which ruled that there had been no refusal to negotiate – before taking the “extreme decision of stopping work without awaiting the outcome of the appeal”.
- 407.** Finally, regarding the illegality of the work stoppage called for by SINTRAIME, the Government points out that, after examining the jurisprudence in such cases, the Court declared that in practice every trade union was entitled to exercise its “right to engage in a collective dispute and pursue it to its conclusion” and that, in so far as minority unions may choose to conduct their own negotiating process, it was quite feasible for the same enterprise to have more than one collective agreement.
- 408.** The Government notes the Court’s observation that, among the disputes that have to be submitted for compulsory arbitration, Act No. 584 of 2000 includes “collective labour disputes involving minority trade unions, where the absolute majority of an enterprise’s workers has not opted for strike action”. It concluded that the legislature thus grants minority trade unions “the power to sign contracts and to negotiate, on the understanding that the right to declare a strike must remain in the hands of the absolute majority of the workers in an enterprise”.
- 409.** With regard to the alleged refusal to negotiate a list of demands, the Government states that the Territorial Directorate of Cundinamarca conducted a labour administration inquiry and, in the first instance, adopted Resolution No. 000616 of 16 March 2009 wherein it declared that, since a legal dispute existed between SINTRAIME and FENOCO SA, it was not for the Ministry of Social Welfare to take a decision on the matter but for the ordinary labour court. The decision of the court of first instance was confirmed by the court of second instance in resolution No. 0001384.
- 410.** The Government attaches FENOCO’s comments on the allegations. Referring to the legal dispute behind FENOCO’s action, the company notes that article 356 of the Labour Code defines industrial trade unions as being “composed of individuals who provide services in various enterprises in the same industry or branch of economic activity”. In other words, the workers who claim to be members of SINTRAIME must have a connection with enterprises engaged in metal engineering, machinery, metallurgy, marketing in the sector; otherwise, they do not meet the legal requirements for union membership. FENOCO maintains that SINTRAIME cannot engage in union activities within the company because it is part of the rail, coal and transport sector. Consequently, the company considers the list of demands presented on 2 November 2008 is a blatant abuse of the right of freedom of association. In other words, it challenges the legal right of SINTRAIME to affiliate

workers from the rail, coal and transport sector. FENOCO therefore considers that it is not obliged to negotiate with SINTRAIME, inasmuch as enterprises cannot be compelled to negotiate with unions that do not fulfil the legal requirements for presenting a list of demands for an industry that they do not represent.

- 411.** FENOCO believes that SINTRAIME's Santa Marta branch has no legal existence, since its employees cannot rightfully become members of that union. It observes that the ILO has classified the rail transport industry as distinct from the metal engineering, machinery, metallurgy, iron and steel and electrical engineering industry; thus, in the International Standard Industrial Classification of All Economic Activities (ISIC) developed by the ILO, "Transport via railways" is classified separately as class 6010. That is to say that SINTRAIME cannot legally affiliate workers who are employed in enterprises that are engaged in activities other than those represented by the union.
- 412.** The representative of FENOCO also refers to the signing of the collective agreement with the railway workers' union known as SINTRAVIFER, which is affiliated to the General Confederation of Labour (CGT); the Confederation was involved throughout the negotiations with SINTRAVIFER, which shows that the principle of freedom of association was fully respected. Furthermore, the illegal conduct of the members of SINTRAIME not only hampers the public transport service provided by FENOCO but seriously undermines the fundamental rights of the company's employees, including those affiliated to SINTRAVIFER. For instance, the unlawful work stoppage prevented these and other FENOCO employees from exercising their right to work in fair and decent conditions, since SINTRAIME's unjustified "demonstrations" and disproportionate and malicious conduct prevented the entire workforce from entering the company premises. SINTRAIME's violation of the constitutional rights of FENOCO's employees was so blatant that they were obliged to appeal to the courts for protection against SINTRAIME and to defend their freedom of association, their right to bargain collectively, their right to work, etc. The matter is currently before the Supreme Court of Justice.
- 413.** FENOCO believes that the conflict is the product of an inter-union dispute and recalls the following principle of the Committee on Freedom of Association: "Article 2 of Convention No. 98 is designed to protect workers' organizations against employers' organizations or their agents or members and not against other workers' organizations or the agents or members thereof. Inter-union rivalry is outside the scope of the Convention". [see *Digest*, 2006, para. 1118] It emphasizes that it is obvious in the case under examination that an inter-union dispute exists between SINTRAVIFER, the primary trade union at FENOCO, and SINTRAIME, an industrial trade union, which has on many occasions and in several contexts demonstrated its refusal to accept the creation of SINTRAVIFER. This is quite clear from the exchange of communications between SINTRAIME and the CGT, to which SINTRAVIFER is affiliated.
- 414.** The company states that the Supreme Court of Justice, when ruling on the appeal for protection and in order to guarantee the right of freedom of association, ordered that a process of collective bargaining be engaged. FENOCO requested clarification of the ruling, and the matter is currently awaiting the decision of the Constitutional Court. FENOCO states that, in order to bring about an agreement between the parties, the Ministry of Social Welfare, acting through the Directorate of Inspection, Surveillance and Monitoring, programmed a series of meetings between FENOCO and SINTRAIME. In the presence of the Ministry, the two parties accordingly met on 28 October 2009 where an agreement was reached to enter into a dialogue on 4 November 2009.

C. The Committee's conclusions

- 415.** *The Committee observes that the complainant organizations allege: (1) refusal of FENOCO SA to recognize the SINTRAIME as a representative trade union organization or to negotiate a list of demands presented by it; (2) banning of the work stoppage carried out peacefully by SINTRAIME from 24 March 2009, on FENOCO's premises; (3) violent repression by the police of a peaceful permanent assembly held by SINTRAIME on 3 and 19 April 2009, with resultant damage to the plant and injuries to several workers; (4) arrest of a number of workers and disappearance of the president of the Santa Marta branch of SINTRAIME on 19 April 2009; and (5) anti-union dismissal of 14 workers affiliated to SINTRAIME on 7 July 2009 and of the president of the union's Santa Marta branch without complying with the labour regulations in force. The Committee notes that the Government questions the admissibility of the complaint on the grounds that there is no evidence. The Committee notes, however, that by and large the allegations are sufficiently precise and the complainant organization has submitted a ruling of the Supreme Court of Justice that contains detailed information.*
- 416.** *The Committee notes the Government's statement that: (1) the Territorial Directorate of Cundinamarca conducted a labour administration inquiry into the refusal to negotiate the list of demands; (2) since a legal dispute exists between SINTRAIME and FENOCO the competent authority is the ordinary labour court; (3) the work stoppage was declared unlawful in a ruling handed down on 3 June 2009; (4) the workers affiliated to SINTRAIME used force to take over state-owned public property, to which they caused major structural damage, and the police were therefore bound by their constitutional and legal duty to intervene; (5) the Government has requested information from the competent authorities, the Territorial Directorate of Cundinamarca is currently investigating the incidents and an administrative complaint has been lodged by the company against SINTRAIME in connection with the damage caused during the work stoppage; (6) according to FENOCO, the president of the Santa Marta branch of SINTRAIME went back to work for the company as normal after the work stoppage and therefore clearly did not disappear on 19 April 2009. He has served as union leader on a number of occasions since then, contrary to the complainant organization's assertions his whereabouts were never unknown, and the competent authorities have nevertheless been asked to look into the alleged incidents; (7) in order to guarantee freedom of association the Supreme Court of Justice ordered a process of collective bargaining to be engaged; and (8) the company and SINTRAIME, in the presence of the Ministry of Social Welfare and after a number of meetings held under its auspices, reached an agreement on 28 October 2009 to start negotiating on 4 November 2009.*
- 417.** *With regard to the acts of violence that were allegedly perpetrated on company premises by members of the anti-riot police, the Committee notes that, according to the complainant organizations, on 3 April 2009 the anti-riot police burst into the company premises Bosconia (Cesar Department) where the members of SINTRAIME were holding a peaceful permanent assembly, injured several people in their attempt to disperse the workers and caused damage to property that they then blamed on the workers to justify their brutal tactics. The complainants allege that subsequently, on 19 April 2009, the police attacked the workers who were attending the permanent assembly. The Committee notes that, according to the Government, the permanent assembly was not peaceful, since the workers affiliated to SINTRAIME used force to take over state-owned public property to which they caused major structural damage, and the police therefore were bound by their constitutional and legal duty to intervene. On this point, the Committee notes the Government's statement that an inquiry into the incidents is being conducted by the Territorial Directorate of Cundinamarca; it also takes note of the administrative complaint lodged by the company against SINTRAIME concerning the damage caused during the work stoppage. While noting the different versions advanced by the complainant*

organization and the Government regarding the peaceful nature of the strike and the perpetrators of the damage that was caused to property, the Committee deeply regrets that a number of workers sustained injuries. The Committee requests the Government to keep it informed of the outcome of the administrative inquiry and of the administrative decision to be handed down on the complaint lodged by the company in respect of the damage to its installations.

418. *With regard to the alleged disappearance of the president of the Santa Marta branch of SINTRAIME, José de Jesús Orozco, the Committee notes the Government's statement that his whereabouts were never unknown but that, at the end of the work stoppage, he returned to work for the company as normal and therefore clearly did not disappear on 19 April 2009, contrary to the assertions of the complainant organization. The Committee observes that the Government has nevertheless sought information on the alleged incidents from the competent authorities and requests the Government to keep it informed of the matter and to send it the relevant information when it becomes available. The Committee expresses its concern over the alleged arrests and acts of violence and requests the Government to send its observations on the alleged arrest of several workers and to inform it whether they are presently at liberty and if any penal charges have been brought against them. The Committee also invites the complainant organization to send it any information it has on the subject.*

419. *With regard to the refusal to negotiate the list of demands presented on 4 November 2008, the Committee notes the information supplied by the Government to the effect that a labour administration inquiry was conducted which led to the adoption in the first instance (confirmed in the second instance) of Resolution No. 000616 of 16 March 2009, which ruled that, since a legal dispute existed between SINTRAIME and the company the matter was for the ordinary labour court to decide. The Committee observes that, according to the company: (1) workers who claim to be members of SINTRAIME must have a connection with enterprises engaged in metal engineering, machinery, metallurgy, iron and steel, electrical engineering or marketing in the sector, whereas FENOCO's activities concern the rail, coal and transport sector, which is why the company refused to negotiate the list of demands; (2) a collective agreement exists between the company and a trade union known as SINTRAVIFER (a primary trade union affiliated to the CGT) and there is an inter-union dispute between SINTRAVIFER and SINTRAIME; (3), following the administrative resolutions referring to the existence of a legal dispute, the Supreme Court of Justice ordered that a process of collective bargaining be engaged (FENOCO states that it requested a clarification of the resolution); and (4) the company confirms the Government's statement inasmuch as, in the presence of the Ministry of Social Welfare, SINTRAIME and FENOCO reached an agreement on 28 October 2009 to start negotiating on 4 November 2009. The Committee requests the Government to indicate whether the planned negotiations have begun and expects that they will enable an agreement to be reached that will put an end to the dispute. It requests the Government to keep it informed of any progress in this area.*

420. *With regard to the banning of the work stoppage by the workers affiliated to SINTRAIME, the Committee notes the information supplied by the Government to the effect that the work stoppage was declared unlawful in a Supreme Court of Justice ruling of 3 June 2009 (a copy of which was attached by the complainants and the Government), notably on the grounds that the legal procedure had not been observed and the legal conditions for exercising this right had not been fulfilled, i.e. failure to respect the legal deadline for holding the strike, lack of direct dialogue between the union and the company to resolve the problem (according to the ruling), calling of a work stoppage without awaiting the outcome of the administrative appeal that was lodged when FENOCO refused to engage in direct dialogue but without actually refusing to negotiate (according to the administrative ruling). The Committee also notes FENOCO's contention that the illegal work stoppage*

prevented its employees from exercising their right to work in fair and decent conditions and that this led to the lodging of an appeal for protection against SINTRAIME that is currently before the Supreme Court of Justice. The Committee observes further that in its 3 July 2009 ruling the Supreme Court of Justice declared that the transport of passengers and goods is not an essential service in which strike action can be prohibited but that in exercising that right the requirements of the law must be respected. The Committee requests the Government to keep it informed of the outcome of the appeal for protection lodged by FENOCO against SINTRAIME for violating the freedom to work of non-strikers and to send it a copy of the decision that is handed down.

421. With regard to the anti-union dismissal of 14 members and a union leader of SINTRAIME alleged by FUNTRAENERGETICA, the Committee deeply regrets that the Government has not provided any information on the subject and requests it to do so without delay.

The Committee's recommendations

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

- (a) *With regard to the acts of violence allegedly perpetrated on the company's premises by anti-riot police, the Committee, while noting the different versions of events supplied by the complainant organization and the Government and, while deeply regretting that a number of workers sustained injuries, requests the Government to keep it informed of the outcome of the administrative inquiry and of the ruling handed down on the complaint lodged by the company in connection with the damage caused to its installations.*
- (b) *With regard to the alleged disappearance of the president of the Santa Marta branch of SINTRAIME, José de Jesús Orozco, the Committee notes the Government's statement that he returned to work as normal after the work stoppage and therefore did not disappear on 19 April 2009 as asserted by the complainant organization, but that it has nevertheless sought information on the alleged incidents from the competent authorities. The Committee requests the Government to keep it informed of the matter and to send it the relevant information when it becomes available. It also requests the Government to send its observations on the alleged arrest of several workers and to inform it whether they are presently at liberty and if any penal charges have been brought against them.*
- (c) *With regard to the refusal to negotiate the list of demands, the Committee requests the Government to indicate whether the planned negotiations have begun and expects that they will enable an agreement to be reached that will put an end to the dispute. It requests the Government to keep it informed of any progress in this area.*
- (d) *With regard to the banning of the work stoppage by the workers affiliated to SINTRAIME, the Committee requests the Government to keep it informed of the outcome of the appeal for protection lodged by the company against SINTRAIME for violating the freedom to work of non-strikers and to send it a copy of the relevant ruling.*

- (e) *With regard to the anti-union dismissals alleged by FUNTRAENERGETICA (a committee of several union leaders), the Committee deeply regrets that the Government has not provided any information on the subject and requests it to do so without delay.*

CASE NO. 2730

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

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

- **the Cali Public Sanitation Services Company
Workers' Union (SINTRAEMSIRVA)**
supported by
- **the Single Confederation of Workers (CUT) and**
- **Public Services International (PSI)**

Allegations: The Cali Public Sanitation Services Company Workers' Union (SINTRAEMSIRVA) alleges that, in the context of the liquidation of the company, which was completed on 25 March 2009, retirement was imposed on trade union leaders and members with the aim of eliminating the trade union, even though collective bargaining was in progress. The trade union claims that the retirements were effected without observance of the statutory circumstantial trade union immunity that was applicable during the bargaining process and without payment of the compensation and pension benefits provided for in the collective agreement in force

- 423.** The complaint is contained in communications from the Cali Public Sanitation Services Company Workers' Union (SINTRAEMSIRVA) dated 6 July and 7 September 2009. The Single Confederation of Workers (CUT) and Public Services International (PSI) supported the complaint in communications dated 12 and 18 August 2010, respectively.
- 424.** The Government sent its observations in a communication dated February 2010.
- 425.** 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

- 426.** In its communications dated 6 July and 7 September 2009, the SINTRAEMSIRVA alleges that the Domestic Public Services Supervisory Authority liquidated the Cali Public Sanitation Services Company (EMSIRVA ESP) on grounds of supposed economic and financial non-viability. However, the complainant claims that the true motive for the liquidation was to eliminate the trade union at a time when it was engaged in collective bargaining.
- 427.** The complainant indicates that in December 1996 the SINTRAEMSIRVA and the company signed an unofficial accord which was later elevated to the status of collective labour agreement. The agreement provided for a compensated retirement plan designed to compensate workers who opted for voluntary retirement so as to reduce the company's labour costs. Retirements under this scheme led to a significant reduction in the organization's income as 317 workers retired. Eight years later, in October 2005, the Government intervened in the company through the Domestic Public Services Supervisory Authority on account of the company's high labour and pension costs.
- 428.** In November 2006, the Domestic Public Services Supervisory Authority adopted a rescue package for the company based on the renegotiation of agreed benefits and a voluntary retirement plan. Even though the SINTRAEMSIRVA indicated its willingness to start new negotiations, the company refused to do so until August 2008. The negotiations covered, among other things, the economic proposal for compensation for voluntary retirement. The SINTRAEMSIRVA indicated its willingness to respect the agreement signed in 1996. However, on 10 March 2009, the Domestic Public Services Supervisory Authority announced its definitive proposal which all the contract workers had to accept. The proposal guaranteed rights that were considerably inferior to those provided for in the collective agreement as regards compensation and the old-age pension. All the statutory and discretionary benefits established in the collective agreement in force were ended definitively. On 20 March 2009, the union's general assembly decided that the workers would accept voluntary retirement subject to payment of the compensation which had been established in the collective agreement. On 25 March 2009, the Domestic Public Services Supervisory Authority decided to liquidate the company because no agreement had been reached with the union concerning renegotiation of the collective agreement in force. The work of the company is currently being carried out by a labour cooperative.
- 429.** According to the SINTRAEMSIRVA, liquidation of the company was the mechanism used for justifying termination of the workers' employment, thereby reducing the number of active members in the union.
- 430.** The SINTRAEMSIRVA also alleges that, when the lifting of trade union immunity was sought, the union argued that the workers were engaged in collective bargaining, owing to the partial denunciation of the collective agreement by the company, and hence they were protected by trade union immunity which could not be lifted until the bargaining process was completed. But the administrative authority states that it has no proof of any such denunciation. The union attaches a copy of the said denunciation and also of various official documents drawn up during the collective bargaining process started after the denunciation. The judicial authority authorized the lifting of trade union immunity so that the company could dismiss the union leaders.
- 431.** In the context of the denunciation filed with the Ministry of Social Protection on account of the company's refusal to engage in collective bargaining, a decision was issued to the effect that the issue should be settled by the judicial authority. As regards the complainant's claim that the pension rights established in the agreement were not

recognized by the liquidating authorities during the liquidation of the company, the judicial authority decided in favour of the workers.

B. The Government's reply

432. In its communication of February 2010, the Government states that in the present case the SINTRAEMSIRVA workers never gave any indication of seeking a dispute inasmuch as they did not denounce the agreement or present a list of demands to the EMSIRVA ESP, which did not denounce the collective agreement either. In the specific case of the EMSIRVA ESP, a process of "renegotiation" took place in the context of the liquidation of the company for legal reasons connected with the grounds for liquidation of enterprises providing such services. The renegotiation was one of a number of measures aimed at rescuing the company in liquidation and was subject to the condition that, if no agreement was reached between the parties after reasonable efforts were made, liquidation would ensue. The workers were aware of that condition. The decision to conclude the bargaining process and proceed with liquidation of the company was taken when it became clear that no agreement could be reached between the EMSIRVA ESP and the complainant organization. This occurred after several meetings, and so there is no basis for the allegation that there was insufficient opportunity for the parties to reach an agreement.

433. The Government explains that, by Decision No. SSPD-20051300024305 of 27 October 2005, the Domestic Public Services Supervisory Authority ordered the seizure of the EMSIRVA ESP with a view to liquidation. The decision stated that, further to completion of the first year of execution of the management programme and further to the evaluation which was completed on 30 September 2005, it was determined that, although certain commitments had been met in the areas of accounting, administration and legal and commercial matters, issues such as the location of a new final disposal site and aspects of the viability of the company remained critical.

434. The Government points out that the company's situation began long before the supposed partial denunciation of the collective agreement alleged by the SINTRAEMSIRVA and before the start of consultations with the trade union designed to analyse the rescue plan for the EMSIRVA ESP. The company's situation actually predates that plan. For all these reasons the liquidation of the EMSIRVA ESP can be said to stem from the abovementioned causes, not from any alleged dubious and malicious intention of terminating collective bargaining between the EMSIRVA ESP and the SINTRAEMSIRVA. Moreover, the collective agreement was in force at the time the decision was issued. The key criterion for the legislator regarding liquidation of a public service provider is the provision of services itself. Furthermore, there is no trace of any anti-union intention in the decision.

435. The seizure of the EMSIRVA ESP was followed by an analysis of the company by the Domestic Public Services Supervisory Authority designed to identify the necessary actions and measures for tackling the issues which gave rise to the seizure, in order to ensure the company's viability and the quality and continuity of sanitation services in the company's territory, in accordance with Decision No. SSPD-20061300042245 of 11 November 2005, establishing a business solution for the EMSIRVA ESP. The rescue process was established with the intention of identifying and adopting the necessary measures for seeking the recovery of the company and avoiding any adverse impact. The plan presupposed the implementation of a series of initiatives in various areas, one of which referred to renegotiation of the collective agreement, but such implementation proved impossible. According to the abovementioned decision, the initiatives to be implemented consisted of the following:

- (1) renegotiation of the collective labour agreement ...;

- (2) plan for voluntary retirement offered to all company employees, observing their legal rights and those arising from the collective agreement;
- (3) reduction of operating and administrative costs linked to provision of the service;
- (4) transfer, standardization and financial solution with respect to pension liabilities, including transfer thereof to the responsible bodies, including the Municipality of Cali, the Department of Valle del Cauca, EMCALI;
- (5) public invitation to tender for the provision of a landfill service for the final disposal of solid waste matter collected by the EMSIRVA ESP and its contractors in the service area of the City of Cali.

436. The SINTRAEMSIRVA alleges that, on account of the liquidation of the company, it was impossible to continue the collective bargaining between the EMSIRVA ESP and the trade union. The company recognizes that no agreement was reached between itself and the SINTRAEMSIRVA before starting liquidation but an exhaustive process of information exchange and consultation with the SINTRAEMSIRVA was completed before the decision to proceed with liquidation was taken by the Government. These consultations were held on 20 December 2006, 11 June 2008, 15 August 2008, 23 September 2008, 10 October 2008, 5 November 2008, 21 November 2008, 27 January 2009 and 24 March 2009. By means of Decision No. SSPD-2009130007455 of 25 March 2009 the Domestic Public Services Supervisory Authority ordered the liquidation of the EMSIRVA ESP:

The Supervisory Authority for Water Supplies, Sewerage and Waste Disposal, discharging its duties of supervision, inspection and control, became aware of the deterioration in the administrative, financial, technical and operational situation of EMSIRVA ESP for reasons including the following:

- High operating costs owing to: (a) an onerous collective agreement; (b) substantial pension liabilities resulting in an operating loss of \$336 million in 2003; and (c) heavy expenditure owing to inefficient procedures and obsolescence of the vehicle fleet.
- It is responsible for 1,230 retirees who represent pension liabilities of \$38.879 million, which accounts for 61 per cent of total liabilities. On behalf of the Municipality of Santiago de Cali, the EMSIRVA ESP paid the pensions of 291 retirees out of its revenue for provision of its service. This is not only irregular but also entails an unsustainable financial burden for the company.
- Total accounts receivable amounted to \$38.973 million (42 per cent of total assets), of which accounts receivable for the supply of sanitation services alone, after payment of provisions, amounted to \$25.954 million (28 per cent of total assets).
- Provision of cleaning services covered only 38 per cent of the city, which caused problems of public hygiene for the city and its inhabitants.
- Non-compliance with regulations concerning adequate final disposal of waste at the Navarro site, whose disposal capacity was saturated, and uncertainty regarding a new final disposal site, which could lead in the short term to the suspension of services.
- Deficiencies in reporting to the unified information system administered by the Domestic Public Services Supervisory Authority, and also alleged unauthorized payments collected from users of the final disposal site.
- Unreliable financial statements.

437. As regards the allegation concerning non-compliance with the provisions of the collective agreement concerning retirement pensions, the Government indicates that proceedings exist for dealing with such complaints and these are at the evidentiary stage.

438. The Government refers to the various actions taken by the labour administration:

- Decision No. 00002286 of 25 August 2009 of the Ministry of Social Protection – “For the resolution of an administrative investigation”. The decision was based on: (1) the denunciation by the IPS Colombia National Coordinating Committee, which resulted in ordinary judicial proceedings relating to the liquidation of the company, by means of the decision mentioned above; and (2) the action brought on 6 May 2009, in which the EMSIRVA ESP furnished documentary proof, analysis of which disproved the alleged refusal to negotiate. The Ministry of Social Protection refrained from taking any administrative labour measure against the EMSIRVA ESP.
- *Judicial proceedings.* The information supplied by the EMSIRVA ESP contains details of certain judicial proceedings. As a result of the liquidation of the company, the workforce was made redundant. Some workers launched action for protection of constitutional rights proceedings (*tutela*) (*tutela* ruling No. 0245-2009, Municipal Civil Court No. 24, Cali, Valle, 28 July 2009, brought by Mr Lisandro Henry Rengifo against EMSIRVA ESP in liquidation, and *tutela* ruling No. 0263-2009, Municipal Civil Court No. 24, Cali, Valle, 4 August 2009, brought by Mr Ananias Correa Piedarahita against the EMSIRVA ESP in liquidation). The *tutela* actions were successful and reinstatement was ordered by the first-instance court. The company, taking account of the state of liquidation and in compliance with constitutional guarantees, requested the lifting of trade union immunity in the competent court with respect to the members of the executive committee.

C. The Committee’s conclusions

439. *The Committee observes that in the present case the SINTRAEMSIRVA alleges that, in the context of the liquidation of the company which was completed on 25 March 2009, retirement was imposed on union leaders and members with the aim of eliminating the trade union, even though collective bargaining was in progress. The union claims that the retirements were effected without observance of the statutory circumstantial trade union immunity that was applicable during the bargaining process, and without payment of the compensation and pension benefits provided for in the collective agreement in force. The Committee notes the complainant’s assertion that the judicial authority authorized the lifting of the trade union immunity of the leaders so that the company could dismiss them, but that as regards the issue of non-compliance with the provisions laid down in the collective agreement the judicial authority decided in favour of the workers.*
440. *The Committee notes the Government’s statement that: (1) by Decision No. SSPD-20051300024305 of 27 October 2005, the Domestic Public Services Supervisory Authority ordered the seizure of the company with a view to liquidation; (2) in the context of that process, “renegotiation” took place aimed at rescuing the company, subject to the condition that if no agreement was reached between the parties, liquidation would ensue; and (3) the workers were aware of that condition.*
441. *The Committee notes the Government’s additional statement that, although the company did not reach any agreement with the SINTRAEMSIRVA before starting the liquidation process, an exhaustive process of information exchange and consultation with the SINTRAEMSIRVA was conducted between December 2006 and March 2009 before the decision was taken to proceed with liquidation. The consultations were held on 20 December 2006, 11 June 2008, 15 August 2008, 23 September 2008, 10 October 2008, 5 November 2008, 21 November 2008, 27 January 2009 and 24 March 2009. Finally, by Decision No. SSPD-2009130007455 of 25 March 2009, the Domestic Public Services Supervisory Authority ordered the liquidation of the EMSIRVA ESP on the grounds of high operating costs due to the existence of an onerous collective agreement, substantial pension liabilities and heavy expenditure owing to inefficient procedures and obsolescence*

of the vehicle fleet. In the wake of the decision, the company workforce was made redundant.

- 442.** *The Committee notes the Government's statement that some workers launched tutela proceedings and these were decided in favour of the workers, whose reinstatement was ordered, further to which the company brought actions for the lifting of trade union immunity. As regards the alleged failure to pay the retirement pensions provided for in the collective agreement, the Committee notes the Government's statement that judicial proceedings exist for dealing with such complaints and that they are at the evidentiary stage.*
- 443.** *The Committee observes that the allegations and the Government's reply show that the liquidation of the company affected all the workers, including trade union leaders and members and that the decision involves eminently economic grounds aimed at ensuring the efficient provision of service. Even though the liquidation of the company and the resulting dismissal of the workers had an impact on the SINTRAEMSIRVA, an enterprise trade union which was deprived of its membership, the Committee considers that neither the allegations nor the Government's reply support the conclusion that the final objective of the liquidation was to ensure the elimination of the trade union, particularly if account is taken of the fact that numerous negotiation and consultation sessions were held between the company and the complainant.*
- 444.** *As regards the dismissal of the workers despite the fact that, according to the complainant, they were covered by circumstantial immunity which protects workers during collective bargaining, the Committee notes that the judicial authority authorized the lifting of trade union immunity so that the company could proceed with the dismissals.*
- 445.** *As regards the allegations that, in the context of the liquidation of the company and the dismissals of the workers, the collective agreement was not observed with respect to compensation and pension benefits, the Committee notes the Government's confirmation that the collective agreement was in force and the judicial proceedings instituted are at the evidentiary stage. While recalling the importance of the observance of collective agreements, especially in this specific case concerning the terms of compensation and pension payments connected with the liquidation of a company and the shedding of the workforce, the Committee requests the Government to keep it informed on the views expressed in the allegations and of the final outcome of the abovementioned judicial proceedings. The Committee further expects that freedom of association and collective bargaining rights are respected in the labour cooperative currently carrying out the work previously carried out by the company.*

The Committee's recommendation

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

As regards the allegations that, in the context of the liquidation of the company, the collective agreement in force was not observed with respect to the compensation and pension benefits linked to the dismissals, the Committee requests the Government to keep it informed on the views expressed in the allegations and of the final outcome of the abovementioned judicial proceedings. The Committee further expects that freedom of association and collective bargaining rights are respected in the labour cooperative currently carrying out the work previously carried out by the company.

CASE NO. 2620

INTERIM REPORT

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

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

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

447. The Committee examined this case on its merits at its November 2009 session, where it issued an interim report, approved by the Governing Body at its 306th Session [see 355th Report, paras 679–710].
448. The Government provided observations in a communication of October 2010.
449. The Republic of Korea 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

450. In its previous examination of the case, the Committee made the following recommendations [see 355th Report, para. 710]:
- (a) The Committee requests the Government to proceed with the MTU's prompt registration and to ensure that national decisions concerning the MTU's application for registration recognize the principle that all workers may be guaranteed the full exercise of their freedom of association rights. It further requests the Government to ensure that the Committee's conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the Supreme Court's consideration and to provide a copy of the Supreme Court's decision once it is handed down.
 - (b) The Committee requests the Government to undertake an in-depth review of the situation concerning the status of migrant workers, along with the social partners concerned, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation and in conformity with freedom of association principles, and to prioritize dialogue with

the social partners concerned as a means to find negotiated solutions to the issues faced by these workers. The Committee requests the Government to keep it informed of the progress made in this regard.

- (c) The Committee once again requests the Government to refrain from taking measures which involve a risk of serious interference with trade union activities, such as the arrest and deportation of trade union leaders for reasons related to their election to trade union office and while legal appeals are pending.

B. The Government's reply

- 451.** In a communication of October 2010, the Government states that the Supreme Court has not yet handed down its decision on the case pending since 23 February 2007 with regard to the case concerning the Migrants' Trade Union (MTU)'s status. As the defendant of the case, the Government is making every effort to help the Supreme Court make a decision based on sufficient information by submitting supplementary reports explaining its reasons for appeal on four occasions and the Seoul High Public Prosecutor's Office also provided reference materials to the Supreme Court. The Government expects the decision to be handed down soon since, in addition to the parties concerned, the Committee, employers' and workers' organizations at home and abroad as well as civil society organizations are waiting for it.
- 452.** The Government once again emphasizes that the Supreme Court case is regarding foreign workers illegally staying in the Republic of Korea, and foreign workers who stay in the Republic of Korea with a valid working visa are granted the same labour rights as Korean citizens including the right to establish a trade union. In fact, in November 2009, a group of foreign English teachers established a trade union, submitted a union establishment report, and received a union establishment certificate from the Government.
- 453.** By revising the Foreign Workers Employment Act, the Government modified on 10 December 2009 the system of allowing foreign workers to change their workplaces in order to strengthen protection for foreign workers. Previously, a foreign worker who applied for a change of workplace had to be re-employed within two months after application. Though more than 95 per cent of applicants succeeded in finding a new job within the permitted period even under the past system, the period has been extended to three months to give foreign workers enough time to seek re-employment. In addition, when a foreign worker has to transfer to another workplace due to business suspension or closure, or other reasons not attributable to the worker him/herself, such transfer is not counted toward the total number of workplace changes. This change has made it possible for foreign workers to freely change their workplace when an inevitable reason not attributable to themselves arises.
- 454.** Moreover, in order to manage foreign workers' health and protect them from industrial accidents, the Government is strengthening occupational safety and health education. Since July 2009, the Ministry of Employment and Labour has widely distributed health examination forms and explanations about each examination in foreign languages to workplaces employing foreign workers so that foreign workers can manage their health in appropriate ways. It provides interpreters for foreign workers during their health examination and counselling. The Government also supports the development of education materials and instructor training with a view to preventing industrial accidents among foreign workers.

C. The Committee's conclusions

455. *The Committee recalls that this case concerns allegations that, against a background of an allegedly generalized discrimination against migrant workers intended to create a low-wage and easily exploitable labour force, the Government refused to register the Migrants' Trade Union (MTU) and carried out a targeted crackdown on the MTU by successively arresting its Presidents Anwar Hossain, Kajiman Khapung and Toran Limbu, Vice-Presidents Raj Kumar Gurung (Raju) and Abdus Sabur, and General Secretary Abul Basher Moniruzzaman (Masum), and subsequently deporting many of them.*
456. *From previous examinations of this case, the Committee recalls the following pertinent facts: on 3 May 2005, the MTU sent a notification of its establishment to the Seoul Regional Labour Office. On 3 June 2005, the Seoul Regional Labour Office rejected the notification essentially on the following grounds: (i) the union failed to produce documents to prove that its establishment did not violate the provisions of the Trade Union and Labour Relations Adjustment Act (TULRAA) upholding trade union monopoly at the enterprise level; and (ii) the union was composed mainly of illegally employed foreigners "who do not have the right to join labour unions" and its officers are foreigners without legal right of residence and employment. On 14 June 2005, the MTU filed an administrative suit against the Seoul Regional Labour Office which was rejected by the courts essentially on the grounds that: (i) the union was under an obligation to produce documents proving that the provisions of the TULRAA on trade union monopoly are not violated; and (ii) since illegal residents are strictly banned from employment under the Immigration Control Act, they are not vested with the legal right to seek to improve and maintain their working conditions and to improve their status; such rights are given on the assumption that legitimate employment relations will continue; thus, illegal migrant workers are not eligible to establish a trade union. The MTU appealed against this decision and the Seoul High Court decided on 1 February 2007 in favour of the union on the following grounds: (i) there was no need to produce documents to ensure application of the provisions of the TULRAA upholding trade union monopoly, since these provisions apply in specific circumstances at the enterprise level while the MTU was established above that level; (ii) irregular migrant workers qualify as workers under the Constitution and the TULRAA and, therefore, they are vested with legally protected basic labour rights; they are workers allowed to set up trade unions as long as they actually provide labour services and live on wages, salaries or other equivalent income paid for their service; and (iii) the restrictions on the employment of illegal migrant workers under the Immigration Control Act are not intended to prohibit foreign workers from forming a workers' organization to improve their working conditions. As a result, the High Court found that it was against the law to request a list of union members with the only purpose of checking whether they hold legal residence status. The Government appealed against this decision, and the case has been pending before the Supreme Court ever since.*
457. *The Committee observes from the Government's communication of October 2010, that the case is still pending before the Supreme Court. It further notes that the Government expects the decision to be rendered soon, as many parties are waiting for it.*
458. *In respect of migrant workers, the Committee once again recalls, as it had in its previous examination of this case [see 355th Report, para. 705], the general principle according to which all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 216]. The Committee further recalls that when examining legislation that denied the right to organize to migrant workers in an irregular situation – a situation maintained de facto in this case – it has emphasized that all workers, with the sole exception of the armed forces and the police, are covered by*

Convention No. 87, and it therefore requested the Government to take the terms of Article 2 of Convention No. 87 into account in the legislation in question [see *Digest*, *op. cit.*, para. 214]. The Committee also recalls the resolution concerning a fair deal for migrant workers in a global economy adopted by the ILO Conference at its 92nd Session (2004) according to which “[a]ll migrant workers also benefit from the protection offered by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998. In addition, the eight core ILO Conventions regarding freedom of association and the right to bargain collectively, non-discrimination in employment and occupation, the prohibition of forced labour and the elimination of child labour, cover all migrant workers, regardless of status” (paragraph 12).

- 459.** *The Committee deeply regrets that, although three years have elapsed since the Seoul High Court’s decision in favour of the union, no new information has been provided by the Government and the appeal is still pending before the Supreme Court, more than three-and-a-half years after the appeal. In view of the principles respecting migrant workers noted above, and recalling once again with concern the complainant’s allegation that the lack of a Supreme Court decision on the MTU’s status has greatly obstructed the latter’s activities, the Committee once again urges the Government to proceed with the MTU’s registration without delay and to ensure that national decisions concerning the MTU’s application for registration recognize the principle that all workers may be guaranteed the full exercise of their freedom of association rights. Furthermore, it once again requests the Government to ensure that the Committee’s conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the Supreme Court’s consideration, along with other information which the Government states it has been providing. It requests the Government to provide a copy of the Supreme Court’s decision once it is handed down.*
- 460.** *As regards the complainants allegations concerning a generalized discrimination against and the repression of migrant workers, the Committee takes note of the new measures adopted by the Government in the revised Foreign Workers Employment Act as regards some flexibility for looking for new jobs and expects that the workers’ freedom of movement will be fully respected. The Committee wishes, however, once again to emphasize the importance of guaranteeing the right of migrant workers, both documented and undocumented, to organize. It once again requests the Government to undertake an in-depth review of the situation concerning the status of migrant workers in full consultation with the social partners concerned, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation and in conformity with freedom of association principles, and to prioritize dialogue with the social partners concerned as a means to find negotiated solutions to the issues faced by these workers. The Committee requests to be kept informed of the progress made in this regard.*

The Committee’s recommendations

- 461.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee once again urges the Government to proceed with the MTU’s registration without delay and to ensure that national decisions concerning the MTU’s application for registration recognize the principle that all workers may be guaranteed the full exercise of their freedom of association rights. Furthermore it once again requests the Government to ensure that the Committee’s conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the*

Supreme Court's consideration and to provide a copy of the Supreme Court's decision once it is handed down.

- (b) *The Committee once again requests the Government to undertake an in-depth review of the situation concerning the status of migrant workers in full consultation with the social partners concerned, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation and in conformity with freedom of association principles, and to prioritize dialogue with the social partners concerned as a means to find negotiated solutions to the issues faced by these workers. The Committee requests to be kept informed of the progress made in this regard.*

CASE NO. 2764

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

Complaint against the Government of El Salvador presented by

- **the National Confederation of Salvadoran Workers (CNTS) and**
- **the Union of Construction Workers (SUTC)**

Allegations: Refusal to register the executive committee of the Union of Construction Workers (SUTC), thus hindering the exercise of the right to collective bargaining

- 462.** The complaint is contained in a communication dated 20 February 2010, presented by the National Confederation of Workers of El Salvador (CNTS) and the Union of Construction Workers (SUTC). The complainant organizations provided additional information by means of a communication dated 12 April 2010.
- 463.** The Government sent its observations in a communication dated 31 May 2010.
- 464.** El Salvador 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

- 465.** In their communications dated 20 February and 12 April 2010, the CNTS and the SUTC state that they are lodging a formal complaint against the Government of El Salvador for refusing to register the executive committee of the SUTC, infringing on the union's operating capacity and functioning and its right to collective bargaining because of interference by the State restricting the rights and guarantees covering trade unions.
- 466.** The complainant organizations explain that on 17 December 2009 – in accordance with the trade union's statutes – the official summons was published announcing that on 9 January 2010, an ordinary general assembly would be held at which the election of the general

executive committee of the trade union for the period from 26 January 2010 to 25 January 2011 would take place.

- 467.** With a view to greater objectivity and transparency in the election procedure, delegates from the Ministry of Labour and Social Security were invited to attend as observers in the ordinary general assembly for the election of a general executive committee; 488 members were present.
- 468.** On 14 January 2010, the Organization and Statistics Secretary in office requested, before the Office of the National Department of Social Organizations of the Ministry of Labour and Social Security, the registration of the executive committee and the issuing of the respective credentials recognizing the elected persons as members of the executive committee. Attached to the request were the summons and the minutes of the general assembly, and a list of the workers who attended.
- 469.** As the Administration did not reply, on 19 January 2010 the SUTC presented a letter addressed to the head of the National Department of Social Organizations invoking the right to a reply within a reasonable period of time, which, although the law does not set out a defined period, is linked to being granted the credentials before the end of the mandate of the outgoing executive committee in order to ensure its functioning.
- 470.** On 1 February 2010, the trade union was notified of the decision of the head of the aforementioned department rejecting the application for registration of the general executive committee of the trade union, underlining that the delegates of the Ministry who attended the general assembly produced a report in which they stated the following: a group of around 150 people, duly identified as trade union members, had been prevented from attending the assembly because they owed trade union dues, without mentioning the trade union cards the so-called members should have had with them so as to be recognized as members of the trade union. The complainant organizations point out that the report of the delegates of the Ministry mentions that some people were considered as members because the day prior to the general assembly meeting they had paid the membership fee which was used to check the payment of trade union dues, which is impossible given that the payment of the trade union dues should follow the procedure established in section 252 of the Labour Code.
- 471.** The complainant organizations allege that among the people who were denied the right to participate in the assembly there was a group of people who did not belong to the trade union and whose intention was to destabilize and sabotage the event. The said persons, who were allegedly denied the right to participate in the assembly for owing their trade union dues – the payment of which is a condition in order to be able to exercise their political rights as trade union members – were sanctioned with the suspension of the enjoyment of their trade union rights for the period of 60 days pursuant to the trade union statute. However, the procedural mechanism for this sanction requires that the complaint made by the trade union members must first be reviewed by the executive committee before it can be imposed and enforced. The complainant organizations clarify that the executive committee is precluded by law from unofficially imposing the said sanction.
- 472.** The head of the National Department of Social Organizations, in the exercise of her mandate to monitor procedures and legal standards under section 256 of the Labour Code, considered that the assembly was held in violation of the trade union rights of a group of trade union members who were illegally prevented from attending the general assembly. In the complainant organizations' opinion, this stance, however, constitutes an act of interference by the State restricting the rights and guarantees covering trade unions.

- 473.** The complainant organizations also highlight that the members of the outgoing executive committee, whose mandate has ended, were in conflict about the revision and conclusion of a collective agreement with the Directorate General of Labour of the Ministry of Labour and Social Security. Not having an executive committee in office has had the direct result of slowing down the said negotiations on the collective agreement, affecting more than 30,000 workers in the construction sector. Clearly this made it impossible for the bargaining committee, made up of members of the executive committee, to continue negotiating given that at the moment nobody has been able to become an accredited member of the executive committee and therefore of the bargaining committee. The complainant organizations underline that the collective agreement was effective until 31 December 2009.
- 474.** On 12 February 2010, after lodging an appeal which did not lead to any administrative decision, the trade union lodged an administrative appeal before the Administrative Court of the Supreme Court of Justice claiming that the resolution refusing the registration of the executive committee issued by the head of the National Department of Social Organizations is unlawful.

B. The Government's reply

- 475.** In its communication dated 31 May 2010, the Government states that in relation to the refusal to register the newly elected executive committee and according to the report of the delegates of the Ministry who attended, a group of around 150 people, who were duly identified as trade union members, were not able to access the place where the assembly was being held under the instructions of the SUTC's executive committee. In addition, the trade union argued that the said members owed their trade union dues, which is why the executive committee did not give them the corresponding "solvency" document, which they needed in order to participate in the ordinary general assembly.
- 476.** The Government highlights that in this group of people there were members from different groups belonging to the SUTC – COMTRASUTC, the SUTC's rescue committee, and the Restoration Movement of the SUTC – who were intending to run in the election as candidates for the trade union's executive committee in order to challenge and replace the then general secretary of the SUTC, Mr Fredis Vásquez Jovel, who had led the trade union for 23 years. As a result, this group of trade union members could not exercise their right to freely elect their representatives, a right which is enshrined in Article 3 of Convention No. 87, or their right to be elected as members of the executive committee of the trade union.
- 477.** The Government declares that the SUTC's statutes provide for the suspension of rights of trade union members for up to 60 days for failure to pay the trade union dues, whether regular or additional, without a valid reason, however, this sanction should be imposed after the general executive committee has verified the facts. In practice, the rights of the members were suspended de facto, without the executive committee verifying the facts for the application of the appropriate sanction, thus violating its own statutes and the provisions of section 217 of the Labour Code. In the disciplinary proceedings, no grounds were found for suspending the exercise of the trade union rights of the union members. The Government argues that the executive committee should give the members who allegedly owe their trade union dues the possibility to prove they did not owe any dues or justify the outstanding dues given that, in accordance with article 44 of the trade union's statutes, the suspension of the exercise of trade union rights is only applicable in the case of unjustified outstanding dues.
- 478.** The Government points out that, in the event of trade union members owing dues and in order for this to be considered a disciplinary offence, at least one element must be

attributable to them, otherwise trade union members would be arbitrarily and clearly unjustly receiving disciplinary sanction for a situation for which they are not responsible. In addition, the trade union itself recognizes in its argument that suspending the exercise of the rights because of outstanding trade union dues constitutes a disciplinary sanction which must be applied by the executive committee following the process established in article 50 of the trade union statute, which according to the complainants was not applied because there was no complaint to justify starting proceedings; this power to sanction cannot be used officiously by the executive committee, which confirms a serious violation of the due process. This non-observance could possibly lead to abuses against trade union members with regard to the exercise of their trade union rights and the exclusion from internal decisions of trade union members who might promote a change in the trade union's leadership.

- 479.** To support its statements, the Government mentions the illegal and unlawful practices carried out by the previous executive committee of the SUTC, headed by Mr Fredis Vásquez Jovel. It is claimed that there are exclusion clauses that are, in fact, applied illegally in various companies in the construction sector. Often the workers are forced to leave the trade unions to which they belong in order to become SUTC members and thus be able to get work in this sector.
- 480.** Similarly, the Government notes that the previous executive committee, which is lodging the complaint, favoured the unlawful levying of trade union dues from salaries by the employers in order to pay the SUTC, despite workers not being members, thus appropriating the economic interests of workers of these companies, who saw their salaries reduced. In addition, trade union dues were levied from executive committee members of other trade unions in violation of the right of workers to pay their economic contributions to the trade union to which they belong, regardless of whether or not it is the most representative.
- 481.** With regard to the alleged interference of the State in the elections of the executive committee of the SUTC, the Government declares that the three delegates of the Ministry, who were appointed to attend the ordinary general assembly held on 9 January 2010, observed the assembly's proceedings without interfering, respecting the principles of trade union autonomy, and scrupulously following the provisions in the law. The Government points out that the purpose of the labour administration's undertaking – acting in accordance with section 256 which grants the power to check that electoral processes within trade unions are in line with legal requirements – was to defend democratic principles, which should be applied in trade unions and defend the trade union rights of SUTC members, whose fundamental trade union rights were arbitrarily violated, thus violating the principles of freedom of association. The supervision by the labour administration in accordance with its lawful mandate cannot be considered as interference by the State restricting trade union guarantees.
- 482.** With regard to the allegations concerning the impact on the trade union in the negotiations for the collective labour agreement in force in various companies in the construction industry, the Government states that, in accordance with legislation, the fact that a trade union might find itself without an executive committee does not affect the validity of collective labour agreements to which it is party because these are automatically extended. Currently, negotiations are suspended pending the election and registration of the new executive committee, which will be able to negotiate as normal. The Government underlines that the statutes of the trade union set out the procedure to follow in order to guarantee its operating capacity and functioning in the event of there not being an executive committee but, due to the negligence of the previous executive committee, the necessary conditions to carry out the appropriate procedures were not present and the complainant organizations could not use the said procedure.

483. The Government indicates that the only way of remedying the situation is to collect the signatures of 25 per cent of the trade union members with the aim of calling an extraordinary general assembly to elect a new executive committee, specifying that this procedure depends exclusively on the willingness of trade union members, which is why the Government cannot intervene.

C. The Committee's conclusions

484. *The Committee notes that in this case the complainant organizations allege the unjustified refusal – by means of a resolution of the National Department of Social Organizations of the Ministry of Labour and Social Security – to register the newly elected general executive committee of the SUTC and thus hindering the exercise of the right to collective bargaining.*

485. *The Committee notes that according to the complainant organizations: (1) the delegates of the Ministry of Labour and Social Security, who, at the request of the trade union, attended the general assembly, produced a report in which they stated the following: a group of around 150 people, duly identified as trade union members, were prevented from attending the assembly because they owed their trade union dues (however, they did not mention the trade union card which the so-called members should have had in their possession identifying them as trade union members); (2) the said report points out that some people were considered to be trade union members due to having made a bank transfer the day prior to the meeting of the general assembly through which the payment of the trade union dues were checked (which is, however, impossible given that the payment of the dues must follow the procedure described in section 252 of the Labour Code); and (3) among the group of people who were denied the right to participate in the said assembly, there was a group of people who did not belong to the trade union and whose intention it was to destabilize and sabotage the event.*

486. *The Committee notes the statements of the Government, according to which: (1) the executive committee prevented 150 trade union worker members from participating in the assembly of the trade union, arguing that they were behind on the payment of their trade union dues as noted by the delegates from the Ministry of Labour and Social Security (who were present at the election in the trade union assembly at the voluntary invitation of the executive committee); (2) in this group of people, there were members of different groups affiliated to the SUTC who had the intention of running in the election as candidates for the executive committee of the trade union; (3) the aim of these candidates was to challenge and replace the then general secretary of the SUTC, who had led the trade union for 23 years, but by preventing them from participating in the assembly they were not able to exercise their right to freely elect their representatives as enshrined in Article 3 of Convention No. 87 or their right to be elected; (4) the previous executive committee had carried out illegal, unlawful and abusive practices, which according to the Government's observations violated certain trade union rights of workers in the construction sector in respect of access to employment and the levy of trade union dues to the trade union of their choice, among others; (5) the statutes of the SUTC provide for the suspension of rights of trade union members for up to 60 days for failure to pay trade union dues, both regular and additional, without a valid reason. However, this sanction must be imposed after verification of the facts by the executive committee in line with the provisions of the trade union statutes, which did not occur in this case, thereby violating the rules and regulations of the said statutes by not allowing the members concerned to participate in the elective assembly; (6) a number of trade union members paid their trade union dues the day before the assembly, thereby gaining access to the hall in order to vote; and (7) the authorities' actions and the resolution through which registration of the executive committee is refused were therefore seeking to respect the democratic principles which should be applied in trade unions.*

487. *In this regard, taking into account that the Government claims trade union statutes have been violated by the executive committee in order to prevent other candidates from running for election, that the Government's version and the complainants' version of the alleged facts are different (including the fact regarding the right to participate in the trade union elections of a large group of workers) and that the executive committee itself decided to bring an administrative appeal in February 2010 before the Administrative Court of the Supreme Court of Justice against the resolution containing the refusal for registration of the elected executive committee, the Committee requests that the Government provide a copy of the ruling that is handed down and firmly expects that it will be handed down in the near future.*
488. *With regard to the second allegation, the Committee notes that the complainant organizations indicate that the bargaining committee, made up of executive committee members, was unable to continue with the collective bargaining process under way because, as a result of the executive committee not being registered, nobody can currently become a member of the executive committee and, therefore, a member of the bargaining committee. The Committee notes that according to the Government the fact that a trade union could end up without an executive committee does not affect the validity of the collective labour agreements to which it is party because these are automatically extended in accordance with section 276 of the Labour Code. The Committee notes that according to the Government the negotiations are suspended pending the judicial decision on the validity or non-validity of the elected executive committee.*
489. *The Committee recalls that in order to avoid the danger of serious limitation on the right of workers to elect their representatives in full freedom, complaints brought before labour courts by an administrative authority challenging the results of trade union elections should not – pending the final outcome of the judicial proceedings – have the effect of suspending the validity of such elections [see **Digest of decisions and principles of the Committee on Freedom of Association**, fifth edition, 2006, para. 441]. Under these circumstances, in order to avoid the negative consequences of the trade union not having an executive committee and excessive delays as a result of ongoing judicial proceedings and possible appeals which cause prolonged disruption to the functioning of the trade union, the Committee requests the Government to respect the principle of collective bargaining and to continue negotiations with the newly elected executive committee at least until the Higher Administrative Court of the Supreme Court of Justice has handed down a decision regarding the validity of these elections. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendations

490. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to the refusal to register the executive committee of the SUTC, the Committee requests the Government to provide a copy of the ruling handed down and firmly expects that it will be handed down in the near future.*
 - (b) *With regard to the obstacles to negotiating a new collective agreement, the Committee requests the Government to respect the principle of collective bargaining and to continue negotiations with the newly elected committee at least until the Administrative Court of the Supreme Court of Justice has handed down a decision regarding the validity of these trade union elections. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2759

DEFINITIVE REPORT

**Complaint against the Government of Spain
presented by
the Confederation of Farmers' and Livestock Breeders' Unions (UUAG)**

Allegations: The complainant organization objects to the legal criteria for obtaining the status of most representative organization in the agricultural sector

- 491.** The complaint is contained in a communication from the Confederation of Farmers' and Livestock Breeders' Unions (UUAG) dated 19 January 2010.
- 492.** The Government replied in a communication dated 4 March 2010.
- 493.** Spain 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 Rural Workers' Organisations Convention, 1975 (No. 141).

A. The complainant's allegations

- 494.** In its communication of 19 January 2010, the UUAG explains that it is a nationwide agricultural confederation, that it deposited its statutes to the authorities in December 2008 and that the Farmers' Union of Catalonia, the Labourers' Union of the Valencia Region, the Free Agricultural Platform of the Canary Islands, the Farmers' and Livestock Breeders' Union of Extremadura, the Union of Farmers, Livestock Breeders and Foresters of Madrid and the Farmers' Union of Castile and León, which operate in the autonomous communities in Spain, are part of this confederation.
- 495.** The UUAG alleges that sections 4 and 5 of Act No. 10/2009 of 20 October, establishing national advisory bodies in the agro-food sector and determining the basis for the representation of professional agricultural organizations, breaches the principles of freedom of association and Conventions Nos 87 and 141.
- 496.** The complainant organization points out that section 4(2) of the act sets out the first criterion to be taken into consideration:

To this end, the "most representative" professional agricultural organization of a general nature shall be considered to be that which, at the time of submitting its application to be recognized as such, has at least 15 per cent of the electoral votes cast in all the elections held by the autonomous communities to participate in the advisory bodies and entities of the autonomous communities, having run for election in at least nine autonomous communities.

For the purpose of this act, voters shall be understood to mean natural persons who are registered in the social security system as self-employed because of their agricultural activities and legal persons whose exclusive objective pursuant to their statutes is agricultural activity and who actually undertake such activity.

- 497.** Section 4(3) establishes the second criterion to be taken into consideration:

The professional agricultural organizations that do not obtain the status of "most representative" by means of the arrangements established in paragraph 2 of this section shall

be granted such status when they are recognized as being the most representative in at least ten autonomous communities.

- 498.** According to the complainant organization, the first legal criterion to determine the most representative agricultural organizations (participation in elections in nine autonomous communities and obtaining an overall share of 15 per cent of the total number of votes at the national level) is reprehensible and discriminatory as it could mean that an organization is not considered “most representative” even if it obtains more than 15 per cent of the votes in fewer than nine communities (the current situation, furthermore, is that nine of the 17 existing autonomous communities account for only 18.82 per cent of agricultural professionals). It is also reprehensible because it could mean that an organization with the largest membership at the national level would not be considered the most representative if its coverage does not extend to nine autonomous communities, thereby forcing the establishment of organizations with such coverage.
- 499.** The complainant organization also criticizes the second, alternative, legal criterion for determining the most representative agricultural organizations (recognition as one of the most representative professional organizations in ten autonomous communities), which reflects a legal system that allows the autonomous communities to decide on the percentage of votes that are needed to determine the “most representative” organization, which depending on the case may be 10 or 15 per cent of the valid votes cast. In other words, there are no uniform criteria regarding the percentage required which creates problems, according to the complainant organization, given that the ten autonomous communities with the fewest professional natural persons account for only 24.25 per cent (76,527) of the total number of the country’s agricultural professionals and that obtaining 15 per cent would require the vote of 11,480 professionals. The complainant organization points out that in the last elections it represented 17,961 professionals in three of the autonomous communities in which it operates (but it is not considered to be “most representative” in ten autonomous communities). The current system could mean that an organization with the largest agricultural representation at the national level is not considered the most representative because it is not recognized as such in at least ten autonomous communities. This is likely to force agricultural professionals to set up more organizations so as to obtain such territorial coverage.
- 500.** Furthermore, the complainant organization notes that section 5 of Act No. 10/2009 establishes that professional agricultural organizations receive public assistance for their participation in the Agricultural Advisory Committee. The said committee was established under section 3 of Act No. 10/2009. This public assistance is awarded solely on the basis of the election results on the assumption that the “most representative” status has been granted in accordance with the provisions of section 4(2) of the act (15 per cent of the total number of votes in the country). This is reprehensible in the opinion of the complainant organization because the situation could arise where the most representative organization in the whole country is the organization that represents the largest number of professionals but does not reach this percentage.

B. The Government’s reply

- 501.** In its communication of 4 March 2010, the Government states that the UUAG (hereinafter the Confederation) is a confederation made up of six professional agricultural organizations at the autonomous-community level, of which the Farmers’ Union of Catalonia is the most representative. Most of the said agricultural organizations split from the national agricultural professional organization, the Coordinating Body for Farmers’ and Livestock Breeders’ Organizations (COAG), to create the Confederation, including the aforementioned Farmers’ Union of Catalonia, which is the largest organization in the Confederation. By decision of the General Labour Directorate of the Ministry of Labour

and Immigration of 16 December 2008, the deposit of statutes and the constituent instrument of the Confederation were accepted and authorized after verification that they met the requirements provided for in Act No. 19/1977 of 1 April governing the right to organize. As the statutes were not challenged within the statutory period of 20 days, the said organization acquired full legal personality as of January 2009.

502. With regard to the argument set forth by the Confederation to be considered the “most representative agricultural professional organization at the national level”, the Government states that Act No. 18/2005 of 30 September, which repealed Act No. 23/1986 of 24 December (Framework Act on the legal regime governing chambers of agriculture), established transitional provisions pending the adoption of a new law governing the representativeness of professional agricultural organizations. Such a law has now been adopted, in the form of Act No. 10/2009 of 20 October. The sole transitional provision of Act No. 18/2005 provided in paragraph 4.2(d) that the professional agricultural organizations considered to be the most representative in the area of the General Administration of the State shall be those which have obtained at least 10 per cent of the valid votes in the relevant elections. In addition, in paragraph 4.2(e), it provided that the professional agricultural organizations which are recognized as being the most representative shall carry out institutional representation functions before public authorities, entities and bodies.

503. In accordance with the said act and with the electoral processes held, the professional agricultural organizations considered by the Ministry to be the most representative at the national level are the Association of Young Farmers of Aragón (ASAJA), COAG and the Union of Small-Scale Farmers (UPA), as they obtained a national average of at least 10 per cent of the votes.

504. Notwithstanding the above, the Confederation has, since it was established, brought complaints and appeals through administrative channels and before administrative courts against several of the Ministry’s acts in order to be considered the “most representative professional agricultural organization at the national level”, which would entitle it to carry out institutional representation functions before the General Administration of the State and its subordinate agencies. As recorded by the Ministry, the Confederation filed the following appeals:

- Appeal of 23 April 2009 in order to participate in the advisory bodies of the State Agency for Agricultural Insurance (ENESA) as “most representative professional agricultural organization at the national level”. The appeal was rejected by a decision of the Minister dated 24 June 2009.
- Administrative appeal for the protection of fundamental rights against Decree No. ARM/1038/2009 of 22 April which establishes the regulatory framework for the granting of subsidies; the appellant considers there to be an infringement of the right to the freedom of association and the principle of equality established in articles 28(1) and 14 of the Constitution respectively, due to the unequal treatment of the Confederation by the Ministry compared to the other most representative professional agricultural organizations at the national level. The Ministry contested the appellant’s allegations.
- Appeal of 3 August 2009 against the decision by the Deputy Secretary dated 29 June 2009 in order to be considered the “most representative professional agricultural organization at the national level”. The appeal was rejected by Decision of the Minister dated 14 December 2009.

- 505.** The draft of Act No. 10/2009 was adopted by the Council of Ministers in January 2009 in line with the legal mandate conferred on the Government under paragraph 2 of the sole transitional provision of Act No. 18/2005 of 30 September, which repealed Act No. 23/1986 of 24 December (Framework Act on the legal regime governing chambers of agriculture), to submit a bill to the Parliament establishing a new system governing the representativeness of professional agricultural organizations.
- 506.** During the preparation of the text, the opinion of a committee of renowned experts in the field was sought; their unanimous opinion was fundamental in the drawing up of the preliminary draft, which was submitted for review by the then Ministry of Public Administration and made available as public information to the sectors concerned. The opinion of the Economic and Social Council of Spain was also sought; the Council issued a favourable opinion. This therefore constitutes a dialogue and social consensus with the most representative professional agricultural organizations at the national level such as ASAJA, COAG and the UPA, which represent a majority and work to protect all agricultural interests without limitation as to the productive sector or the personal characteristics of the respective professionals, and whose observations have been incorporated into the text.
- 507.** Furthermore, in order to ensure greater involvement and transparency during the preparation of the bill, a consensus was reached in Parliament especially by the two major political parties of Parliament, the Spanish Socialist Workers' Party (PSOE) and the People's Party (PP), which voted in favour of passing the bill, which is now Act No. 10/2009 of 20 October.
- 508.** As stated by the Minister, this is part of an effort to debate all initiatives in the Congress of Deputies, in full respect of the distribution of power between the State and the autonomous communities, as well as respecting the law and international conventions concerning the subject of this legislation, as provided for under articles 52, 129(1) and 149(1)(18) of the Constitution.
- 509.** With regard to the position taken towards the bill by the parliamentary groups Convergència i Unió and Esquerra Republicana, both groups separately submitted amendments to the bill as a whole, inter alia setting out similar arguments to those now being presented by the Confederation in its written complaint regarding the act; the requisite criteria for representation are considered by both groups to violate the ILO Conventions on freedom of association.
- 510.** These amendments were rejected by parliamentary majority on the grounds that the bill respects the area of competence of the autonomous communities and the Conventions entered into by Spain with the ILO, given that the criteria established to measure the representativeness of professional agricultural organizations at the national level are completely objective and are in line with the decisive action of the autonomous communities within whose remit it is to call elections to determine the representativeness of professional agricultural organizations or to determine that the professional agricultural organization is sufficiently representative.
- 511.** The positions of these political parliamentary groups and the Confederation suggest that there has been some scheming, especially with the Farmers' Union of Catalonia, which is the most representative professional agricultural organization in the autonomous community of Catalonia.
- 512.** The Confederation argues in its appeals, both through administrative channels and before the administrative courts, that there is an alleged breach of constitutional rights, specifically of the right to freedom of association and the principle of equality established

in articles 28(1) and 14 of the Spanish Constitution respectively, resulting from the unequal treatment of the Confederation by the Ministry compared to other most representative professional agricultural organizations at the national level.

- 513.** In this respect, it is necessary to recall the Constitutional Court's extensive case law on issues related to trade unions, to which professional agricultural organizations can be equated to a certain extent, including Ruling No. 7/1990 of 18 January (*Official State Gazette* of 15 February 1990), which clearly outlines the grounds which constitute a breach of the rights in question. The ruling states in paragraph 2 of the preambular part:

With regard to the principle of equal treatment, this Court has confirmed that it is possible to make a distinction between unions in order to ensure the effectiveness of the activity with which they are entrusted, provided that the distinctions are not inconsistent or arbitrary because, where this is the case, making such distinctions would be an infringement of the principle and would breach the free and equal enjoyment of the right provided for in article 28(1) of the Spanish Constitution on the freedom of association. To this end, the Court has decided that the concept of majority representation and majority coverage are objective criteria and are therefore constitutionally valid.

- 514.** The Court goes on to state in the said ruling that:

The purpose of the trade union elections is twofold; first, they serve to elect the workers' representatives, and second they allow various trade unions to be heard within the unitary or elected bodies for workers' representation, thereby establishing what is known as the "majority representation" and "partial or sufficient representation" of trade unions.

- 515.** Given that the elections to measure representativeness of unions are important, the Ministry has granted the status of most representative professional agricultural organization at the national level to those organizations that, in accordance with the laws in force and until the entry into force of Act No. 10/2009, have run in the elections called by the autonomous communities and have obtained an average of at least 10 per cent of the votes at the national level, the only objective criterion applicable and regulated by law (Act No. 18/2005).

- 516.** The Government therefore considers that Act No. 10/2009 of 20 October has been prepared in keeping with the constitutional principles of freedom of association and equal treatment, which are principles that are contained in the agreements entered into by Spain with the ILO. This act, which has been adopted by majority in Parliament and with the consent of the PSOE and the PP, has not been the subject of a complaint on the grounds of unconstitutionality by any autonomous community and has received broad consensus and support from the sectors concerned. Nevertheless, the Confederation may initiate the applicable *amparo* proceedings for the protection of constitutional rights where it considers that there has been a breach of its rights and freedoms as recognized by the Constitution.

C. The Committee's conclusions

- 517.** *The Committee notes that in this complaint the complainant organization objects to the criteria established in sections 4 and 5 of Act No. 10/2009 for obtaining the status of most representative agricultural organization at the national level and for participating in the Agricultural Advisory Committee provided for in section 5. The complainant organization considers that the requirement for territorial coverage of organizations provided for in section 4 is biased and discriminatory, and could even mean that an organization with the largest membership in the country but whose coverage does not extend to nine autonomous communities is not granted the status of "most representative", especially taking into account that the number of workers in the agricultural sector in the different autonomous communities varies greatly and that the percentage required in each one in order to be*

recognized as most representative organization is not uniform (in some cases 10 per cent is required while in others 15 per cent is required).

518. *The Committee notes the Government's statements on the reason and logic behind the legal conditions for obtaining the status of most representative agricultural organization at the national level, which indicate that: (1) Act No. 10/2009 was the result of a consensus reached with major political parties and of a broad dialogue and consensus with the most representative agricultural organizations (ASAJA, COAG – from which the complainant organization split – and the UPA), after seeking the opinion of a committee of experts and the Economic and Social Council of Spain; (2) the bill respected the distribution of power between the State and the autonomous communities and the ILO Conventions; (3) the act sets forth objective criteria and the responsibility for taking decisive action falls to the autonomous communities which are vested with the power to call the elections that determine the representativeness of the organizations; (4) the Constitutional Court has recognized that the concept of majority (territorial) representation and majority coverage are objective criteria and are therefore constitutionally valid; and (5) pursuant to the provisions of Act No. 10/2009, "most representative" status has been granted to those organizations that have run in elections called by the autonomous communities and have obtained an average of at least 10 per cent of the votes at the national level.*

519. *The Committee notes that the sections criticized by the complainant organization stipulate the following:*

Section 4. Criteria for representativity

- 1. The professional agricultural organizations that obtain the status of "most representative" in accordance with the provisions of this act shall be entitled to institutional representation before the General Administration of the State and other entities and bodies of a public nature pertaining thereto.*
- 2. To this end, the "most representative" professional agricultural organization of a general nature shall be considered to be that which, at the time of submitting its application to be recognized as such, has at least 15 per cent of the electoral votes cast in all the elections held by the autonomous communities for participation in the advisory bodies and entities of the autonomous communities, and has run for election in at least nine autonomous communities.*

For the purpose of this act, voters shall be understood to mean natural persons who are registered in the social security system as self-employed because of their agricultural activities and legal persons whose exclusive objective pursuant to their statutes is agricultural activity and who actually undertake such activity.

- 3. The professional agricultural organizations that do not obtain the status of "most representative" by means of the arrangements established in paragraph 2 of this section shall be granted such status when they are recognized as being the most representative in at least ten autonomous communities.*

Article 5. Weighting of representativity

The participation in the Agricultural Advisory Committee established by this act and its respective budget and resources shall be shared in proportion to the level of representation and in accordance with the results obtained in the respective elections for the entities recognized as most representative on the grounds established in section 4(2).

520. *The Committee wishes to refer to the principles which it has established:*

- The Committee has pointed out on several occasions, and particularly during discussion on the draft of the Right to Organize and Collective Bargaining Convention, that the International Labour Conference referred to the question of the representative character of trade unions, and, to a certain extent, it agreed to the distinction that is sometimes made between the various unions concerned according to how representative they are.*

Article 3, paragraph 5, of the Constitution of the ILO includes the concept of “most representative” organizations. Accordingly, the Committee felt that the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism. Such a distinction, however, should not result in the most representative organizations being granted privileges extending beyond that of priority in representation, on the ground of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organizations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87.

- The determination of the most representative trade union should always be based on objective and pre-established criteria so as to avoid any opportunity for partiality or abuse.
- Pre-established, precise and objective criteria for the determination of the representativity of workers’ and employers’ organizations should exist in the legislation and such a determination should not be left to the discretion of governments [see **Digest of Decisions and Principles of the Freedom of Association Committee**, fifth (Revised) edition, 2006, paras 346–348].

521. *With regard to the legal provisions of Act No. 10/2009 to which the complainant organization objects, the Committee wishes to point out that, in light of the national conditions, the legal requirement to have a given national coverage in order to enjoy at a national level the status of most representative agricultural organization and participate in the Agricultural Advisory Committee – specifically: (a) running in elections in at least nine of the 17 autonomous communities; or (b) being recognized as most representative in ten autonomous communities, which in practice requires 10 or 15 per cent of the votes, depending on the case – is an objective and relatively frequent criterion in comparative law aimed at ensuring that the strongest and largest organizations are those which are integrated into the state advisory bodies. With regard to the additional requirement – in case (a) – to have 15 per cent of the total number of votes in all the elections held by the autonomous communities, the Committee wishes to recall that in previous cases concerning Spain it considered that 15 per cent at the level of the autonomous communities was not incompatible with Convention No. 87 [see 243rd Report, Case No. 1320, para. 113, and 311th Report, Case No. 1968, para. 501]. Thus the Committee of Experts on the Application of Conventions and Recommendations, upon reviewing the act and the application of Conventions Nos 87, 98 and 141, did not have any objection to the provisions of the act which stipulate that 15 per cent of votes in autonomous communities must be obtained in order to be recognized as most representative organization for the purposes of participating in advisory bodies. Finally, the Committee notes that section 6 of Act No. 10/2009 provides for a review every five years of the representativeness of the professional organizations recognized by the authorities, and that the Confederation may initiate the applicable amparo proceedings if it so wishes.*

The Committee’s recommendation

522. *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. 2723

INTERIM REPORT

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

- **Education International (EI) and**
- **the Fijian Teachers' Association (FTA)**

Allegations: Dismissal of a trade union leader in the public service education sector and ongoing anti-union harassment and interference with internal trade union affairs

- 523.** The complaint is contained in communications from Education International (EI) and the Fijian Teachers' Association (FTA) dated 1 July, 11 August and 9 September 2009 and 30 August 2010.
- 524.** The Government forwarded its partial response to the allegations in communications dated 1 September 2009 and 27 May 2010.
- 525.** Fiji 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

- 526.** In a communication dated 1 July 2009, the complainant organizations, EI, and its member organization, the FTA, allege acts of anti-union discrimination, anti-union harassment and interference, in violation of ILO Conventions Nos 87 and 98 ratified by Fiji in 2002 and 1974, respectively.

Act of anti-union discrimination

- 527.** EI and the FTA deplore that the Government prejudiced Mr Tevita Koroi, President of the FTA and President of the Council of Pacific Education, by terminating his employment in the civil service on account of the mandate he holds from the teachers' association.
- 528.** On 10 December 2008, Fiji's Public Service Commission (PSC) notified Mr Koroi of the suspension from his position as school principal and subsequently terminated his employment in the civil service on 30 April 2009.
- 529.** Mr Koroi has been charged with three offences for allegedly breaching Fiji's Public Service Code of Conduct, which is part of the Public Service Act promulgated in 1999. The accusations were based on a statement Mr Koroi had made on 5 December 2008 during a meeting held at the FTA headquarters in Suva, where he took the floor as the President of the FTA for the launch of the Movement for Democracy in Fiji. The gathering was attended by representatives of trade unions, civil society groups, political parties and members of the general public. During his speech, Mr Koroi stated that "[the Movement for Democracy] will organize and coordinate a campaign to return Fiji to a parliamentary rule as quickly as possible. The announcement of the initiative is timely to coincide with the second anniversary of the forceful takeover of the elected government by the Republic of Fiji Military Forces." This gathering did not take place at a school, with students in

attendance, or during school hours. The complainants thus believe that Mr Koroi was acting in his capacity as FTA President and consider it unfair and unjust to discipline Mr Koroi in his position as school principal.

- 530.** The FTA has filed a dispute with the Ministry of Labour and Industrial Relations against the decision of termination as handed down by the PSC. According to the complainants, there are no other avenues for appeal through the court system in Fiji, as the Government's Appeals Board has been abolished, just like the High Court, the Appeals Court and the Supreme Court, as a result of the abrogation of the country's Constitution on 10 April 2009. In their communication dated 30 August 2010, the complainants indicate that, until now, no response has been received from the Ministry of Labour.
- 531.** In addition, EI addressed a letter to the Fijian authorities to condemn the suspension of Mr Koroi on 9 February 2009. On 18 February, in response to this letter, the Ministry of Education of Fiji, in the person of the Permanent Secretary for Education, National Heritage, Culture and Arts, Youth and Sports, replied that "Mr Koroi has been disciplined as a civil servant for speaking on matters beyond his jurisdiction as a civil servant and also as trade union leader of a union that deals only with teachers and their work conditions." The Fiji Teachers Union (FTU), the other EI affiliate in Fiji, and the Fiji Islands Council of Trade Unions (FICTU), where Mr Koroi as the FTA President is a member of the Executive, have expressed their support to Mr Koroi. In a letter to the PSC, dated 11 June 2009, the FTU requested that Mr Koroi be reinstated in his position without any loss of salary, and the FICTU expressed concerns about his termination that is "most unreasonable and unjustified and totally unrelated to his role as a public servant".
- 532.** Furthermore, the complainant organizations indicate that the activities of trade union leaders in Fiji are protected by the laws of the country under the former Trade Union Act and the 2007 Employment Relations Promulgation. The Employment Relations Act, promulgated in 2007, protects the workers against discrimination on the grounds of, inter alia, political opinion and trade union membership or activity in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship. In addition, the Fijian Constitution, which unfortunately has been abrogated on 10 April 2009, guarantees the rights to freedom of association and freedom of expression. The Public Service Code of Conduct, which regulates the conduct of civil servants, states that "the public service respects the values, policies, rights and freedoms set out in the Constitution".
- 533.** With reference to the fundamental principles of freedom of association such as freedom of expression and adequate protection against all acts of anti-union discrimination in respect of employment, EI and the FTA therefore conclude that the dismissal of Mr Koroi is in clear violation of his right to exercise his legitimate duties as a trade union leader, recognized by the Fijian legislation and by international labour standards, and that he was punished as a school principal for a role that he had performed as a trade union leader. In their view, this is the first time since the establishment of the FTA in 1934 that a union president is disciplined as a civil servant and a trade unionist. Although the FTA has participated in many trade union activities throughout the years, including strikes, protests, public rallies, marches and even the formation of a political party in 1985, previous governments have always recognized the constitutional role of unions and trade union leaders, and the FTA President has over the years been appointed by the Ministry of Education at various forums for the formulation of the country's education policies.
- 534.** The complainants call for the immediate reinstatement of Mr Koroi into his civil servant and school principal positions and compensation, and for the withdrawal of all charges against him by the appropriate authorities.

535. In their communication dated 9 September, the FTA submits further evidence of discriminative action taken by Fiji's interim regime against Mr Koroi as regards the issue of representation of the FTA at various forums. In a letter of 11 August 2009, the Ministry of Education instructed that Mr Koroi would not be accepted as a representative of the FTA at certain forums, namely the Education Forum, the Fiji Teachers' Registration Board, the Joint Consultative Committee (JCC) and the Staff Board (CSB).

Additional anti-union harassment and interference

536. The complainant organizations allege that the home and car of Mr Attar Singh, General Secretary of the FICTU have been vandalized, that his office has on two occasions been the target of fire bombs, and that he himself has been taken to the military camp and tortured. Other trade union leaders such as Mr Taniela Tabu, General Secretary of the Viti National Union of Taukei Workers, have also experienced similar types of treatment since the recent political events and, sadly, these acts of threats and vandalism on their lives and properties have never been sanctioned. Moreover, at the end of May 2009, the Building, Construction and Timber Workers' Union filed a complaint with the Ministry of Labour following the dismissal of 30 workers in the company Haroon Holdings after they had joined a union. The complainants indicate that the situation has resulted in a general feeling of threat, intimidation and oppression of workers and citizens in general, since avenues for seeking redress are very limited or non-existent.

537. In their communication dated 30 August 2010, the complainants provide additional information denouncing restrictions on union meetings, on the freedom of movement of trade unionists and on union membership (especially for civil servants), the restriction of the right to express opinions through the press (via the Media Decree of 28 June 2010), the abolition of representative bodies (e.g. Towns and City Councils, Sugar Cane Growers Council, etc.) or of their tripartite composition (e.g. Fiji National Provident Fund), new methods of recruiting civil servants and the Government's rule by Decree.

B. The Government's reply

538. In its communication dated 1 September 2009, the Government indicates that Mr Koroi had already been charged with disciplinary offences in 2002 under the Finance Act and had been fined and reprimanded. Also, in 2008, he had been charged under General Orders 309, found guilty and, as a penalty, downgraded to a minimum of 2D grade. Under General Orders 309(b) and (c), no officer or employee shall, without the permission of the Secretary for the Public Service, whether on duty or on leave of absence: contribute to, whether anonymously or otherwise, or cause to be published in any manner, anything which may reasonably be regarded as of political or administrative in nature; or speak in public or broadcast on any matter which may reasonably be regarded as of a political or administrative in nature. According to the Government, such rules are not uncommon in Commonwealth countries.

539. The recent penalty to terminate Mr Koroi's employment on 30 April 2009 is due to breaches of the Public Service Code of Conduct stipulated under the Public Service Act, 1999, which provides for the ways in which a civil servant should conduct in the course of employment in the civil service. Section 6 of the Act spells out 14 codes that all civil servants have to observe, and section 7 of the Act provides that any breach of those codes will form the ground or basis for disciplinary action.

540. Mr Koroi holds the position of President of the FTA and trade union officer and has, simultaneously, held an appointment of civil servant as the principal of the Nasinu Secondary School. The Government indicates that the Ministry of Education has had to

deal with Mr Koroi on a number of occasions regarding his participation in political activities and public comments against the Government which violated his position as a civil servant. The Ministry tried to reason Mr Koroi in that he needed to be mindful of his status as a civil servant, to uphold the Public Service Code of Conduct when participating in public forums and not to be misled that he could do as he wished as the President of his trade union. The Ministry went on to advise Mr Koroi and the FTA to utilize full-time officers of the Union who are not civil servants to represent and speak in forums that involve political parties and other NGOs on topics that are political in nature. According to the Government, the advice was not considered by Mr Koroi, as he continued to speak and participate in such forums that are completely outside the scope of his position and most importantly his status as a civil servant and an employee of the State. The Government considers that, due to his non-cooperation, there was no other option but to institute disciplinary actions against him, and his case was taken through the PSC Disciplinary Procedures, which finally led to the decision to terminate his position as a civil servant and teacher of the State.

- 541.** On the allegation of anti-union discrimination, the Government categorically denies that its actions led to the dismissal of Mr Koroi. It points out that, in this case, the Government is the employer which provides employment to public servants who are covered by ethics and values stipulated under the Public Service Act, 1999. With due respect to the rights of Mr Koroi as a trade unionist, as a government employee he was also expected to observe the requirements of that Act, which provides for the ways in which a civil servant should conduct in the course of employment in the public service. The action of Mr Koroi was considered as vilifying the Government, his employer, and violating the principles of good faith.
- 542.** While respecting the rights of workers and trade unionists under Conventions Nos 87 and 98 as also laid down by part 2 of the Employment Relations Promulgation, 2007, on the Fundamental Principles and Rights at Work, the Government considers that the Public Service Act 1999 is a law of the land as stipulated in Article 8(1) of Convention No. 87, which is to be followed by all civil servants without discrimination, irrespective of whether the civil servant is a member of a trade union or not. The PSC had made its decision to terminate Mr Koroi's service as a civil servant teacher based purely on his breach of the Public Service Act and its Code of Conduct. This law, together with the Employment Relations Promulgation, 2007, was designed to promote a very high professional standard amongst civil servants in Fiji.
- 543.** In its communication dated 27 May 2010, the Government reiterates that the case at hand is a matter between the employer and an employee who has breached his terms and conditions of employment. The PSC found Mr Koroi to be in breach of sections 6 and 7 of the Public Service Act and General Orders 309(c), provisions broadly stating that civil servants are not allowed to speak in public or broadcast a matter which may be regarded as political or administrative in nature. As a result, the Ministry of Education, after verifying the facts through an internal investigation, suspended Mr Koroi by communication No. TPF42772 dated 10 December 2008. In the letter, Mr Koroi was advised to write directly to the PSC, should he wish to make representation on his suspension. Moreover, to ensure his right of appeal within the PSC internal grievance procedure, Mr Koroi was given the opportunity to mitigate against his suspension at a PSC hearing on 30 April 2009. After thoroughly considering all factors including Mr Koroi's mitigation, the PSC found the employee guilty of all charges and decided to take the necessary disciplinary action. As a result, Mr Koroi's employment was terminated on 30 April 2009.
- 544.** The Government indicates that, according to its records, Mr Koroi has not yet appealed against the PSC decision at the PSC Appeals Tribunal. Instead, the FTA filed by letter No. HQ/AD/32 dated 6 May 2009 an employment dispute on the issue with the Ministry of

Labour under the dispute reporting mechanism of the Employment Relations Promulgation, 2007. However, the FTA withdrew the dispute by letter No. HQ/AD/32 of 11 September 2009, in the light of the Employment Relations Tribunal decision of Dispute No. 35 of 2008, stating that the Tribunal cannot adjudicate on employment disputes over the dismissal of an employee nor, as a result, over an “unjustified” or “unfair” dismissal.

- 545.** The FTA subsequently advised the Ministry of Labour that it would raise the alleged unfair termination as an employment grievance through the mediation service under the mechanism provided for in the Employment Relations Promulgation, 2007. However, according to the Ministry of Labour records, the report of this employment grievance has not yet eventuated. The Government indicates that, under section 4 of the Promulgation, “employment grievance” means that a grievance of the worker against the employer because of the workers’ claim, inter alia, that the worker has been dismissed or has been subject to duress during employment in relation to membership or non-membership of a union. If a worker is a member of a trade union, the worker has the additional choice of allowing the union to lodge an employment dispute regarding any employment matter (including anti-union discrimination) to the Ministry of Labour for determination and access to the “free of charge” mediation service of the Employment Relations Tribunal. In terms of employment grievance remedies, section 230 of the Promulgation provides the Employment Relations Tribunal or the Employment Relations Court to order reinstatement of the worker; reimbursement of lost wages; and/or payment of compensation to the aggrieved worker for humiliation, loss of dignity, loss of any benefit (monetary or not) and loss of any personal property.
- 546.** The Government concludes that the redress mechanism in Mr Koroi’s case has not been exhausted yet, as the FTA is yet to lodge an employment grievance on Mr Koroi’s suspension to the mediation service under the Employment Relations Promulgation, 2007, and hopes that the FTA will not delay this case and seek for social justice as provided for under the Promulgation.

C. The Committee’s conclusions

- 547.** *The Committee notes that, in the present case, the complainants allege dismissal of a trade union leader in the public service education sector and ongoing anti-union harassment and interference with internal trade union affairs.*
- 548.** *The Committee notes that, according to the complainants, the Government prejudiced Mr Tevita Koroi, President of the FTA, President of the Council of Pacific Education and member of the Executive of the FICTU, by suspending him from his position as school principal on 10 December 2008 and subsequently terminating his employment in the civil service on 30 April 2009, on account of the mandate he holds from the teachers’ association. The complainants indicate that the PSC charged Mr Koroi with three offences for allegedly breaching Fiji’s Public Service Code of Conduct, by holding a speech on 5 December 2008 for the launch of the Movement for Democracy in Fiji, during which he stated that “[the Movement] will organize and coordinate a campaign to return Fiji to a parliamentary rule as quickly as possible. The announcement of the initiative is timely to coincide with the second anniversary of the forceful takeover of the elected government by the Republic of Fiji Military Forces.” Given that the gathering did not take place at a school, with students in attendance or during school hours, but was held at the FTA headquarters in Suva and was attended by representatives of trade unions, civil society groups, political parties and members of the general public, the complainants believe that Mr Koroi was acting in his capacity as FTA president and consider it unfair to discipline him in his position as a school principal. According to the complainants, the Ministry of Education replied on 18 February 2009 to a letter of EI condemning his suspension that “Mr Koroi has been disciplined as a civil servant for speaking on matters beyond his*

jurisdiction as a civil servant and also as trade union leader of a Union that deals only with teachers and their work conditions.” The FTA also indicates that it has filed a dispute with the Ministry of Labour and Industrial Relations against the decision of termination as handed down by the PSC but has received no response so far. In the complainants’ view, as a result of the abrogation of the Constitution of Fiji on 10 April 2009, there are no other avenues for appeal through the court system in Fiji, as the Government’s Appeals Board, the High Court, the Appeals Court and the Supreme Court have been abolished. The FTA alleges further discriminative action taken by the Government in that, by letter of 11 August 2009, the Ministry of Education instructed that Mr Koroi would no longer be accepted as a representative of the FTA at various forums. With reference to the former Trade Union Act, the Employment Relations Promulgation of 2007, and the recently abrogated Fijian Constitution, the complainants conclude that the dismissal of Mr Koroi is in clear violation of Fijian legislation and international labour standards and that he was punished as a school principal for a role that he had performed as a trade union leader. They call for the immediate reinstatement of Mr Koroi into his civil servant and school principal positions with due compensation, and for the withdrawal of all charges against him by the appropriate authorities.

- 549.** *The Committee notes from the Government’s reply that Mr Koroi had already been charged with disciplinary offences, fined and reprimanded in 2002 under the Finance Act, and charged under the General Orders 309(b) and (c), found guilty and downgraded in 2008. The Government indicates that, regarding his participation in political activities and public comments against the Government, the Ministry of Education has tried on a number of occasions to reason Mr Koroi in that he needed to be mindful of his status as a civil servant, uphold the Public Service Code of Conduct and not be misled that he could do as he wished as the union president. The Ministry also advised the FTA to utilize full-time union officers who are not civil servants to speak in forums that involve political parties on topics that are political in nature. According to the Government, the advice was not considered by Mr Koroi as he continued to speak and participate in such forums that are completely outside the scope of his position and most importantly his status as a civil servant and an employee of the State. The Government considers that, due to his non-cooperation, there was no other option but to institute disciplinary action against him. Thus, the Ministry of Education, after verifying the facts through an internal investigation, suspended Mr Koroi by communication of 10 December 2008. After having given Mr Koroi the opportunity to object to his suspension at a hearing on 30 April 2009, the PSC found him guilty of all charges and decided to terminate his employment on the same day. The Government points out that, with due respect to the rights of Mr Koroi as a trade unionist, as a government employee he was expected to observe the requirements of the Public Service Act, 1999 and to refrain from vilifying his employer and violating the principles of good faith. The Government considers that the Public Service Act is a law of the land as stipulated in Article 8(1) of Convention No. 87, which is to be followed by all civil servants, irrespective as to whether they are union members, and that the present case is a matter between the employer and an employee who has breached his terms and conditions of employment. In the Government’s view, the PSC decision to terminate Mr Koroi’s service as a civil servant is based purely on his breach of sections 6 and 7 of the Public Service Act and General Orders 309(c), provisions broadly stating that civil servants are not allowed to speak in public or broadcast a matter which may be regarded as political or administrative in nature. The Government also indicates that, according to the records, Mr Koroi has not yet appealed against the PSC decision at the PSC Appeals Tribunal. Instead, the FTA filed on 6 May 2009 an employment dispute on the issue with the Ministry of Labour under the dispute reporting mechanism of the Employment Relations Promulgation, 2007, but withdrew it on 11 September 2009, in the light of the Employment Relations Tribunal decision No. 35 of 2008, stating that it cannot adjudicate on employment disputes over the dismissal of employees. The FTA subsequently advised the Ministry of Labour that it would raise the alleged unfair termination as an employment*

grievance to the Mediation Service under the Employment Relations Promulgation, 2007. However, according to the Ministry of Labour records, the FTA has not yet lodged such grievance. The Government concludes that the redress mechanism in Mr Koroi's case has not been exhausted, and hopes that the FTA will not delay this case and seek for social justice as provided for under the Promulgation.

- 550.** *The Committee notes that the information provided by the complainant and by the Government coincides in that Mr Koroi was suspended from his position as school principal on 10 December 2008 and his employment in the civil service was subsequently terminated on 30 April 2009, due to a public statement made during a meeting in December 2008. The Committee notes, however, the conflicting versions of the two parties as to the nature and purpose of the statement and the justifiability of the dismissal. While the complainants believe that the speech at the FTA headquarters in Suva was held by Mr Koroi in his capacity as FTA President and constitutes a legitimate trade union activity, the Government considers that, by making a public statement of political nature directed against the Government, Mr Koroi has violated sections 6 and 7 of the Public Service Act and General Orders 309(c) thus breaching his terms and conditions of employment.*
- 551.** *In previous cases of dismissal of trade union leaders, the Committee has repeatedly highlighted 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. It has pointed out that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 799 and 804].*
- 552.** *The Committee considers that the issue at stake is whether or not Mr Koroi's public statement can be considered as a legitimate trade union activity and wishes to recall that it has already reviewed on previous occasions the question of normal trade union activities as opposed to activities outside the trade union sphere. The Committee notes that sections 6 and 7 of the Public Service Act and General Orders 309(c) contain a blanket prohibition for civil servants to speak in public on matters of a political nature. In this regard, the Committee points out that, firstly, in its opinion, teachers do not carry out tasks specific to officials in the state administration; indeed, this type of activity is also carried out in the private sector. In these circumstances, it is important that teachers with civil servant status should enjoy the guarantees provided for under Convention No. 98 [see **Digest**, *op. cit.*, para. 901]. Secondly, the Committee wishes to reaffirm that measures, although of a political nature and not intended to restrict trade union rights as such, may nevertheless be applied in such a manner as to affect the exercise of such rights, and that a general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of association, but also unrealistic in practice. Trade union organizations may wish, for example, to express publicly their opinion regarding the Government's economic and social policy. The freedom of expression which should be enjoyed by trade unions and their leaders should also be guaranteed when they wish to criticize the Government's economic and social policy. For the contribution of trade unions and employers' organizations to be properly useful and*

credible, they must be able to carry out their activities in a climate of freedom and security. This implies that, in so far as they may consider that they do not have the basic freedom to fulfil their mission directly, trade unions and employers' organizations would be justified in demanding that these freedoms and the right to exercise them be recognized and that these demands be considered as coming within the scope of legitimate trade union activities [see **Digest**, *op. cit.*, paras 36, 157, 206 and 503]. More generally, the Committee wishes to emphasize the importance which it places on respect for the basic civil liberties of trade unionists and for employers' organizations, including freedom of expression, as essential prerequisites to the full exercise of freedom of association, and considers that the statement made by Mr Koroi (which has not been contested by the Government) falls fully into the realm of speech that should be protected, particularly as it was a view expressed outside the employment relationship.

- 553.** *The Committee notes that the FTA has indicated that it has filed a dispute with the Ministry of Labour, considering that there are no other avenues for appeal through the national court system as a result of the abrogation of the Constitution of Fiji but that it has so far received no response from the Ministry. While the Government for its part reports that Mr Koroi has not yet appealed against the PSC decision at the PSC Appeals Tribunal and that the FTA has withdrawn the filed employment dispute and still not lodged an employment grievance to the Mediation Service under the Employment Relations Promulgation, 2007, the Committee 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**, *op. cit.*, para. 817]. Thus, in light of the abovementioned principles, the disruptions in the judicial system in Fiji and the apparent absence of any constitutional guarantees, the Committee requests the Government to take the necessary steps to ensure that Mr Koroi is immediately reinstated in his former position as a school principal without loss of pay or benefits and to keep it informed of developments.*
- 554.** *As regards the allegation that the Ministry of Education instructed on 11 August 2009 that Mr Koroi would no longer be accepted as a representative of the FTA at various forums, the Committee draws the Government's attention to the fact that, given that workers' organizations are entitled to elect their representatives in full freedom, the dismissal of a trade union leader, or simply the fact that a trade union leader leaves the work that he or she was carrying out in a given undertaking, should not affect his or her trade union status or functions unless stipulated otherwise by the constitution of the trade union in question [see **Digest**, *op. cit.*, para. 411]. Noting that the FTA continues to consider Mr Koroi to be the president of the union, the Committee urges the Government to refrain from any interference in this regard and to permit Mr Koroi, as the legitimate representative of the FTA, to carry out his representation functions at the relevant forums, including the Education Forum, the Fiji Teachers' Registration Board, the JCC and the CSB.*
- 555.** *In addition, the Committee notes that the complainant organizations further allege that Mr Attar Singh, the General Secretary of the FICTU, has been taken to the military camp and tortured, that his home and car have been vandalized, that his office has on two occasions been the target of fire bombs, that other trade union leaders such as Mr Taniela Tabu, General Secretary of the Viti National Union of Taukei Workers, have also experienced similar types of treatment since the recent political events, that these acts of threats and vandalism have never been sanctioned. Additionally, at the end of May 2009, the Building, Construction and Timber Workers' Union filed a complaint with the Ministry of Labour following the dismissal of 30 workers in the company Haroon Holdings after they had joined a union. The complainants indicate that the situation has resulted in a general feeling of threat, intimidation and oppression of workers and citizens in general, since avenues for seeking redress are very limited or non-existent. The Committee deeply*

regrets that the Government has not replied to these allegations and wishes to recall that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see *Digest*, op. cit., para. 44]. The Committee therefore urges the Government to reply fully and without delay thereto and invites the complainant organizations to provide any relevant additional information.

556. Finally, the Committee notes that, in their communication dated 30 August 2010, the complainants provide additional information denouncing, inter alia, restrictions on union meetings, on the freedom of movement of trade unionists and on union membership (especially for civil servants), restriction of the right to express opinions through the press and the abolition of representative bodies or of their tripartite composition. The Committee requests the Government to respond in detail to these allegations.

557. Given the seriousness of the complainants' allegations and the absence of a complete picture of the situation on the ground, the Committee invites the Government to accept an advisory tripartite mission from the ILO to clarify the facts and assist the Government and the social partners in finding appropriate solutions in conformity with freedom of association principles.

The Committee's recommendations

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

- (a) *In light of the disruptions in the judicial system in Fiji and the apparent absence of any constitutional guarantees, the Committee requests the Government to take the necessary steps to ensure that Mr Koroi is immediately reinstated in his former position as a school principal without loss of pay or benefits and to keep it informed of developments.*
- (b) *The Committee urges the Government to refrain from any further interference in the internal affairs of the FTA and to permit Mr Koroi, as its legitimate representative, to carry out his representation functions at the relevant forums, including the Education Forum, the Fiji Teachers' Registration Board, the JCC and the CSB.*
- (c) *The Committee invites the complainant organizations to provide any relevant additional information and urges the Government to reply fully and without delay to the allegations of acts of violence against trade union leaders and anti-union harassment.*
- (d) *The Committee also requests the Government to respond in detail to the most recent allegations concerning restrictions on union meetings, on the freedom of movement of trade unionists and on union membership, restriction of the right to express opinions through the press and the abolition of representative bodies or of their tripartite composition.*

- (e) *Given the seriousness of the complainants' allegations and the absence of a complete picture of the situation on the ground, the Committee invites the Government to accept an advisory tripartite mission from the ILO to clarify the facts and assist the Government and the social partners in finding appropriate solutions in conformity with freedom of association principles.*
- (f) *The Committee draws the Governing Body's attention to the extreme seriousness and urgency of the issues involved in this case.*

CASE NO. 2735

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

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

- **the Serikat Pekerja PT Angkasa Pura 1 Union (SP–AP1) and**
- **Public Services International (PSI)**

Allegations: The complainant organizations allege several violations of freedom of association on the part of the state-owned enterprise PT (Persero) Angkasa Pura 1, including the following: (1) refusing to implement in full a collective bargaining agreement; (2) causing an unreasonable delay in concluding arbitration proceedings aimed at resolving the dispute; (3) intimidating and harassing workers protesting against the refusal to implement the collective bargaining agreement; (4) dismissing and suspending workers for taking part in legitimate strike action; and (5) establishing or actively encouraging the establishment of a new, company-controlled union for the purpose of ousting SP–AP1 as the representative union

- 559.** The complaint is contained in a communication from the Serikat Pekerja PT Angkasa Pura 1 Union (SP–AP1) and Public Services International (PSI) dated 11 September and 19 October 2009.
- 560.** The Government forwarded a partial response to the allegations in a communication dated 29 October 2009.
- 561.** Indonesia 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 Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

- 562.** In a communication dated 11 September 2009, the complainant organizations SP-AP1 and PSI denounce the infringement by the Government of Indonesia of ILO Conventions Nos 87 and 98 through the actions of its state-owned enterprise, PT (Persero) Angkasa Pura 1, such as: refusing to implement in full a collective bargaining agreement (CBA) negotiated with the union for the period 2005–07 and seeking unilaterally to vary its terms; causing an unreasonable delay in concluding arbitration proceedings aimed at resolving the dispute; intimidating and harassing workers protesting against the refusal to implement the CBA in full; dismissing or suspending workers for taking part in legitimate strike action; establishing or actively encouraging the establishment of a new company-controlled or “yellow union” with the sole aim of ousting SP-AP1 as the representative union; and actively encouraging employees to disaffiliate from SP-AP1 and affiliate to the new union.
- 563.** The complainants indicate that SP-AP1 is a national union established in 1999 organizing in 13 airports in the eastern part of Indonesia, whose members are engaged in the provision of airport management and air traffic services (including air traffic controllers, technicians, aviation security, aviation firefighters, car park attendants, baggage handlers, check-in counter staff and administration desk staff). SP-AP1 is a “reformasi” (or independent) union, which is affiliated to PSI at international level. At the time of the dispute, 3,200 of the 3,800 workers employed in the 13 airports were members of SP-AP1.

Collective bargaining agreement

- 564.** The complainants state that SP-AP1 and the management of PT (Persero) Angkasa Pura 1 concluded in 2005 a “joint employment agreement” or CBA, which covered, amongst other things, facilities, salaries, working hours, overtime payments, pension entitlements and retirement and health allowances. Notably, the CBA provided for the salaries of the employees of Angkasa Pura 1 to be linked to the civil service pay scale.
- 565.** However, according to the complainants, the management of the company has consistently failed to implement the CBA in full, in particular sections 38(2) concerning the salary package, 65(2) on pensions and 66(1), (2) and (4) concerning retirement health insurance and benefits. Between 2006 and 21 April 2008, the union held numerous meetings with the management in an attempt to break the stalemate, and the Ministry of Manpower and Migration intervened constructively in the dispute by establishing an industrial dispute team and inviting the union and management to meetings on 9 and 17 January 2008. According to the complainants, the team mediated the concerns of both sides and recommended full compliance with the CBA but its recommendations were ignored by the company.
- 566.** The complainants also indicate that, on 6 March 2008, the General Director of Industrial Relations and Social Insurance for the Ministry of Manpower and Migration, in a further attempt to resolve the dispute, mediated a meeting between the union and management, with representatives from the Ministry of State-Owned Enterprises and the Ministry of Transportation in attendance. The conclusions of the meeting are set out in the Joint Agreement of 6 March 2008, which also extended the period of the CBA to cover 2008. The parties agreed, inter alia, on terms relating to pensioners' allowances, pension fund programmes for new employees and overtime working hours and payments for operational staff, to be implemented within 30 days of the Joint Agreement. It was also agreed that separate negotiations would be held on employee salary adjustments in line with the CBA.
- 567.** The complainants report that, on 17 April 2008, the Ministry of Manpower and Migration convened a meeting, between the union and management to assess progress on the implementation of the Joint Agreement. No progress having been made, a further meeting

was called for 21 April 2008, during which, in the face of continued refusal by management to abide by the terms of the Joint Agreement, the parties agreed to declare “failed negotiations” concerning parts of the CBA and the Joint Agreement.

568. Furthermore, the complainants state that, on 13 October 2008, PT (Persero) Angkasa Pura 1 began proceedings in the Industrial Relations Court, District Court of Central Jakarta, to have section 38 of the CBA, linking salary increases for the company’s employees to salary increases for civil servants, declared null and void. In response, the union issued on 18 November 2008 a counterclaim concerning the loss it had suffered as a result of the non-implementation of the CBA. In a decision dated 24 March 2009, the Industrial Relations Court rejected the company’s claim and upheld the union’s counterclaim. To date, the management of PT (Persero) Angkasa Pura 1 refuses to abide by the court decision.

Strike action

569. According to the complainants, the union announced on 25 April 2008 its intention to call three days of strike action (7–9 May 2008), in accordance with section 3(2) of the CBA and existing national laws and regulations. Letters giving notice of the intention to take strike action were sent to the Director of PT (Persero) Angkasa Pura 1, the head of police of the Republic of Indonesia and the Ministry of Manpower and Migration. The complainants allege that the company’s management reacted to the notice of strike action by issuing a letter dated 5 May 2008 informing members of SP–AP1 that the planned strike was illegal and that those who participated in the “illegal work stoppage” would be subjected to stern measures according to the company’s disciplinary rules and mutual employment agreement.

570. The complainants indicate that the union sent letters to its members advising them of rules of conduct during the strike, including: ensuring the maintenance of services directly related to the safety of human lives; demonstrating the best conduct and manner; refraining from any criminal acts or sabotage; and obeying the laws of the land. The union also directed that no air traffic control staff shall be involved in the strike, since section 139 of Act No. 13 of 2003 concerning manpower provides that the implementation of strikes staged by workers of enterprises that serve the public interest or whose types of activities, if interrupted by strike, would lead to the endangerment of human lives, shall be arranged in such a way so as not to disrupt public interests or endanger the safety of other people, and that enterprises that serve the public interest or whose types of activities, if interrupted by strike, would lead to the endangerment of human lives, are those running hospitals, fire departments, those providing railway services, those in charge of sluices, regulation of air traffic, and sea traffic.

571. According to the complainants, the strike action was partial, held over two days (7–8 May 2008) and involved six out of the 13 airports. The management retaliated to the strike action on 7 May 2008 by dismissing Mr Arif Islam, Chairman of Angkasa Pura 1 union, Sepinggan branch, and suspending without pay seven other leaders of SP–AP1: (1) Ms Sulistiyani, General Secretary; (2) Ms Sri Rejeki, Head of Human Resources and Development; (3) Ms Milda, Head of Legal Department; (4) Ms Asnawaty, General Treasurer; (5) Mr Trijono, Chair of head office branch; (6) Mr Effendy Sulistiono, Secretary of head office branch; and (7) Mr Florentinus Subandi, Field Coordinator for head office branch.

572. The complainants further claim that the management used heavy-handed tactics to intimidate other workers taking part in the strike action, such as: using the military to force workers at Frans Kaisepo-Biak Airport to return to work on 7 May 2008; arresting Mr Primus H. Rahagiar, the Chairman of SP–AP1 at the same airport; ordering airport

police to prevent trade union leaders from communicating directly with striking workers at Sepinggan-Balikpapan Airport; and coercing workers to sign a letter acknowledging that they had been wrong to participate in the strike action.

- 573.** The complainants indicate that SP-AP1 informed Commission IX of the House of Representatives (Demography, Health, Manpower and Transmigration Affairs) of management's refusal to honour the CBA and its intention to take strike action. Following a meeting on 8 May 2008 between representatives of Commission IX, management and SP-AP1, the Chairwoman of Commission IX sent a letter to the management recommending that the striking workers should neither be dismissed nor punished and that management should at all times respect the law. Moreover, on 21 May 2008, SP-AP1 attended a general hearing held by Commission IX regarding the strike and management's reaction to the industrial dispute. In its conclusions, the Commission urged the General Director of Industrial Relations and Social Insurance for the Ministry of Manpower and Migration to carry out an inspection of management's conduct during and after the strike, and directed that management cease all acts of intimidation and retaliation against SP-AP1 and its members. According to the complainants, both the recommendations and the conclusions of the Commission were ignored by management.
- 574.** The complainants also report that, on 16 May 2008, the union complained to the National Commission on Human Rights about the violation of its rights to freedom of association and collective bargaining and the treatment of its members. The Commissioner subsequently visited the headquarters of PT (Persero) Angkasa Pura 1 seeking further information from the union and management. On 12 August 2008, the Human Rights Commission requested further information from management on progress in reaching a resolution to the dispute. The complainants stress that the deadlock persists despite these interventions.
- 575.** On 4 June 2009, the Head of the Manpower and Social Agency of the City Government of Balikpapan issued a recommendation that the company's management reinstate Mr Arif Islam to his previous position and pay his wages for the period of his dismissal. According to the complainants, the board has ignored this recommendation so far.

Union-busting tactics and intimidation and harassment of SP-AP1 members

- 576.** The complainants allege that Mr Arif Islam remains dismissed, and that the management continues to deny his dismissal claiming that he was on secondment and that his secondment has been brought to an end. The seven suspended employees were eventually reinstated in September 2008, without however receiving full compensation for the period of suspension. According to the complainants, they have not been permitted to return to their full duties, have been isolated by management, are given few or no duties to perform during the working day and often find upon arrival at work access to computers and networks denied through changes of passwords. Other acts of intimidation include threatening or subjecting SP-AP1 members to disciplinary interrogations and threatening them with criminal proceedings.
- 577.** Finally, the complainants claim that, in April 2009, a new union, Asosiasi Karyawan Angkasa Pura 1 (AKA) was formed with the support of the company's management. AKA has been actively raiding the members of SP-AP1, aided and abetted by management. Members of SP-AP1 have been threatened with relocation or transfer if they do not join AKA and have been "bribed" with offers of promotion in order to join the new union. The management has been handing out disaffiliation forms regarding SP-AP1 to employees, while at the same time giving them affiliation forms for AKA. In the complainants' view, the intention is to weaken the density of SP-AP1 in order to claim that the union no longer

has the legal authority to bargain on behalf of its members. SP-AP1 estimates that it has lost close to 50 per cent of its membership as a result of the union-busting and intimidation tactics of the management of PT (Persero) Angkasa Pura 1.

578. In conclusion, the complainants denounce that the Ministry of State-owned Enterprises and the management of PT (Persero) Angkasa Pura 1 have ignored repeated appeals emanating from the Ministry of Manpower and Migration, Commission IX of the House of Representatives and the National Commission on Human Rights to resolve the dispute by honouring the terms of the CBA, ending all acts of harassment and intimidation against the leadership and members of SP-AP1 and reinstating Mr Islam.

579. The complainants therefore request that:

- (1) the company's management reinstate Mr Arif Islam and ensure that he is fully compensated for the period of his dismissal;
- (2) the workers who had been suspended are properly reintegrated into the workforce, fully resume their duties without obstruction and are fully compensated for the period of their suspension;
- (3) the management return to the negotiating table in good faith and take steps to implement the CBA and joint agreement of 6 March 2008;
- (4) the management refrain from all acts of interference in the affairs of SP-AP1, including acts of intimidation and attempts to weaken the membership and bargaining power of the union; and
- (5) the company's management and the Minister of State-owned Enterprises abide by the recommendations of the Ministry of Manpower and Migration, Commission IX of the House of Representatives and Manpower and Social Agency of the City Government of Balikpapan.

580. In a communication of 19 October 2009, the complainants forward the recommendations of the National Commission on Human Rights relating to this case, which confirm its own requests.

B. The Government's reply

581. In a communication dated 29 October 2009, the Government informs that the Ministry of Manpower and Migration organized several meetings in soliciting information from the employer (PT (Persero) Angkasa Pura 1) concerning Case No. 2735.

1. Refusing to implement in full a collective agreement negotiated with the union for the period 2005–07 and seeking unilaterally to vary its system

582. In the Government's view, PT (Persero) Angkasa Pura 1 has implemented the CBA for the period 2005–07, with the exception of three sections:

- Section 38(2)(a) – According to the Government, this section referring to the salary scale of civil servants, cannot be implemented by the company, as it is a state-owned enterprise (Badan Usaha Milik Negara – BUMN) and thus bound to abide by all regulations of state-owned enterprises, including Government Regulation No. 45 of

2005 concerning the establishment, management, inspection and termination of state-owned enterprises. Section 95(2) of that regulation provides that regulations on civil servants, including ranks and echelon structure, cannot be applied to a state-owned enterprise.

- Section 66(4) – This section on health allowance for retired workers provides that the amount is regulated and decided by the employer. The Government indicates that, even though there was no employer’s decision on the issue during the 2005–07 CBA, the company had issued Board of Management Decisions No. AP.I.164/KU.170/2003/DU-B of 27 January 2003 concerning health insurance for retired workers and No. AP.I.2621/KP.170/2005/DU-B of 6 September 2005 concerning the health allowance programme for retired workers. Both decisions state that retired workers in the company’s Health Foundation for Retired Workers (Yayasan Kesehatan Pensiun), are entitled to a maximum health security of 12,500,000 rupiah per person/year.
- Section 66(4) – The section stipulates that the funding for the Retired Workers’ Health-care Programme stems from the contributions of the workers and the company. Retired workers who have paid their contributions during employment are covered by this programme but those who did not pay their contributions, are not entitled to its benefits. The SP–AP1 complains that all retired workers, regardless as to whether he/she has paid the contribution of this programme, are entitled to the benefits of this programme.

583. The Government states that, in accordance with Act No. 2 of 2004 on industrial relations dispute settlement, if a party is not able to fulfil the agreement, the party can make a judicial appeal to the Industrial Relations Court.

2. *Causing an unreasonable delay in concluding arbitration proceedings aimed at resolving the dispute*

584. The Government indicates that the dispute between SP–AP1 and PT (Persero) Angkasa Pura 1 has not been solved through arbitration proceedings, and that the Government has taken several measures to facilitate the settlement of the dispute. For instance, on 17 January 2008, the Government formed a team of labour inspectors and mediators to solve the labour dispute in the company. The team visited the company and advised the parties to solve the dispute through bipartite consultative dialogues, in accordance with the procedures in Act No. 2 of 2004. Also, following the complaint delivered to the Government by the SP–AP1 on 29 February 2008, the Government invited the parties on 6 March 2008 to clarify the results of the bipartite consultative dialogue. At that meeting, an agreement was reached, stating that:

- within 30 days, the parties shall implement the agreement relating to the provision of facilities, i.e. hospitalization and official travel; retirement benefit; retirement benefit for new workers; pension scheme for new workers; overtime payment for operational workers;
- a separate negotiation will be conducted relating to: adjustment of basic wage for workers; health-care programme for retired workers; allowance for the Secretary of the Committee for Civil Servant Discipline Enforcement Team; and
- the job transfer of Ms Sulistyani and Ms Asnawati (members of the board of management of the trade union) will be cancelled.

585. Furthermore, the Government invited both parties on 17 April 2008, to clarify the implementation of the agreement signed on 6 March 2008. The Government indicates that, up to now, the agreement has been implemented as regards: hospitalization and official travel under Board of Management Decision No. KEP.34/KP.30/2008 of 17 April 2008; pension scheme for new workers under Official Memo No. DDAP.25/KP.30.6/2008-B of 18 January 2008; overtime payment for operational workers under the President Director's Circular No. ED.13/KP.10.9/2008-DU of 17 April 2008; and cancellation of the job transfer of Ms Sulistyani and Ms Asnawati.

3. *Intimidating and harassing workers protesting against the refusal to implement the CBA in full*

586. The Government stresses that its function has always been to protect workers' rights, i.e. to urge the parties to settle their disputes immediately through bipartite negotiation, as proven by the following letters sent to the parties:

- letter No. 560/1045/Disnaker.4/2008 dated 5 May 2008 concerning bipartite negotiation sent by the Head of Balikpapan Manpower Regional Office;
- letter No. 260/PHIJSKA/IH/2008 dated 25 August 2008 on advice relating to the dispute settlement of PT (Persero) Angkasa Pura 1 sent by the Director-General for Industrial Relations Development and Workers' Social Security;
- letter No. 97/PHIJSK/VIII/2009 dated 5 March 2009 concerning the wage of Mr Arif Islam sent by the Director-General for Industrial Relations Development and Workers' Social Security; and
- letter No. B.58/PHIJSK/PPHI/III/2009 dated 6 March 2009 concerning "the payment of wages and fulfilment of other rights regularly received by the suspended workers", sent by the Director for Industrial Relations Dispute Settlement (PPHI) on behalf of the Director-General for Industrial Relations Development and Workers' Social Security.

4. *Dismissing or suspending workers for taking part in legitimate strike action*

587. The Government states that PT (Persero) Angkasa Pura 1 did not dismiss the seven workers who violated the CBA but only gave them disciplinary punishment in the form of three months' suspension, as of 7 May 2008 to 6 August 2008.

588. The Government indicates that the workers violated the following CBA sections:

- Section 84, heading Obligations, point 2 refers to giving priority to the interest of the State/institution above the interest of any group, and avoiding anything that is in conflict with the interest of the State/institution and may benefit the interest of a certain group.
- Section 84, heading Prohibition, point 19 refers to conducting activities that might disturb law and order and lead to the creation of a non-conducive working environment.

- Section 84, heading Prohibition, point 23 refers to refusing or not implementing an official order from one's superior.
- Section 99(3) provides that a civil servant who in assisting a company is found to violate the laws and regulations of the company, should be terminated from his/her assignment and be transferred back to his/her original institution.

589. The Government further reports that the seven temporarily suspended workers have been reinstated since 7 August 2008.

5. *Establishing or actively encouraging the establishment of a new company-controlled or "yellow" union with the sole aim of ousting the trade union of PT (Persero) Angkasa Pura 1 as the representative union*

590. The Government reaffirms its commitment as an ILO Member to protecting the universal rights of workers, as stated in the eight ILO core Conventions ratified by Indonesia. As to ILO Convention No. 87, it has been enacted by the Government through Act No. 21 of 2000 concerning trade unions. The Government also renews its commitment to protecting the free will of workers without pressure or intervention from the employer, the Government, a political party or any other parties. In accordance with Act No. 21 of 2000 and the Ministry of Manpower Regulation No. 16/MEN/2001 concerning procedures for the registration of trade unions, whereby the Government has to register all the established trade unions in Indonesia, the Government claims that it has never been involved directly or indirectly in the establishment of trade unions.

6. *Actively encouraging employees to disaffiliate from the SP-AP1 and affiliate to the new union*

591. The Government reiterates that it upholds the rights of workers, in compliance with ratified ILO Convention No. 87, which has been enacted through Act No. 21 of 2000 concerning trade unions. Based on this Act, all workers have the right to form and become a member of a trade union, and become a board member of a trade union according to their own choice without pressure or intervention whatsoever from any party. The Government again claims that, in accordance with Act No. 21 of 2000 and the Ministry of Manpower Regulation No. 16/MEN/2001, it has never been involved directly or indirectly in the establishment of trade unions.

592. With reference to the complainants' requests, the Government makes the following observations:

(a) *Request that the company's management reinstate Mr Arif Islam and ensure that he is fully compensated for the period of his dismissal*

593. The Government indicates that Mr Arif Islam is a civil servant of the Ministry of Transportation. According to Regulation No. SK991 of 7 January 2001 issued by the Ministry, he was assigned to PT (Persero) Angkasa Pura 1 as a technician responsible for

flight safety and security, to assist in the control tower as a flight traffic controller in Sepinggan Airport, Balikpapan, East Kalimantan. According to Decree No. SK. 613 of 8 October 2008 of the Ministry of Transportation, Mr Islam was dismissed from the company and reinstated in his former post at the Ministry as of 1 July 2008; his rights as a civil servant were restored based on the regulations of the Ministry. The Government states that the company prepared the following gratuities for Mr Islam but he never availed himself of any of them: retirement allowance; housing allowance; pension benefits accorded for his services at the company; and workers' social security. According to Instruction Letter No. Print/323/XII/2008 of 9 December 2008 of the Secretary for the Directorate General of Air Transportation, Mr Islam was assigned to Berau Airport, East Kalimantan as of 5 September 2009. According to the Government, he has unfortunately never worked there.

(b) *Request that the workers who had been suspended are properly reintegrated into the workforce, fully resume their duties without obstruction and are fully compensated for the period of their suspension*

594. The Government reiterates that the workers concerned (Ms Asnawati; Ms Sri Rejeki; Mr Florentinus Subandi; Ms Sulistiani, SE; Ms Milda, SH; Mr Efendi Sulistiono) were not terminated but given disciplinary punishment in the form of a three-month suspension from 7 May to 6 August 2008, because of their violation of section 84, heading Obligations, point 2; section 84, heading Prohibition, point 19; section 84, heading Prohibition, point 23; and section 99(3) as described above. The said seven workers have been reinstated since 7 August 2008. According to the Government, during the suspension, the basic wages and fixed allowances of the workers have been paid out, while unfixed allowances which depend on attendance have not. In the Government's view, this is in accordance with the company's Board of Management Decree No. Kep.43/KP.00.8/2008 concerning work regulation, which states that those who violate the regulation will be punished by receiving wages only, without incentives or allowances.

(c) *Request that the management return to the negotiating table in good faith and take steps to implement the CBA and Joint Agreement of 6 March 2008*

595. The Government reports that, on 17 April 2008, the Directorate General of Industrial Relations Development and Workers' Social Security of the Ministry of Manpower and Migration took a precautionary measure by inviting the company's management and the SP-AP1 to clarify the implementation of the agreement of 6 March 2008. The Government indicates that the company has not yet implemented three points of the collective agreement of 6 March 2008, as follows: adjustment on basic wage increase in accordance with the civil servants' wage scale; health scheme for retired workers; and retirement scheme for employees. As mentioned above, the adjustment of the basic wage cannot be implemented due to section 95(2) of Government Regulation No. 45 of 2005 and the status of PT (Persero) Angkasa Pura 1 as a state-owned enterprise. In this regard, the Government informs that the company's management made an appeal through the Industrial Relations Court in Jakarta, which was unfortunately turned down because the former could not furnish the latter with the required judicial procedures. As a result of it, the former is making another judicial appeal to the Supreme Court for a cassation (still in process).

(d) Request that the management refrain from all acts of interference in the affairs of SP–AP1, including acts of intimidation and attempts to weaken the membership and bargaining power of the union

596. The Government reaffirms its commitment as an ILO Member to protecting the universal rights of workers, a commitment which is illustrated by the ratification of all eight ILO core Conventions. ILO Convention No. 87 has been enacted through Act No. 21 of 2000 concerning trade unions. The Government again states that, in accordance with national legislation, it has never been involved directly or indirectly in the establishment of trade unions.

(e) Request that the company's management and the Minister of State-owned Enterprises abide by the recommendations of the Ministry of Manpower and Migration, Commission IX of the House of Representatives and Manpower and Social Agency of the City Government of Balikpapan

597. In the Government's view, the various entities of the Government of Indonesia, i.e. the Ministry of Manpower and Migration, Ministry of Transportation, Commission IX of the House of Representatives, Central Jakarta Manpower Municipal Office and Manpower and Social Agency of the City Government of Balikpapan, are consistent in facilitating the labour dispute settlement in PT (Persero) Angkasa Pura 1 in accordance with the prevailing laws and regulations. Letter No. /PHIJSK/PPHI/V/2008 of 5 May 2008 from the Director-General for Industrial Relations Development and Workers' Social Security emphasizes that the company shall solve the dispute with the SP–AP1 as soon as possible.

C. The Committee's conclusions

598. *The Committee notes that, in the present case, the complainants allege several violations of freedom of association on the part of the state-owned enterprise PT (Persero) Angkasa Pura 1, including the following: (1) refusing to implement in full a CBA negotiated with the union for the period 2005–07 and seeking unilaterally to vary its terms; (2) causing an unreasonable delay in concluding arbitration proceedings aimed at resolving the dispute; (3) intimidating and harassing workers protesting against the refusal to implement the CBA in full; (4) dismissing and suspending workers for taking part in legitimate strike action; and (5) establishing or actively encouraging the establishment of a new, company-controlled union for the purpose of ousting SP–AP1 as the representative union.*

599. *The Committee notes the Government's indication that the Ministry of Manpower and Migration organized several meetings in soliciting information from the company concerning this case. The Committee notes that the SP–AP1 and the management concluded in 2005 a collective agreement, which, according to the allegations, has not been implemented in full by the company. In this regard, the complainants refer in particular to sections 38(2)(a) concerning the linking of salaries to the civil service pay scale, 65(2) on pensions and 66(1), (2) and (4) concerning retirement health insurance and benefits, whereas the Government only mentions sections 38(2)(a) and 66(4). The Committee notes that, according to the Government, section 38(2)(a) on the salary scale of civil servants cannot be implemented by the company, as it is a state-owned enterprise and thus bound to abide by section 95(2) of Government Regulation No. 45 of 2005, which*

provides that regulations on civil servants, including ranks and echelon structure, cannot be applied to a state-owned enterprise.

- 600.** *The Committee notes the Government's statement that the Ministry of Manpower and Migration intervened constructively to facilitate the settlement of the dispute by establishing a team of labour inspectors and mediators and inviting the parties to attend several meetings. According to the complainants, the team recommended full compliance with the CBA but its recommendations were ignored by the company; the Government indicates that the team advised the parties to solve the dispute through bipartite consultative dialogue. The Committee also notes that the Government mediated another meeting on 6 March 2008 to clarify the results of the recommended dialogue. As a result, a joint agreement was signed, in which the parties agreed, inter alia, on terms relating to pensioners' allowances, pension fund programmes for new employees and overtime hours and payment for operational staff to be implemented within 30 days; and on separate negotiations to be held on employee salary adjustments in line with the CBA and health-care programmes for retired workers. Furthermore, the Committee notes that the Government invited both parties on 17 April 2008 to assess progress made on the implementation of the agreement of 6 March 2008. While the complainants indicate that, due to lack of progress, a further meeting was convened on 21 April 2008, at which the parties declared the negotiations concerning parts of the CBA and the joint agreement failed, the Government states that the agreement has been implemented by the company partially, i.e. with the exception of the following three points: adjustment of basic wage increase according to civil servants' wage scale; health scheme for retired workers and retirement scheme for employees. Finally, the Committee notes that on 13 October 2008 the company filed an appeal with the Industrial Relations Court to declare section 38(2)(a) of the CBA null and void because it is contrary to existing legislation, and that, in response, the union filed a counterclaim for the loss suffered as a result of non-implementation of the CBA. The Committee notes from its decision dated 24 March 2009 that the Industrial Relations Court rejected the company's claim on procedural grounds. The Government reports that the company has subsequently filed a judicial appeal in cassation with the Supreme Court, which is ongoing.*
- 601.** *The Committee wishes to recall that it has previously had the occasion to review questions of non-implementation of collective agreements. In this regard, the Committee has reaffirmed that agreements should be binding on the parties, and that failure to implement a collective agreement, even on a temporary basis, violates the right to bargain collectively, as well as the principle of bargaining in good faith [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 939 and 943]. As regards the question of the linking of salaries to the civil service pay scale in a state-owned enterprise that employs civil servants, the Committee observes that this section was part of a voluntarily concluded CBA and the Government's reasons for rejecting this provision remain unclear.*
- 602.** *Bearing in mind that agreements should be binding on the parties, the Committee expects that all remaining disputes as to the application of the CBA in force will be resolved in the near future and requests the Government to keep it informed in this respect. Noting that, according to the joint agreement of 6 March 2008, separate negotiations are to be held on three enumerated points including the employee salary adjustments in line with the CBA, and welcoming the various attempts already made by the Ministry of Manpower and Migration to conciliate the parties, the Committee requests the Government to continue to take active steps to intercede with the parties with a view to facilitating the speedy settlement of the dispute between the state-owned enterprise PT (Persero) Angkasa Pura 1 and the SP-AP1 union. It expects to be kept fully informed on any progress achieved in this respect. The Committee also requests the Government to keep it informed on the final*

outcome of the judicial procedures before the Supreme Court on the question of salaries and to communicate the text of the ruling once it is handed down.

- 603.** *As regards the allegations relating to acts of anti-union discrimination, the Committee notes that, on 7 May 2008, the company imposed disciplinary punishment following strike action by: (1) dismissing Mr Arif Islam, Chairman of the Sepinggan branch of SP-AP1; and (2) suspending the following seven other leaders of SP-AP1: Ms Sulistiyani, General Secretary; Ms Sri Rejeki, Head of Human Resources and Development; Ms Milda, Head of Legal Department; Ms Asnawaty, General Treasurer; Mr Trijono, Chair of head office branch; Mr Effendy Sulistiono, Secretary of head office branch; and Mr Florentinus Subandi, Field Coordinator for head office branch.*
- 604.** *The Committee observes that the parties appear to have different views regarding the legitimacy of the strike action on 7 and 8 May 2008. According to the complainants, the strike is lawful, since the parties had declared at a meeting on 21 April 2008 that negotiations had failed due to lack of progress and the continued refusal by management to abide by the terms of the CBA and the joint agreement, and the SP-AP1 had given strike notice on 25 April 2008, sent letters to its members advising them of rules of conduct and directed that no essential services, including air traffic control staff, be involved in the strike. On the other hand, the Committee notes that, in the Government's view, the suspended workers violated several CBA sections, in particular: 84(a)(2) obliging to give priority to the interest of the State/institution above the interest of any group and avoid anything that is in conflict with the interest of the State/institution; 84(b)(19) prohibiting activities that might disturb law and order and lead to the creation of a non-conducive working environment; and 84(b)(23) prohibiting to refuse or not implement an official order from one's superior. The Committee also notes that the company affirmed by a letter dated 5 May 2008 that, in the absence of a bilaterally declared failure to negotiate, the planned strike was illegal under Decree No. KEP.232/MEN/2003 and striking workers would be subjected to stern measures according to the company's disciplinary rules. In its Decree of Directors No. SKEP.578/KP.80.4/2008, the company has provided as reasons for the dismissal of Mr Arif Islam the violation of several CBA sections and the fact that, under Decree No. KEP.232/MEN/2003, work stoppage is illegal if conducted in companies that serve public interests or where the business directly relates to the safety of human lives.*
- 605.** *Noting that the present case concerns strike action in a state-owned company serving public interests and that the CBA sections considered by the Government and the company to be violated mainly deal with worker loyalty towards the State/institution, the Committee wishes to generally highlight that public servants in state-owned commercial or industrial enterprises should have the right to negotiate collective agreements, enjoy suitable protection against acts of anti-union discrimination and enjoy the right to strike, provided that the interruption of services does not endanger the life, personal safety or health of the whole or part of the population [see **Digest**, *op. cit.*, para. 577]. As regards the company's view that the work stoppage was illegal under Decree No. KEP.232/MEN/2003, the Committee refers to the Committee of Experts' request to repeal or amend the various conditions included in the strike procedure set out in that Decree, in particular to amend section 4 to the effect that a finding as to whether negotiations have failed, which is a condition for the lawful staging of strikes, can either be made by an independent body or be left to the unilateral determination of the parties to the dispute. In this regard, the Committee considers that the decision that a strike is unlawful (and any ensuing disciplinary measures) should not be based on provisions of legislation that is itself not in accordance with the principles of freedom of association. Finally, on previous occasions when it has had to review the questions touching upon the legitimacy of strike action, the Committee has repeatedly recalled that the 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. It is contrary to freedom of association that the right to declare a strike in the public service illegal should lie with the heads of public institutions, which are thus judges and parties to a dispute [see **Digest**, *op. cit.*, paras 628 and 630]. It expects that the above principles will be fully taken into account by the parties concerned in the future.

- 606.** *With respect to the dismissal of Mr Arif Islam following strike action, the Committee notes the allegation that Mr Islam remains dismissed, and that the company continues to deny his dismissal claiming that he had only worked there on secondment and secondment has been brought to an end. The Committee notes that the Government does not contest the alleged dismissal but indicates that Mr Islam, who, in his capacity as a civil servant of the Ministry of Transportation, had been assigned to PT (Persero) Angkasa Pura 1 as a technician responsible for flight safety and security to assist in the control tower as a flight traffic controller, was reinstated in his former post as of 1 July 2008 and his rights as a civil servant were restored. The Committee further notes that, according to Decree of Directors No. SKEP.578/KP.80.4/2008, the reason provided by the company for the dismissal of Mr Arif Islam was indeed the alleged illegality of the work stoppage, and that it was recommended that he return to the Ministry. The Government also states that Mr Islam never availed himself of the gratuities offered by the company (housing allowance; retirement allowance; pension benefits accorded for his services at the company; and workers' social security), and that, according to an instruction letter dated 9 December 2008 of the Secretary for the Directorate General of Air Transportation, Mr Islam was assigned to Berau Airport, East Kalimantan as of 5 September 2009, where he has unfortunately never worked. In this regard, the Committee recalls that, when trade unionists or union leaders are dismissed for having exercised the right to strike, it can only conclude that they have been punished for their trade union activities and have been discriminated against [see **Digest**, *op. cit.*, para. 662]. The Committee also notes the recommendation of the National Commission on Human Rights to reinstate Mr Arif Islam and the complainants' indications (which were not denied by the Government) that the Head of the Manpower and Social Agency of the City Government of Balikpapan recommended on 4 June 2009 the reinstatement of Mr Islam by the company in his previous position without loss of pay, and that Commission IX of the House of Representatives, following a meeting with the parties, recommended via letter to the management that the striking workers neither be dismissed nor punished.*
- 607.** *While noting the Government's statement that Mr Islam was reinstated in the post that he had held prior to PT (Persero) Angkasa Pura 1 and subsequently assigned to Berau Airport (East Kalimantan), the Committee expresses its concern that, according to the complainants, he remains dismissed and that the Government admits he has not shown up to his new place of assignment. In these circumstances, and given the fact that Mr Islam was dismissed for carrying out legitimate trade union activities, the Committee requests the Government to take the necessary steps for his reinstatement in the position that he occupied in the company PT (Persero) Angkasa Pura 1 at the time of dismissal, with compensation for lost wages and benefits, in accordance with the above recommendations. If, given the time that has elapsed since the dismissal from his duties at the company PT (Persero) Angkasa Pura 1, it is determined by a competent independent body that it is no longer possible to reinstate him in that particular post, the Committee requests the Government to take steps without delay to review with Mr Islam the relevant available posts for his appointment and to ensure that he is paid full and adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals.*
- 608.** *With respect to the suspension of trade unionists following strike action, the Committee notes the allegation that the seven employees were suspended without pay and eventually reinstated in September 2008, without however receiving full compensation for the period of suspension. Moreover, according to the complainants, they have been isolated by*

management, have not been permitted to return to their full duties (only few or no duties are assigned to them), and often find access to computers and networks denied through changes of passwords. The Committee notes from the Government's reply that the seven workers have been reinstated as of 7 August 2008 and that the basic wages and fixed allowances for the suspension period have been paid out to the workers, which, in the Government's view, is in line with the company's Board of Management Decree No. Kep.43/KP.00.8/2008, which stipulates that workers violating the regulations will be punished by receiving wages only without any incentives or allowances based on attendance. With reference to the principles highlighted above in connection with the issue of legitimacy of strike action, the Committee recalls that no one should be penalized for carrying out or attempting to carry out a legitimate strike [see *Digest*, op. cit., para. 660]. Noting the recommendation of Commission IX of the House of Representatives that the striking workers neither be dismissed nor punished, the Ministry of Manpower and Migration letter of 6 March 2009 concerning the payment of wages and fulfilment of other rights regularly received by the suspended workers, as well as the recommendation of the National Commission on Human Rights to pay them wages and restore their rights as employees, the Committee requests the Government to ensure that the workers are properly reintegrated in the workforce and fully resume the duties that were assigned to them at the time of suspension, under the terms and conditions prevailing prior to the strike, and with full compensation for lost wages and benefits for the period of their suspension.

609. With regard to the alleged anti-union harassment, the Committee notes the complainants' claim that the management used heavy-handed tactics to intimidate other workers taking part in the strike action, such as: arresting Mr Primus H Rahagiar, the Chairman of SP-API, at Frans Kaisepo-Biak Airport; using the military to force workers at the same airport to return to work on 7 May 2008; ordering airport police to prevent trade union leaders from communicating directly with striking workers at Sepinggan-Balikpapan Airport; and coercing workers to sign a letter acknowledging that they had been wrong to participate in the strike action. The Committee notes that the Government confines itself to responding that its function has always been to protect workers' rights, i.e. to urge the parties to settle their disputes immediately through bipartite negotiation, as proven by the various letters sent to the parties. In this regard, the Committee wishes to emphasize 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]. Furthermore, the Committee has repeatedly recalled that measures depriving trade unionists of their freedom on grounds related to their trade union activity, even where they are merely summoned or questioned for a short period, constitute an obstacle to the exercise of trade union rights [see *Digest*, op. cit., para. 63]. The Committee also notes the complainants' indication (which was not denied by the Government) that, in its conclusions, Commission IX of the House of Representatives instructed the management to cease all acts of intimidation and retaliation against SP-API and its members and urged the General Director of Industrial Relations and Social Insurance for the Ministry of Manpower and Migration to carry out an inspection of management's conduct during and after the strike. The Committee requests the Government to take the necessary steps to ensure that an independent inquiry is instituted without delay, with a view to fully clarifying the circumstances, determining responsibilities, and, where appropriate, imposing sanctions on the guilty parties and issuing appropriate instructions to police and military so as to prevent the repetition of such acts in the future. It urges the Government to keep it informed of progress achieved in this regard.

- 610.** *Finally, with respect to the allegations relating to union-busting and intimidation tactics, the Committee notes that, according to the complainants: (i) in April 2009, a new union, Asosiasi Karyawan Angkasa Pura 1 (AKA) was formed with the support of the company; (ii) the management has been handing out to employees disaffiliation forms for SP-AP1 accompanied by affiliation forms for AKA; and (iii) with the help of management, SP-AP1 members have been “bribed” with offers of promotion in order to join the new union, threatened with relocation or transfer if they do not join AKA and subjected to other acts of intimidation including threats, disciplinary interrogations and announced criminal proceedings. According to the complainants, the intention is to weaken the density of SP-AP1 in order to claim that the union no longer has the legal authority to bargain on behalf of its members; as a result, SP-AP1 has lost close to 50 per cent of its membership. The Committee notes that, in reply, the Government limits itself to reaffirming its commitment as an ILO Member to protecting the universal rights of workers, commitment illustrated by the ratification of all eight ILO core Conventions, in particular Convention No. 87 as enacted through Act No. 21 of 2000 concerning trade unions; indicating that under the Act all workers have the right to form a union and become trade union members or board members of a union according to their own choice without pressure or intervention from the employer, the Government, a political party etc.; and stating that, in line with national law, it has never been involved directly or indirectly in the establishment of a trade union.*
- 611.** *When reviewing on previous occasions acts of interference by employers, the Committee has repeatedly recalled that Article 2 of Convention No. 98 establishes the total independence of workers’ organizations from employers in exercising their activities. As regards allegations of anti-union tactics in the form of bribes offered to union members to encourage their withdrawal from the union and the presentation of statements of resignation to the workers, as well as the alleged efforts made to create puppet unions, the Committee has always considered such acts to be contrary to Article 2 of Convention No. 98, which provides that workers’ and employers’ organizations shall enjoy adequate protection against any acts of interference by each other or each other’s agents in their establishment, functioning or administration [see **Digest**, *op. cit.*, paras 855 and 858]. In this regard, the Committee would like to stress that the existence of legislative provisions prohibiting acts of interference on the part of the authorities, or by organizations of workers and employers in each other’s affairs, is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice [see **Digest**, *op. cit.*, para. 861]. The Committee therefore requests the Government to institute an independent inquiry without delay to ensure that any acts of employer interference are identified and remedied, and, where appropriate, that sufficiently dissuasive sanctions are imposed so that such acts do not reoccur in the future. It requests the Government to keep it informed of developments in this regard.*

The Committee’s recommendations

- 612.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Bearing in mind that agreements should be binding on the parties, the Committee expects that all remaining disputes as to the application of the CBA will be resolved in the near future. Noting that, according to the joint agreement of 6 March 2008, separate negotiations are to be held on three enumerated points including the employee salary adjustments in line with the CBA, and noting with interest the various attempts already made by the Ministry of Manpower and Migration to conciliate the parties, the Committee requests the Government to continue to take active steps to*

intercede with the parties with a view to facilitating the speedy settlement of the dispute between the state-owned enterprise PT (Persero) Angkasa Pura 1 and the SP-AP1 union. It expects to be kept fully informed on any progress achieved in this respect. The Committee also requests the Government to keep it informed on the final outcome of the judicial procedures before the Supreme Court on the question of salaries and to communicate the text of the ruling once it is handed down.

- (b) The Committee requests the Government to ensure that Mr Arif Islam is reinstated in the position that he occupied in the company PT (Persero) Angkasa Pura 1 at the time of dismissal, with compensation for lost wages and benefits, in accordance with the recommendations made by the National Commission on Human Rights, Commission IX of the House of Representatives and the Head of the Manpower and Social Agency of the City Government of Balikpapan. If, given the time that has elapsed since the dismissal from his duties at the company PT (Persero) Angkasa Pura 1, it is determined by a competent independent body that it is no longer possible to reinstate him in that particular post, the Committee requests the Government to take steps without delay to review with Mr Islam the relevant available posts for his appointment and to ensure that he is paid full and adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals.*
- (c) The Committee requests the Government to ensure that the workers who had been suspended are properly reintegrated in the workforce and fully resume the duties that were assigned to them at the time of suspension, under the terms and conditions prevailing prior to the strike, and with full compensation for lost wages and benefits for the period of their suspension, in accordance with the recommendations made by the National Commission on Human Rights and Commission IX of the House of Representatives, as well as the Ministry of Manpower and Migration letter of 6 March 2009.*
- (d) With regard to the alleged anti-union harassment, the Committee requests the Government to take the necessary steps to ensure that an independent inquiry is instituted without delay, with a view to fully clarifying the circumstances, determining responsibilities, and, where appropriate, imposing sanctions on the guilty parties and issuing appropriate instructions to police and military so as to prevent the repetition of such acts in the future, in accordance with the conclusions of Commission IX of the House of Representatives. It urges the Government to keep it informed of progress achieved in this regard.*
- (e) The Committee requests the Government to institute an independent inquiry without delay to ensure that any acts of employer interference are identified and remedied, and, where appropriate, that sufficiently dissuasive sanctions are imposed so that such acts do not reoccur in the future. It requests the Government to keep it informed of developments in this regard.*

CASE NO. 2737

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

**Complaint against the Government of Indonesia
presented by
the International Union of Food, Agriculture, Hotel, Restaurant, Catering,
Tobacco and Allied Workers' Associations (IUF)**

*Allegations: The complainant organization
alleges acts of anti-union dismissal and the
refusal to comply with the Bandung Manpower
Office's reinstatement order by the management
of the Hotel Grand Aquila*

- 613.** The complaint is contained in communications dated 12 October 2009 and 28 May 2010 from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF).
- 614.** The Government sent its observations in a communication dated 26 April 2010.
- 615.** Indonesia 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

- 616.** In a communication dated 12 October 2009, the IUF, acting on behalf of an affiliated organization, namely the Federation of Hotel, Restaurant, Plaza, Apartment, Catering and Tourism Workers' Free Union (FSPM), alleged violations by the Government of Indonesia of the fundamental freedom of association rights enshrined in Convention No. 87.
- 617.** The complainant stated that these violations arose in the context of a labour dispute between the management of the Hotel Grand Aquila Bandung (hereafter the hotel) and the Independent Trade Union (SPM) Hotel Grand Aquila. This dispute began after the employees of the Hotel Grand Aquila notified the management, on 13 October 2008, of the establishment of a trade union. As a result, 137 employees of the hotel, all members of the trade union, were intimidated and threatened by the management before being removed from their employment in December 2008. They since remain without employment.
- 618.** The complainant indicated that until 2004, there was no formally registered trade union at the hotel. A first trade union was formed by the employees in 2004 and registered with the local Manpower Office. In May 2008, a dispute arose between workers and the management in relation to the service charge distribution. In the workers' opinion, the policy concerning service charge distribution was decided by the management without consultation or agreement with the workers' representative, which was in breach of the Ministry of Manpower regulations relating to service charge distribution, as well as government regulations on salary and payment protection.
- 619.** In August 2008, the workers held a congress and decided to dissolve the registered trade union and establish a new independent trade union at the hotel. The new trade union was formally registered on 3 September 2008. On 19 September 2008, the chairperson of the

trade union was summoned to the general manager's office of the hotel and questioned about the establishment of the union. The chairperson of the union provided a written notification to the hotel management of the new union on 13 October 2008.

- 620.** The complainant further alleged that on 14 October 2008, the chairperson of the SPM and two elected union officers were removed from the hotel by security officers by order of the management. Furthermore, seven union officers were questioned by management and threatened with dismissal if they did not leave the union. On refusing, they were also removed from their employment. Between 16 and 31 October 2008, all members of the SPM employed at the hotel were questioned on a one-to-one basis by management and threatened with dismissal or demotion if they refused to quit the union. The intimidation went on with the announcement that union members would face a 25 per cent reduction in their service charge payment, unless they quit the union before 6 December 2008.
- 621.** The complainant indicated that the hotel management refused to reach agreement with the SPM despite a mediation attempt by the local Manpower Office in Bandung and several negotiation attempts by the union itself. On 6 December 2008, the human resources manager of the hotel issued a list of 128 union members and instructed the security personnel not to allow them to enter the hotel premises, thus their employment was terminated.
- 622.** The union filed a number of complaints to the Bandung Manpower Office as well as to the Bandung police in relation to the dispute and to the ongoing violation of freedom of association in the hotel. As a result of these complaints, and following several attempts to resolve the dispute by a mediation process, the Head of the Bandung Manpower Office issued on 15 December 2008 a letter of reprimand, asking the hotel to reinstate the nine union officers with the payment of any wage due. The same warning letter was issued again on 18 December 2008. On 23 December 2008, the Bandung Manpower Office issued a letter of reprimand asking the hotel to reinstate the 128 union members with the payment of wages due. On 5 January 2009, the Bandung Manpower Office issued a final letter of reprimand on both matters indicating that non-compliance would lead the Manpower Office to process the matter according to the laws and regulations. Still, the management of the hotel has yet to comply with the recommendations of the Bandung Manpower Office.
- 623.** The complainant requested that the Government of Indonesia take the necessary measures to enforce the recommendations of the Bandung Manpower Office and ensure that all dismissed union members are reinstated in their employment in the Hotel Grand Aquila with full back pay, benefits and seniority. The complainant also requested that dissuasive sanctions against anti-union discrimination be taken so that freedom of association rights and Convention No. 87 are applied.
- 624.** In a communication dated 28 May 2010, the IUF sent copy of a recommendation dated 7 April 2010 from the National Commission on Human Rights concerning the labour dispute between the SPM Hotel Grand Aquila Bandung and the Hotel Grand Aquila management in which the National Commission indicated that following the request for mediation from the SPM, it sent letters to the hotel management but its mediation efforts were refused by the latter. As a result, the National Commission on Human Rights recommended that the President of the Republic of Indonesia take action by instructing relevant government official in the labour affairs department to immediately resolve the problems through the mechanism of existing law, whether civil or criminal, and by ordering government officials to monitor directly in order to ensure that workers' rights to freedom of association at the Hotel Grand Aquila in Bandung are ensured and protected.

B. The Government's reply

- 625.** In its communication of 26 April 2010, the Government indicated that the case involves the Hotel Grand Aquila, a five-star hotel located in Bandung, West Java Province, which employs 320 workers, of whom 137 are members of the SPM Grand Aquila Hotel (128 members and nine elected officers).
- 626.** The Government indicated that the SPM was registered to the local Manpower Office in Bandung on 3 September 2008. It also indicated that on 19 November 2008, a Family Association of Grand Aquila Union (IKGA) was registered.
- 627.** The Government reported that on 14–15 October 2008, following the notification of the formation of the SPM to the hotel management, officers of the SPM were called in to meet with the management but were driven out by security officers and not permitted to enter the premises of the hotel. On 20 October 2008, the Manpower Office in Bandung received reports on the infringement of freedom of association rights by the nine union officers. The Manpower Office organized an informal meeting with the two parties with a view to resolving the dispute and reaching an agreement. However, no agreement was reached. The Manpower Office also sent to the hotel management a letter clarifying Act No. 21 on Labour Union (2000).
- 628.** On 1 December 2008, the SPM notified the management of the hotel that the workers and union members would hold a strike unless the union members were reinstated and all forms of intimidation stopped. The strike took place on 6 December 2008 in the hotel premises and lobby by employees of the hotel. The day after, the employment of all 128 members of the SPM was terminated and they were no longer allowed on the premises of the hotel. They were given a payment of 15 days of work.
- 629.** According to the Government, mediation between the two parties was organized by the Bandung Manpower Office on 10 and 16 December 2008, but without any result. The Government informed that meanwhile, by warning letters dated 11 November 2008, 15 and 23 December 2008, 5 January 2009, the Bandung Manpower office requested the hotel management to reinstate the union officers and members with full back pay and reminded of the possible sanctions in case of non-compliance. In a letter dated 5 January 2009, the Manpower Office indicated that unless it complied with the recommendations within five days, the hotel would be brought to court. However, no response was received from the hotel management.
- 630.** The SPM reported both to the Manpower Office and to the local city police on the criminal offences of non-payment of wages (Act No. 13 of 2003), and on the violation of freedom of association rights (Act No. 21 of 2000).
- 631.** The Government provided a summary of all steps taken by the local authorities concerning the dispute:
- the Manpower Office in Bandung issued an incident report on January 2009 on the Grand Aquila Hotel for the non-payment of wages to nine trade unions members starting October 2008 and to 121 union members starting January 2009.
 - The Manpower Office had attempted to resolve the dispute through mediation (December 2009).
 - The mediator of the Manpower Office of Bandung issued recommendations for the reinstatement of the nine trade union officers (18 December 2008, No. 567/8290-

Disnaker) and of 119 trade union members (12 October 2009 No. 567/5140-Disnaker) with payment of wages due.

- The local police of Bandung had submitted the case to the District Attorney Office on several occasions, including the docket case of alleged violation of freedom of association (3 August 2009, 28 December 2009 and 2 February 2010). Further action is expected from the District Attorney.
- The Labour Inspector had provided guidance to the hotel management on the respect of provisions of Act No. 21 on Labour Union (2000).

632. The Government reminded that it is committed to protect freedom of association rights, including the establishment of trade unions and their activities in companies, in accordance with Act No. 21 on Labour Union (2000). In case of violation of such rights, the courts can decide on one to five years of imprisonment and a fine of at least 100,000,000 rupees.

C. The Committee's conclusions

633. *The Committee notes that this case concerns allegations of anti-union dismissals and the refusal from the management of the Hotel Grand Aquila to comply with the Bandung Manpower Office's reinstatement order.*

634. *The Committee notes that the independent trade union SPM Grand Aquila Hotel was established following a congress of employees of the Hotel Grand Aquila in August 2008 whereby they also decided to dissolve the registered trade union. The SPM was formally registered on 3 September 2008 at the Bandung Manpower Office under No. 250/SPM.HGAB-CTT.33-Disnaker/2008.*

635. *The Committee notes from the information provided both by the complainant and by the Government that a dispute arose upon the notification of the establishment of the trade union to the hotel management. It observes that, according to the complainant, the day after the notification the chairperson of the SPM was driven out of the hotel by security officers by order of the management. Furthermore, the nine elected union officers were questioned by management, threatened with dismissal if they did not leave the union, and were dismissed from their employment upon refusal. The Committee notes the allegation that employees of the hotel who were union members were also subject to intimidation and threats of dismissal or demotion unless they quit the trade union. The intimidation allegedly continued with the announcement that union members would face a 25 per cent reduction in their service charge payment. 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. Cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (Revised) edition, 2006, para. 799].*

636. *The Committee notes that the hotel management refused to reach agreement with the SPM despite a mediation attempt by the Bandung Manpower Office and several negotiation*

attempts by the union itself to resolve the dispute on the dismissal of the union officers. It further notes that on 1 December 2008, the SPM notified the management of the hotel that the workers and union members would hold a strike unless the union members were reinstated and all forms of intimidation stopped. The strike took place on 6 December 2008 on the hotel premises and lobby by employees of the hotel. The day after, the employment of all 128 members of the SPM was terminated and they were no longer allowed on the premises of the hotel. They were only given a payment of 15 days of work. In this regard, the Committee wishes to emphasize that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests. As a result, the dismissal of workers because of a strike constitutes serious discrimination in employment on grounds of legitimate trade union activities and is contrary to Convention No. 98 [see *Digest*, *op. cit.*, paras 521 and 661]. The Committee notes that the SPM filed a number of complaints to the Bandung Manpower Office as well as to the Bandung police in relation to the dispute and to the ongoing violation of freedom of association in the hotel. According to the complainant, following several attempts to resolve the dispute by a mediation process, the Manpower Office issued on 15 and 18 December 2008 a letter of reprimand, asking the hotel to reinstate the nine union officers with the payment of any wages due. On 23 December 2008, the Bandung Manpower Office issued a letter of reprimand asking the hotel to reinstate the 128 union members with the payment of wages due. On 5 January 2009, the Bandung Manpower Office issued a final letter of reprimand on both matters indicating that non-compliance would lead the Manpower Office to process the matter according to the laws and regulations. The Committee notes from the Government's reply that by warning letters dated 11 November 2008, 15 and 23 December 2008, 5 January 2009, the Bandung Manpower Office requested the hotel management to reinstate the union officers and members with full back pay and reminded of the possible sanctions in case of non-compliance. In a letter dated 5 January 2009, the Manpower Office indicated that unless it complied with the recommendations within five days, the hotel would be brought to court. However, no response was received from the hotel management. Furthermore, the Government indicates that the mediator of the Manpower Office of Bandung issued recommendations for the reinstatement of the nine trade union officers (18 December 2008, No. 567/8290-Disnaker) and of 119 trade union members (12 October 2009 No. 567/5140-Disnaker) with payment of wages due.

- 637.** *The Committee also notes the recommendation dated 7 April 2010 from the National Commission on Human Rights concerning the labour dispute between the SPM and the hotel management in which the National Commission indicated that the hotel management refused all mediation process and it recommended to the President of the Republic of Indonesia to instruct the relevant government official in the labour affairs department to immediately resolve the problems through the mechanism of existing law, whether civil or criminal, and to order a direct monitoring by government officials to ensure that workers' rights to freedom of association at the Hotel Grand Aquila in Bandung are ensured and protected.*
- 638.** *The Committee acknowledges the efforts from the local authorities, and from the National Commission on Human Rights to resolve the dispute through mediation. It also takes due note of the numerous recommendations and orders directed to the hotel management for the reinstatement of the officers and the members of the SPM. However, it observes that two years have passed since the first recommendation directed to the hotel management on the dispute and that letters of reprimand were also sent reminding of sanctions in case of non-compliance, without result to date. Noting the stated commitment of the Government to protect freedom of association rights, including the establishment of trade unions and their activities in companies, in accordance with Act No. 21 on Labour Union (2000), the Committee recalls that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government.*

639. *The Committee recalls more generally that on a number of occasions it examined complaints of anti-union discrimination in Indonesia and has considered that the prohibition against anti-union discrimination in Act No. 21/2000 is insufficient. While the Act contains a general prohibition in article 28 accompanied by dissuasive sanctions in article 43, it does not provide any procedure by which workers can seek redress [see 335th Report, op. cit., para. 968]. The Committee recalls that it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities [see **Digest**, op. cit., para. 791]. The Committee cannot but express its deep concern that the time that has elapsed since the initial dispute and the dismissal of the trade union members and leaders (October–December 2008) is likely to have effectively prevented the trade union from carrying out its activities to defend the rights of its members. In these circumstances, the Committee urges the Government to take without delay all necessary measures to enforce the recommendations and orders issued by the Bandung Manpower Office concerning the reinstatement of officers and members of the SPM at the Hotel Grand Aquila in Bandung.*
640. *In addition, the Committee notes with deep regret that the Government does not reply to the serious allegations made with regard to the Government's failure to ensure an effective mechanism of protection against acts of anti-union discrimination. The Committee also notes with concern the failure of the mediation processes to resolve the issues and emphasizes the importance which it places on the need to initiate investigations aimed at verifying and remedying the alleged acts of anti-union discrimination [see also Cases Nos 2336 (336th Report, paras 498–539, at 534); 2451 (343rd Report, paras 906–928, at 926); 2472 (348th Report paras 907–942) and 2494 (348th Report, paras 943–966)]. While acknowledging once again the importance of mediation in finding commonly acceptable solutions to labour disputes, the Committee also recalls that no one should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and the persons responsible for such acts should be punished [see **Digest**, op. cit., para. 772]. Where a government has undertaken to ensure that the right to associate shall be guaranteed by appropriate measures, that guarantee, in order to be effective, should, when necessary, be accompanied by measures which include the protection of workers against anti-union discrimination in their employment [see **Digest**, op. cit., para. 814]. The basic regulations that exist in national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see **Digest**, op. cit., para. 818]. Consequently, the Committee once again urges the Government to take steps, in full consultation with the social partners concerned, to amend its legislation to ensure comprehensive protection against anti-union discrimination in the future, providing for swift recourse to mechanisms that may impose sufficiently dissuasive sanctions against such acts. The Committee requests the Government to keep it informed of all steps taken in this regard.*
641. *The Committee also requests the Government to keep it informed of any measures taken to follow up the recommendations of the National Commission for Human Rights in relation to the present case. Finally the Committee requests the Government to indicate any court action taken by the District Attorney of Bandung or any sanction taken in relation to the allegation of infringement of freedom of association rights by the hotel management.*
642. *The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

The Committee's recommendations

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

- (a) The Committee urges the Government to take without delay all necessary measures, including sanctions where appropriate, to enforce the recommendations and orders issued by the Bandung Manpower Office concerning the reinstatement of officers and members of the SPM at the Hotel Grand Aquila in Bandung.*
- (b) The Committee urges the Government to take steps, in full consultation with the social partners concerned, to amend its legislation to ensure comprehensive protection against anti-union discrimination in the future, providing for swift recourse to mechanisms that may impose sufficiently dissuasive sanctions against such acts. The Committee requests the Government to keep it informed of all steps taken in this regard.*
- (c) The Committee also requests the Government to keep it informed of any measures taken to follow up the recommendations of the National Commission for Human Rights in relation to the present case.*
- (d) The Committee requests the Government to indicate any court action taken by the District Attorney of Bandung or any sanction taken in relation to the allegation of infringement of freedom of association rights by the hotel management.*
- (e) The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

CASE NO. 2740

INTERIM REPORT

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

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

644. The complaint is contained in communications dated 3 and 9 November 2009 from the Iraqi Federation of Industries.

645. The Government sent its observations in a communication dated 25 October 2010.
646. Iraq has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), but not the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

A. The complainant's allegations

647. In its communications dated 3 and 9 November 2009, the Iraqi Federation of Industries denounced the seizure of its fund, amounting to US\$1,500,000 collected from membership fees and paid service, by Decision No. 8750 of 8 August 2005 of the Government. Such seizure hampered the Federation's activities and prevented it from providing support, advice and consultancy to its members.
648. Moreover, the complainant indicated that, although Law No. 34 of 2002 concerning the Federation provides for the election of its board members every four years, the Government had been appointing persons to the board who do not have the legal and legitimacy status to manage the Federation.
649. The complainant alleged that, contrary to its stated commitment before the International Labour Conference in 2008 to fully implement Convention No. 98 with a particular emphasis on promoting social dialogue as an essential means to achieve democracy, growth and prosperity among the social partners, the Government continues to deliberately violate its international obligations. The complainant denounced the storming of its headquarters located in the Jadiriya area on 6 October 2009 by a group of persons appointed by the Ministry of Civil Society and the Higher Ministerial Committee who benefited from the protection of security forces of the emergency police of Al Kadara area. The security forces prevented the members of the board of directors of the Federation to enter the building. The complainant indicated that it brought a complaint to the Supreme Judicial Council and made a public denunciation in relation to the occupation of its premises. The persons involved in the storming of the headquarters are still in control of the Federation.
650. The complainant federation expects that the Committee on Freedom of Association would reprimand the Government's interference and would recommend the Government to respect the provisions of the freedom of association principles enshrined in Convention No. 98, ratified by Iraq, and to guarantee that the Iraqi Federation of Industries may conduct its activities without any kind of interference, harassment or intimidation.

B. The Government's reply

651. In a communication dated 25 October 2010, the Government indicates that it is keen on applying international labour standards, particularly Convention No. 87 as it represents one of the most important principles and rights in the field of labour. Complaints from social partners on freedom of association are a natural right and cooperation and coordination is carried out with associations that represent the majority. The issue has arisen, however, as to which associations are the genuine legitimate representatives. The Government has therefore resorted to fair and democratic elections to determine the most representative social partners.
652. In order to protect association assets, the Government issued Decision No. 8750 which freezes all assets until elections take place, at which time they will be released and given to the most representative association. Preparatory committees were established to conduct elections, in accordance with Council of Ministries' Law (364) of 2008 to manage the

affairs of the Iraqi Federation of Industries for 90 days and make arrangements for elections in accordance with laws and by-laws. The preparatory committee faced many challenges regarding the data field of industrial projects of the private sector. The Committee's goal is to form subcommittees to organize the election. In addition, Iraq is going through a complex and critical phase with the continuation of terrorist acts against associations of labour and industry which had rendered it difficult to move forward with elections for both the Iraqi Federations of Industries and the General Federation of Workers' Union. The Government is fully ready to cooperate and facilitate as required to have standard elections according to labour Conventions and by-laws to ensure integrity and impartiality and to support basic labour rights and principles.

C. The Committee's conclusions

653. *The Committee notes that this case concerns alleged interference of the authorities in the activities of the Iraqi Federation of Industries, in particular, the seizure of its funds by virtue of Decree No. 8750, issued on August 2005, that allows the Government to take control of the finances of existing federations and unions, the appointment of its board members, and the occupation of its premises by a group of individuals under the protection of local security forces.*
654. *With regard to the allegations concerning the seizure of the funds of the Iraqi Federation of Industries, the Committee notes that the seizure was justified under a Decree from the Council of Ministers that allows the Government to take control of the finances of existing federations and unions (No. 8750 of August 2005). The Committee wishes to recall that, in a previous case concerning Iraq, it had already made comments on Decree No. 8750 [see 342nd Report, Case No. 2453, paras 698–721]. On that occasion, while taking note of the process of reconstruction ongoing in the country and the rebuilding of national institutions, the Committee insisted on the importance it places on the right of workers to exercise freely their trade union rights. Concerning the restrictions on the use of trade unions funds, the Committee recalled that provisions that give the authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes for normal and lawful trade union purposes are incompatible with the principles of freedom of association. The freezing of union bank accounts may constitute a serious interference by the authorities in trade union activities [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 485–486]. These same principles apply to employers' organizations.*
655. *In Case No. 2453, the Committee recommended the authorities to repeal Decree No. 8750 and to enter into full discussions with all concerned parties so that a solution could be found that was satisfactory to all parties concerned. While taking due note of the concerns expressed by the Government that it chose to freeze all assets to ensure their protection until elections determining the most representative organizations took place, the Committee must express its serious concern that the Government has interfered in the affairs of the Federation both in terms of the seizing of their funds, as well as with respect to its elections. Over the five years since issuance of the Decree, no new elections have yet been held and in the meantime the Iraqi Federation of Industries has been severely limited in its capacity to service its members. It highlights in this regard that the assets referred to in this case actually concern the membership fees collected by the Iraqi Federation of Industries. While further taking due note of the Government's reference to the critical phase in the country and the continuing terrorist acts against associations of labour and industry, the Committee considers that this is all the more reason that such organizations and, in this case, the Iraqi Federation of Industries should be able to count on its funds in order to be in a position to fully provide its membership with the support, advice and consultancy expected and effectively conduct its activities in the interest of its members. Indeed, the seizure of such funds so many years ago may also have an impact upon the*

evaluation of the Iraqi Federation of Industries by its members and result in biasing the impact of the elections, whenever they do finally occur. In these circumstances, the Committee requests the Government to indicate the steps taken to annul Decree No. 8750 and urges it to reconstitute without delay all funds to the Iraqi Federation of Industries, as well as to the other organizations affected by the Decree.

- 656.** *With regard to the allegations concerning the interference of the Government in the appointment of members of the Iraqi Federation of Industries board of directors, the Committee notes from the documents provided by the complainant that, by virtue of an order issued on 22 January 2009, the Higher Ministerial Committee overseeing the implementation of Decree No. 3 of 2004 of the Iraqi Governing Council, chaired by the Minister of State for Civil Society Affairs, had appointed seven members of a preparatory committee which is responsible for preparing permanent elections to the executive committee of the Federation. By letter dated 8 February 2009, the Federation informed the Committee overseeing the implementation of Decree No. 3 of 2004 of the Iraqi Governing Council that it contested the eligibility of four of the seven members of the preparatory committee based on the requirements foreseen under the Iraqi Federation of Industries Act of 2002. In April 2009, the Council of Ministers endorsed new regulations concerning the appointment of members of preparatory committees of federations, trade unions, associations and occupational organizations in Iraq (document provided by the complainant). The Committee wishes to recall, as a general principle, that it is the prerogative of workers' and employers' organizations to determine the conditions for electing their leaders and the authorities should refrain from any undue interference in the exercise of the right of workers' and employers' organizations freely to elect their representatives, which is guaranteed by Convention No. 87 [see **Digest**, *op. cit.*, para. 390].*
- 657.** *The Committee also wishes to draw the Government's attention to the following principles concerning the intervention by authorities in elections of workers' and employers' organizations. Any intervention by the public authorities in trade union and employers' organizations elections runs the risk of appearing to be arbitrary and thus constituting interference in the functioning of workers' and employers' organizations, which is incompatible their right to elect their representatives in full freedom. The right of workers and employers to elect their representatives in full freedom should be exercised in accordance with the statutes of their occupational associations and should not be subject to the convening of elections by ministerial resolution [see **Digest**, *op. cit.*, paras 429–430]. Accordingly, the Committee is of the view that a regulation which provides for the election of members of a preparatory committee for preparing permanent elections to the executive committee of a trade union, a federation, an association or an occupational organization is inconsistent with the above principles and constitutes a clear interference in the election process. Thus, the Committee requests the Government to annul the regulations concerning the appointment of members of preparatory committees of federations, trade unions, associations and occupational organizations and to ensure in the future that the Iraqi Federation of Industries can conduct elections of its leaders in accordance with its statutes, without intervention by the authorities.*
- 658.** *More generally, the Committee recalls that legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference by the public authorities. Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference in the free functioning of*

organizations [see *Digest*, op. cit., para. 369]. The Committee firmly expects that the Government will bear these principles in mind when drafting proposals concerning the manner in which trade unions or representative organizations should function, operate and organize, and that it will fully ensure, in law and in practice, the right of workers and employers to form and join organizations of their own choosing, as well as the free functioning and administration of these organizations.

- 659.** *As regards the allegations concerning the storming and the occupation by a group of individuals under the protection of the local police of the headquarters of the Iraqi Federation of Industries in Jadiriya area, the Committee notes that the complainant brought the case before court on October 2009. The Committee observes, from the complaint brought to court, that the group of individuals which broke by force into the premises of the complainant was composed of members of the preparatory committee for holding the elections of the Federation. The Committee emphasizes that the principle of the inviolability of the premises of employers' organizations – a basic civil liberty – 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. Furthermore, when examining allegations of attacks carried out against trade union premises and threats against trade unionists, the Committee had recalled that activities of this kind create among trade unionists a climate of fear which is extremely prejudicial to the exercise of trade union activities and that the authorities, when informed of such matters, should carry out an immediate investigation to determine who is responsible and punish the guilty parties [see *Digest*, op. cit., para. 184]. The same principle applies to the employers' organizations. Therefore the Committee urges the Government to provide its observation on the issue. It expects that the Iraqi Federation of Industries can use its premises without delay and requests the Government to keep it informed in this respect. It also requests the Government and the complainant to provide information on any court decision following the complaint brought by the Iraqi Federation of Industries.*

The Committee's recommendations

- 660.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to indicate the steps taken to annul Decree No. 8750 and urges the Government to restitute without delay all funds to the Iraqi Federation for Industries as well as to the other organizations affected by the Decree.*
 - (b) The Committee urges the Government to provide its observation on the allegations concerning the storing and occupation of the premises of the Iraqi Federation of Industries by members of the preparatory committee for holding the elections of the Federation under the protection of the local police.*
 - (c) The Committee requests the Government to annul the regulations concerning the appointment of members of preparatory committees of federations, trade unions, associations and occupational organizations and to ensure in the future that the Iraqi Federation of Industries can conduct elections of its leaders in accordance with its statutes, without intervention by the authorities.*

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

CASE NO. 2734

DEFINITIVE REPORT

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

- **the Trade Union of Workers and Employees of the Plastics, Synthetics, Rubber, Pottery, Glass, Similar and Related Industries of the Federal District**
- **the Trade Union of Workers and Employees of the Metal, Metalwork, Similar and Related Industries of the Federal District**
- **the Luis Donaldo Colosio National Trade Union of Workers and Employees of General Industry**
- **the Dr Luis Donaldo Colosio Murrieta Trade Union Front of Workers of the Iron, Metalwork, Similar and Related Industries of the Federal District and**
- **the Revolutionary Trade Union of Workers and Employees of the Plastics and Related Industries of the Federal District**

Allegations: Obstruction by the authorities regarding the establishment of organizations, introduction of non-statutory requirements for the exercise of trade union rights and delays affecting legal procedures before the authorities concerning the exercise of trade union rights as well as affecting the respective rulings

- 661.** The complaint is contained in a communication of the Trade Union of Workers and Employees of the Plastics, Synthetics, Rubber, Pottery, Glass, Similar and Related Industries of the Federal District, the Trade Union of Workers and Employees of the Metal, Metalwork, Similar and Related Industries of the Federal District, the Luis Donaldo Colosio National Trade Union of Workers and Employees of General Industry, the Dr Luis Donaldo Colosio Murrieta Trade Union Front of Workers of the Iron, Metalwork, Similar and Related Industries of the Federal District and the Revolutionary Trade Union of Workers and Employees of the Plastics and Related Industries of the Federal District, dated 9 September 2009.
- 662.** The Government sent its observations in a communication dated 3 August 2010.

663. 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 organizations' allegations

664. In their communication dated 9 September 2009, the complainant organizations (the Trade Union of Workers and Employees of the Plastics, Synthetics, Rubber, Pottery, Glass, Similar and Related Industries of the Federal District, the Trade Union of Workers and Employees of the Metal, Metalwork, Similar and Related Industries of the Federal District, the Luis Donaldo Colosio National Trade Union of Workers and Employees of General Industry, the Dr Luis Donaldo Colosio Murrieta Trade Union Front of Workers of the Iron, Metalwork, Similar and Related Industries of the Federal District and the Revolutionary Trade Union of Workers and Employees of the Plastics and Related Industries of the Federal District) allege that since 2000, the Government of the Federal District, through the Local Conciliation and Arbitration Committee of the Federal District (JLCADF), has been obstructing and hindering workers and trade union organizations wishing to exercise freedom of association. This hindrance takes the form of violations of trade union rights, in particular, slowing down the processing of requests for trade union registration submitted to the JLCADF by legally established trade unions, obliging them to meet non-statutory requirements, or formulating absurd preventive measures which render the right to register trade unions in Mexico City ineffectual. Registration is only granted to those trade unions which offer unconditional support to the JLCADF. One of the most worrying practices carried out by the Government of the Federal District through the JLCADF is the refusal by the Office of the Clerk of the JLCADF to receive requests regarding trade union registration, strike notices, documents updating statutes and lists of members, requests for certification as the bargaining agent and other collective issues, deposits of collective agreements by independent trade union organizations not under the control of the abovementioned government, or which do not belong to the group which dominates the JLCADF and which manipulates said body for its own benefit. Representatives of trade union organizations are thus obliged to use registered mail with receipt of delivery or other means in order to force the authorities to receive requests relating to freedom of association, strikes and collective agreements. This is a disgraceful practice, unheard of in any other federative body, the aim of which is to render ineffectual the submission of any kind of challenge to the will of the JLCADF.

665. Furthermore, the complainant organizations point out that section 920 of the Federal Labour Act states that the strike procedure shall be initiated with the submission of a list of claims stating the requirements which must be met and sets out the actions which must be taken by the relevant Conciliation and Arbitration Committee. However, in practice, when a trade union requests the signing of a collective agreement through a strike notice, the JLCADF proceeds, in an illegal fashion, to require that the applicant trade union meet non-statutory requirements such as providing proof that the workers actually belong to the trade union issuing the strike notice, submitting the names of those workers in the service of the employer in question, and backing this up by producing documents such as those proving registration with the Mexican Social Security Institute (IMSS) (documents which are no longer in use because registration with the IMSS is now carried out by electronic means). Moreover, an employer only has to fail to register his/her workers with the IMSS, as frequently occurs and as is the case with petrol stations, for the workers to be refused documents proving the existence of a labour relationship, and for the right to strike enshrined in paragraph A of section 123 of the Political Constitution of the United States of Mexico to be rendered ineffectual.

666. Despite the fact that, under section 921 of the Federal Labour Act, the Chair of the Conciliation and Arbitration Committee, or the competent authority, is strictly bound to

deliver a copy of the list of claims with strike notice to the employer within 48 hours of having received it, in practice the JLCADF delays the processing of the list beyond the expiry of the period referred to above. This tactic allows the employer to deposit an “employer protection collective agreement” (an agreement signed by an employer with a trade union willing to allow that employer to dictate working conditions, thus depriving the workers of their collective trade union rights) signed with another trade union. Thus, the employer can disregard the strike notice issued by the most representative trade union and avoid having to comply with an authentic collective agreement. It should also be pointed out that the JLCADF acts in a partisan manner, favouring the processing of strike notices submitted by unrepresentative or extortive trade unions. Corruption is widespread within the JLCADF, with labour justice going to the highest bidder.

- 667.** Despite the fact that the Second Chamber of the Supreme Court of Justice of the Nation (the highest court in the country) declared this anti-union practice to be illegal in case law argument 2^a/J. 15/2003, the JLCADF has chosen to ignore case law and continues to set conditions for the processing of strike notices regarding the signing of a collective labour agreement.
- 668.** Consequently, the complainant organizations wish to protest against these practices which violate freedom of association, requesting that the Government be advised to prevent the JLCADF from indulging in any such activity and calling for an end to the practice whereby the processing of strike notices regarding the signing of a collective labour agreement is conditional upon the presentation of documents or the fulfilment of other non-statutory requirements. They also call for list of claims attached to strike notices to be processed within the time period established by law.
- 669.** According to the complainant organizations, the JLCADF arbitrarily refuses to issue certified copies of its acknowledgements and trade union statutes requested by trade unions, or limits itself to issuing two or five copies, thus contravening section 723 of the Federal Labour Act. Furthermore, the JLCADF arbitrarily disregards the powers conferred by general secretaries of trade unions given that it has repeatedly refused to deliver documents to persons authorized by said general secretaries to receive them, thus violating section 692 of the Federal Labour Act. Moreover, when a trade union submits a request to the JLCADF for the withdrawal of bargaining agent status for collective agreements from another trade union which no longer represents the majority of the workers, the JLCADF arbitrarily sets the following requirements regarding the processing of the request: provision of proof that the workers at the workplace in question belong to the applicant trade union, along with that trade union’s statutes; provision of proof that the workers are in the employ of the employer in question. Thus the autonomy of trade unions is weakened, given that once the workers’ names have been provided to the JLCADF this information may find its way back to the employer, prompting him/her immediately to dismiss the workers. Finally, the JLCADF fails to comply with the guarantee of prompt and expeditious justice enshrined in section 17 of the Constitution, as well as the provisions of section 838 of the Federal Labour Act which state that the Committee shall issue its rulings before the relevant legal body or within 48 hours of having received written submissions. However, as previously stated, the JLCADF issues rulings after considerable delay. The JLCADF, acting in an illegal manner, employs delaying tactics and sets absurd non-statutory requirements for trade unions requesting the respective acknowledgement regarding changes concerning trade union officials.

B. The Government’s reply

- 670.** In its communication of 3 August 2010, the Government raises objections regarding the receivability of the complaint and states that, in accordance with paragraph 82(a) of the *Handbook of procedures relating to international labour Conventions and*

Recommendations (hereafter referred to as the *Handbook of procedures*), in order that a complaint may be received, it must be submitted in writing, signed and supported by proof of allegations relating to specific infringements of freedom of association. In the case in question, these requirements were not met given that, in the document dated 9 September 2009, the trade unions put forward a series of generic, subjective and confused arguments, while failing to provide accompanying proof supporting their allegations. Moreover, it is clear that the complainant trade unions have provided as proof copies of newspaper cuttings, claims and various statements which do not refer to specific cases of violations of freedom of association and which consequently do not constitute evidence that acts of anti-union discrimination have taken place. Therefore, the Committee on Freedom of Association is requested to disregard the present complaint, given that it fails to comply with the provisions of paragraph 82(a) of the *Handbook of procedures* in that the trade unions do not provide any reliable evidence to support their allegations.

671. The Government considers that the complaint should not be received in light of the fact that it fails to comply either with paragraph 31 of the Procedures for the examination of complaints alleging violations of freedom of association (2006) (hereafter referred to as the Procedures), or with paragraph 82(b) of the Handbook of procedures, in which the ILO establishes that:

31. Complaints lodged with the ILO, either directly or through the United Nations, must come either from organizations of workers or employers or from governments. Allegations are receivable only if (a) they are submitted by a national organization directly interested in the matter (b) by international organizations of employers or workers having consultative status with the ILO or (c) other international organizations of employers or workers where the allegations relate to matters directly affecting their affiliated organizations. Such complaints may be presented whether or not the country concerned has ratified the freedom of association Conventions.

82(b). Complaints must come from organizations of employers or workers or from governments. An organization may be:

- (i) a national organization directly interested in the matter;
- (ii) an international organization of employers or workers which has consultative status with the ILO; and
- (iii) another international organization of employers or workers, where the allegations relate to matters directly affecting affiliated organizations.

672. In this regard, the Government states that the trade unions fail to provide any evidence linking them to the matter or which might suggest that the JLCADF was at fault and therefore the complainant trade unions have failed to prove that their trade union rights have been harmed or threatened. Consequently, none of these complainants constitutes a national organization directly interested in the matter.

673. It is clear from the statements made and the documents submitted as proof that the JLCADF provided the trade union organizations with the acknowledgements they had requested. Therefore, the claims that this body has refused since 2000 to issue such acknowledgements, or indeed to process requests, are groundless, in particular given that the documents (all of which were issued by the JLCADF) examined bear dates showing them to have been issued after the year in question.

674. The trade unions present as proof the agreements dated 5 March and 22 June 2009, contained in labour files Nos 246/2009 and 551/2009, regarding the Trade Union of Store Workers and Employees, Similar and Related Industries of the Federal District (hereafter to be known as the Trade Union of Store Workers of the Federal District), as well as the document dated 7 August 2009 referring to the hearing granted. However, it should be pointed out that these documents are related to a trade union not signatory to the present

complaint and therefore they are of no value as evidence that harm was done to the complainant trade unions.

- 675.** Moreover, the complaint does not contain any proof whatsoever that the JLCADF violated any international agreement. Thus, it cannot be concluded that any of the principles established in the ILO Conventions were violated.
- 676.** Finally, the trade unions also failed to prove that they had been prevented from exercising their right to draw up constitutions, regulations, freely elect their representatives, organize their administration and activities, as well as formulate programmes, given that at no time do they demonstrate that the authorities acted in such a way. Therefore, the Government concludes that none of the trade unions signatory to the complaint have proved that their trade union rights were harmed or affected; they fail to provide sufficient proof supporting their allegations, and thus do not comply with paragraph 82(a) and (b) of the *Handbook of procedures*, or with the provisions of paragraph 31 of the *Procedures*; the documents provided contain no evidence of any violation having been committed by the JLCADF; no reference is made to any specific violation regarding freedom of association. Thus, the present complaint should not be received.
- 677.** The Government adds, however, that despite the objections raised, in the interests of cooperating in good faith regarding the work of the Committee on Freedom of Association, it includes the following comments on the substance of the complaint.
- 678.** According to the complaint, as a result of the conduct of the JLCADF, the Government has been violating the principle of freedom of association, slowing down the processing of requests for trade union registration submitted to it by legally established trade unions, obliging them to meet non-statutory requirements or formulating absurd measures which render ineffectual the right to register trade unions in Mexico City. In this regard, the Government states that the proof submitted by the trade unions consisting of the agreements dated 5 March and 22 June 2009, issued in labour files Nos 346/2009 and 551/2009, both concerning the Trade Union of Store Workers, and the document of 7 August 2009, only shows that the respective integrated labour proceedings against the enterprise Servicio Comercial Garis SA de CV exist and that preventive measures were taken that were dealt with in time, but does not show that action harmful to or violating the rights of the complainants was taken by the JLCADF. Therefore, the claim that the JLCADF only grants registration to trade unions which support it unconditionally is subjective. The evidence provided is insufficient to support this claim.
- 679.** The JLCADF states that, when issuing rulings, it follows the Political Constitution of the United States of Mexico, the Federal Labour Act, the case law issued by the Supreme Court of Justice of the Nation and the collegiate courts, as well as the provisions of the ILO Conventions signed and ratified by Mexico. Therefore, the JLCADF refutes the allegations made by the complainant trade unions.
- 680.** A copy of the communication acknowledging the new designation, reformed statute, executive committee and list of members of the Dr Luis Donaldo Colosio Murrieta Trade Union Front of Workers of the Iron, Metalwork, Similar and Related Industries of the Federal District, dated 25 September 1995, was provided. Acknowledgements were also issued regarding the executive committees of the following trade unions (with dates):
- the Trade Union of Workers and Employees of the Metal, Metalwork, Similar and Related Industries of the Federal District, 13 February 2000;
 - the Revolutionary Trade Union of Workers and Employees of the Plastics and Related Industries of the Federal District, 3 May 2005;

- the Trade Union of Workers and Employees of the Wood, Paper and Cardboard Processing Industry, the Graphic Arts, Upholstery, Carpentry, Woodwork and Similar and Related Industries of the Federal District, 17 March 2006; and
- the Trade Union of Workers and Employees of the General Plastics, Chemicals, Ceramics, Synthetic Pastes, Rubber, Pottery and Glass, Similar and Related Industries of the Federal District, 5 June 2006.

681. The abovementioned documents show that the statements made in the first point of the complaint are groundless, given that the complainants themselves demonstrate that the JLCADF issued the acknowledgements, fulfilling the corresponding legal requirements.

682. As to the allegation regarding the refusal by the Office of the Clerk of the JLCADF to receive requests regarding trade union registration, strike notices, the updating of statutes and lists of members, requests for certification as the bargaining agent and other collective issues, deposits of collective agreements by independent trade union organizations not under the control of the abovementioned government, or which do not belong to the group which dominates the JLCADF (an organization which, according to the complainant trade unions, forces applicants to use registered mail with receipt of delivery or other means if they wish to oblige the authorities to receive requests relating to freedom of association, strikes and collective agreements), the Government states that the evidence submitted by the complainant trade unions does not prove that such claims are accurate, given that no proof was provided showing that the Office of the Clerk of the JLCADF refused to receive documents, nor that only documents originating from trade unions allegedly inclined to support the JLCADF are received. Moreover, there is no evidence to support the complainants' claims that they were obliged to use registered mail with receipt of delivery or other means in order to send documents related to the registration of other trade unions, strike notices and collective agreements to the JLCADF, such claims therefore being subjective and baseless. When issuing rulings, the JLCADF complies with the legal provisions and therefore all the claims made in the complaint are groundless. Those requests for trade union registration which meet the statutory requirements are granted within the time frame set out by law, as is the case with the trade union registrations granted by the JLCADF to Luis Cuadra Bermúdez, Miguel Ángel Cuadra Andrade and Ana Luisa Cuadra Andrade (listed below):

- file No. 1147. Trade Union of Workers and Employees of the General Plastics, Chemicals, Ceramics, Synthetic Pastes, Rubber, Pottery and Glass, Similar and Related Industries (General Secretary: Mr Miguel Ángel Cuadra Andrade);
- file No. 1234. Trade Union of Workers and Employees of the Metal, Metalwork, Similar and Related Industries of the Federal District (General Secretary: Mrs María Luisa Cuadra Andrade);
- file No. 1459. Trade Union of Workers and Employees of the Wood, Paper and Cardboard Processing Industry, the Graphic Arts, Upholstery, Carpentry, Woodwork and Similar and Related Industries of the Federal District (General Secretary: Mr Luis Cuadra Bermúdez);
- file No. 2286. Trade Union Association of Workers and Employees of the Food Products and Derivatives, Similar and Related Industries of the Federal District (General Secretary: Mr Luis Cuadra Bermúdez);
- file No. 3079. Trade Union Group of Workers and Employees of the Clothing, Thread, Materials and Leather Processing and Manufacture Industry and Trade and the Dyeing Laundry, General Auto-transport, Similar and Related Industries of the Federal District (General Secretary: Mr Luis Cuadra Bermúdez); and

- it should also be pointed out that the request for registration of the National Trade Union of Workers and Employees of the Construction, Haulage, Building, Excavation, Similar and Related Industries of the Federal District (General Secretary: Mr Luis Cuadra Bermúdez) is currently being processed by the JLCADF and the matter will be resolved in the near future.

683. As to the allegation regarding delays affecting the processing of strike notices and the imposition of non-statutory requirements upon trade unions making known their intention to hold a strike (with the aim of helping the employer to deposit an “employer protection collective agreement” with another trade union, thus allowing the employer to disregard the strike notice issued by the most representative trade union and avoid having to comply with an authentic collective agreement), the Government states that the complainant trade unions’ statements are subjective, given that the trade unions provide no proof to support their arguments or statements. Moreover, they make generic statements, failing to provide details regarding the non-statutory requirements allegedly introduced by the JLCADF. The complainant trade unions overlook the fact that Mexican law does not make provision for employer protection collective agreements, given that the workers are free to band together to defend their common interests and can establish independent trade unions free of employer interference. Each trade union is free to establish itself, request registration, draw up statutes and regulate its own administration and internal affairs. The conciliation and arbitration committees do not assist employers in cases where strike notices have been issued by trade unions. The Government recalls that the committees are tripartite bodies, including employers, workers and government, and thus responsibility in terms of decision-making is shared out equitably. In the unlikely event of a complainant trade union organization, or any other organization, detecting a conflict of interests regarding one of the representatives of a committee involved in dealing with a specific matter or case, that trade union or organization has the right to request that that representative desist from conducting the procedure in question. Section 710 of the Federal Labour Act establishes that if any of the parties know of any impediment preventing one of the representatives from continuing to conduct a procedure, then that party shall inform the authorities referred to under section 709(I) of the same Act of that fact so that the relevant legal proceeding may be initiated and the representative in question replaced. In this regard, according to the statistics, the JLCADF receives a large number of requests concerning strike notices; trade union registration; the updating of executive committees, statutes and lists of members; certification as the bargaining agent for collective labour agreements and registration of collective labour agreements. Such requests are transmitted by registered mail and are processed in accordance with the legal provisions currently in force. Consequently, the Government categorically denies that the allegations made by the complainant trade unions are true.

684. As to the allegation that the JLCADF refuses to issue certified copies and only issues the respective rulings after considerable delay, as well as transforming labour law from an instrument for the protection of the workers into an instrument for the protection of the employers, the Government states that the evidence submitted by the trade unions does not constitute proof that the JLCADF refused to issue certified copies, or that there were considerable delays in issuing rulings. Contrary to the evidence submitted by the complainants and in accordance with the provisions of section 723 of the Federal Labour Act, the committees are legally obliged to provide applicants with certified copies of any document or record in the relevant file. Moreover, the statements to the effect that the JLCADF issues rulings or awards after delays are generic and subjective, given that no specific cases are cited which might show that such delays occur, neither has any proof been provided to support such claims. It should be pointed out that on occasions when documents are submitted which are irreceivable by the authority, the JLCADF, in accordance with the Federal Labour Act, must rely on other judicial or administrative authorities to clarify the facts or the situation regarding the documents so that it may be in

a position to guarantee the rights of the workers. Therefore, the Government categorically denies that the JLCADF is acting in bad faith or dishonestly with regard to the requests submitted by the complainant trade unions or any other body, given that it has not been proved that the JLCADF has acted in a partisan manner regarding any of the procedures it has carried out. By way of proof that the JLCADF is acting in good faith, the Government provides the following update regarding notices, the deposit of collective agreements, requests for certification as the bargaining agent for collective agreements, as well as various procedures involving the trade unions registered by Luis Cuadra Bermúdez, Ana Luisa Cuadra Andrade, Miguel Ángel Cuadra Andrade, Rogelio Quiroga Calderón, Raúl and José Magaña Córdova, Luis Ángel Palancares López, Esteban Sarabia and Margarita Espinoza (signatories to the complaint):

- with regard to file No 563/2009, submitted by the Trade Union of Workers and Employees of the Wood, Paper and Cardboard Processing Industry, the Graphic Arts, Upholstery, Carpentry, Woodwork and Similar and Related Industries of the Federal District (General Secretary: Mr Luis Cuadra Bermúdez) on 1 April 2009, concerning the signing of an agreement, which was not processed, an agreement (established in accordance with section 923 of the Federal Labour Act) had already been signed with the enterprise in question (Cartones y Tubos del Sur SA de CV);
- as to file No. 1070/2009, submitted by the Trade Union of Workers and Employees of the General Plastics, Chemicals, Ceramics, Synthetic Pastes, Rubber, Pottery and Glass, Similar and Related Industries of the Federal District (General Secretary: Mrs Ana Luisa Cuadra Andrade) regarding the signing of an agreement, this file is currently being processed;
- Mr Luis Cuadra Bermúdez, Ana Luisa Cuadra Andrade and Miguel Ángel Cuadra Andrade have registered 124 collective labour agreements with various trade unions in which they are named as general secretaries. They have also submitted various requests for certification as the bargaining agent for collective agreements;
- Mr Rogelio Quiroga Calderón, General Secretary of the Dr Luis Donaldo Colosio Murrieta Trade Union Front, has deposited a collective labour agreement;
- Mr Raúl Magaña Córdova registered the Trade Union of Workers of Garages, Ironworks, Aluminium, Ornamental Metalwork and Metal Industries of the Federal District and has several ongoing strike notices. On some occasions he appears as General Secretary, while on others he is named as an agent, including in files Nos 843/2009, 775/2009, 1201/2009 and 1197/2009;
- Mr Ricardo Magaña Alvarado registered the Trade Union Association of Workers of the General Dressmaking and Similar Industries of the Federal District and has deposited 22 collective labour agreements and appears either as General Secretary or agent in the notices. He is involved in files Nos 756/2006, 2591/2007, 1197/2009, 1201/2009, 775/2009 and 843/2009;
- Mr Esteban Sarabia is involved in the affairs of several trade unions, for which he has deposited 44 collective labour agreements; and
- Mrs Margarita Martínez Espinoza has deposited seven collective labour agreements with the committee on behalf of her registered group.

685. The Government states that the above information shows that the requests submitted to the JLCADF by the complainant trade unions have been dealt with in accordance with the national and international labour law in force and that, as a consequence, the complainants' claims are groundless.

686. Finally, the Government wishes to share the following conclusions: (1) the complaint lodged does not comply with paragraph 82(a) and (b) of the *Handbook of procedures*, or with paragraph 31 of the Procedures, given that the complainant trade unions do not provide sufficient proof to support the allegations of violation of freedom of association; (2) the written complaint does not contain any reference to applicable international conventions or provisions which might have been violated; (3) none of the trade unions signatory to the complaint have shown that their trade union rights were affected, nor is there any reference to specific violations of freedom of association, as has been shown; (4) the documents submitted by the complainant trade unions show that the statements made are groundless, given that the complainants themselves demonstrate that the JLCADF granted the acknowledgements requested and has processed the requests submitted, fulfilling the relevant legal requirements, and therefore the claims that the JLCADF refuses to grant such acknowledgements or to receive requests are groundless; (5) neither is it true that the JLCADF imposed non-statutory requirements concerning the processing of strike notices, nor that the rulings were issued following considerable delay – indeed this has been shown not to be the case; (6) the JLCADF, contrary to the claims of the complainants, has shown that it has processed the requests made by the complainant trade unions regarding strike notices, the registration of trade unions, the updating of executive committees, statutes and lists of members, certification as the bargaining agent for collective labour agreements and registration of collective agreements, and; (7) as can be seen from the above information, the requests made to the JLCADF by the complainants have been dealt with in accordance with the provisions of the national and international labour legislation in force. Therefore, the Government requests the Committee on Freedom of Association to reject the present complaint.

C. The Committee's conclusions

687. *The Committee observes that, in the present case, the complainant organizations firstly allege that the Office of the Clerk of the Local Conciliation and Arbitration Committee of the Federal District (JLCADF) refuses to receive requests for trade union registration, strike notices, documents updating statutes and lists of members, requests for certification as the bargaining agent for collective agreements and other collective issues, forcing trade unions to use registered mail with receipt of delivery or other means.*

688. *The Committee notes the Government's argument that the complaint is irreceivable, citing a lack both of proof and of direct interest on the part of the complainant organizations. The Committee wishes to highlight, however, that the present complaint is written, dated and signed by authorized trade union officials and that it refers to the violation of trade union rights. The Committee stresses that it is not always easy or possible to provide proof for all types of allegations and that it is the evaluation of the proof submitted that is decisive (a process carried out when the Committee examines the case), and that direct interest in terms of receivability is always assumed when, as in the present complaint, the complainant organizations allege widespread non-compliance with legislation concerning freedom of association. Finally, the Committee observes that the complainant organizations transcribe examples of case law which, in their opinion, have been disregarded and send a number of annexes supporting their allegations.*

689. *The Committee notes the Government's statements concerning the allegations, to the effect that: (1) the evidence submitted by the complainant trade unions does not prove that such claims are accurate, given that no proof was provided showing that the Office of the Clerk of the JLCADF refused to receive documents, nor that only documents originating from trade unions allegedly inclined to support the JLCADF are received; (2) there is no evidence to support the complainants' claims that they were obliged to use registered mail with receipt of delivery or other means in order to send documents related to the registration of trade unions, strike notices or collective agreements to the JLCADF, such*

claims therefore being subjective and baseless; (3) when issuing rulings, the JLCADF complies with the legal provisions and therefore all the claims made in the complaint are groundless. Requests for trade union registration which met the statutory requirements were granted within the time frame set out by law, as was the case with the trade union registrations granted by the JLCADF to Luis Cuadra Bermúdez, Miguel Ángel Cuadra Andrade and Ana Luisa Cuadra Andrade, signatories to the complaint (the Government refers to five registration processes, as well as to a further registration process currently under way).

- 690.** *The Committee notes the allegation made by the complainant organizations that, with regard to requests for the signing of a collective agreement through a strike notice, in practice, the JLCADF requires proof that the workers actually belong to the trade union in question, as well as the names of those workers in the service of the employer in question. Furthermore, this information must be backed up by documents such as those proving registration with the Mexican Social Security Institute (IMSS), or other documents. As a result, if the employer refuses to provide documentation proving the existence of a labour relationship, then the right to strike is rendered ineffectual. The Committee notes that, according to the complainant organizations, in practice, the JLCADF delays processing of requests beyond the 48-hour time period set under the Federal Labour Act, section 921 of which states that the relevant Conciliation and Arbitration Committee shall deliver a copy of the list of claims with strike notice to the employer within 48 hours of receiving it.*
- 691.** *The complainant organizations state that the delays affecting the 48-hour time period allow the employer to deposit an “employer protection collective agreement”, signed with another trade union, enabling him/her to disregard the strike notice issued by the most representative trade union and avoid having to comply with an authentic collective agreement. Furthermore, the JLCADF favours the processing of strike notices submitted by unrepresentative or extortive trade unions.*
- 692.** *The Committee notes the Government’s statements to the effect that: (1) The complainant trade unions’ statements are subjective, given that the trade unions provide no proof to support their arguments or claims. Moreover, they make generic statements, failing to provide details regarding the non-statutory requirements allegedly introduced by the JLCADF; (2) Mexican law does not make provision for “employer protection collective agreements”, given that the workers are free to band together to defend their common interests and can establish independent trade unions free of employer interference. Each trade union is free to establish itself, request registration, draw up statutes and regulate its own administration and internal affairs. (3) The conciliation and arbitration committees do not assist employers in cases where strike notices have been issued by trade unions. The committees are tripartite bodies, including employers, workers and government, and thus responsibility in terms of decision-making is shared out equitably. (4) In the unlikely event of a complainant trade union organization, or any other organization, detecting a conflict of interests regarding a Committee representative involved in dealing with a specific matter or case, that trade union or organization has the right to request that that representative desist from conducting the procedure in question (section 710 of the Federal Labour Act). (5) According to the statistics, the JLCADF has received a large number of files corresponding to strike notices, requests for trade union registration, the updating of executive committees, statutes and lists of members, certification as the bargaining agent for collective labour agreements and collective labour agreements. (6) Requests regarding collective issues received by registered mail are processed and granted in accordance with the legal provisions currently in force. Consequently, the Government categorically denies that the allegations made by the complainant trade unions are true.*

693. *The Committee notes that the complainant organizations allege that the JLCADF arbitrarily refuses to issue certified copies of trade union statutes or acknowledgements of trade union executive committees, or limits itself to issuing two or five copies, thus contravening the relevant legislation. The Committee also notes the allegation made by the complainant organizations to the effect that when a trade union submits a request to the JLCADF for the withdrawal of bargaining agent status for collective agreements from another trade union which no longer represents the majority of the workers, the JLCADF requires proof of the trade union membership of the workers and of their labour relationship with the employer in question. According to the complainant organizations, the workers' names find their way back to the employer and the workers are dismissed. The complainant organizations go on to claim that these procedures are affected by considerable delays, a problem also affecting other procedures, such as the issuing of acknowledgements regarding changes affecting executive committees.*
694. *The Committee notes the Government's statements to the effect that: (1) the allegation that the JLCADF refuses to issue certified copies, as well as issuing rulings after considerable delays and transforming labour law from an instrument for the protection of the workers into an instrument for the protection of the employers is untrue; (2) the trade unions offer no real evidence to support their claims regarding the refusal to issue copies and delays affecting rulings. Contrary to the evidence submitted by the complainants and in accordance with the provisions of section 723 of the Federal Labour Act, conciliation and arbitration committees are legally obliged to provide applicants with certified copies of any document or record in the relevant file; (3) the statements to the effect that the JLCADF issues rulings or awards after delays are generic and subjective, given that no specific cases are cited which might show that such delays occur, nor has any proof been provided to support such claims; (4) on occasions when documents are submitted which are irreceivable by the authority, the JLCADF, in accordance with the Federal Labour Act, must rely on other judicial or administrative authorities to clarify the facts or the situation regarding the documents so that it may be in a position to guarantee the rights of the workers, and; (5) the JLCADF is not acting in bad faith or dishonestly with regard to the requests submitted by the complainant trade unions or any other body, given that it has not been proved that the JLCADF has acted in a partisan manner regarding any of the procedures it has carried out. The Committee notes that the Government backs up its statements by referring to the current situation regarding notices, the deposit of collective agreements, requests for certification as the bargaining agent for collective agreements, as well as various procedures involving the trade unions registered by those trade union officials who signed the complaint before the Committee:*
- *With regards file No. 563/2009, submitted by the Trade Union of Workers and Employees of the Wood, Paper and Cardboard Processing Industry, the Graphic Arts, Upholstery, Carpentry, Woodwork and Similar and Related Industries of the Federal District (Secretary General: Mr Luis Cuadra Bermúdez) on 1 April 2009, concerning the signing of an agreement, which was not processed, an agreement (established in accordance with section 923 of the Federal Labour Act) had already been signed with the enterprise in question (Cartones y Tubos del Sur SA de C.V.);*
 - *As to file No. 1070/2009, submitted by the Trade Union of Workers and Employees of the General Plastics, Chemicals, Ceramics, Synthetic Pastes, Rubber, Pottery and Glass, Similar and Related Industries of the Federal District (General Secretary: Mrs Ana Luisa Cuadra Andrade) regarding the signing of an agreement, this file is currently being processed;*
 - *Mr Luis Cuadra Bermúdez, Ana Luisa Cuadra Andrade and Miguel Ángel Cuadra Andrade have registered 124 collective labour agreements with various trade unions*

in which they are named as the general secretaries. They have also submitted various requests for certification as the bargaining agent for collective agreements;

- *Mr Rogelio Quiroga Calderón, General Secretary of the Dr Luis Donald Colosio Murrieta Trade Union Front, has deposited a collective labour agreement;*
- *Mr Raúl Magaña Córdova registered the Trade Union of Workers of Garages, Ironworks, Aluminium, Ornamental Metalwork and Metal Industries of the Federal District and has several ongoing strike notices. On some occasions he appears as General Secretary, while on others he is named as an agent, including in the files Nos 843/2009, 775/2009, 1201/2009 and 1197/2009;*
- *Mr Ricardo Magaña Alvarado registered the Trade Union Association of Workers of the General Dressmaking and Similar Industries of the Federal District and has deposited 22 collective labour agreements and appears either as General Secretary or agent in the notices. He is involved in files Nos 756/2006, 2591/2007, 1197/2009, 1201/2009, 775/2009 and 843/2009;*
- *Mr Esteban Sarabia is involved in the affairs of several trade unions, for which he has deposited 44 collective labour agreements; and*
- *Mrs Margarita Martínez Espinoza has deposited seven collective labour agreements with the JLCADF on behalf of her registered group.*

695. *The Committee notes the Government’s statement to the effect that the above information shows that the requests submitted to the JLCADF by the complainant trade unions have been dealt with in accordance with the national and international labour law in force and that, as a consequence, the complainants’ claims are groundless.*

696. *The Committee wishes to point out that the issue of “employer protection collective agreements” referred to in the allegations arose in a previous case (No. 2694), which will be examined at a later meeting, given that the Government claimed that the complaint was irreceivable, for which reason its examination was delayed.*

697. *In general, with regard to the Government’s statement to the effect that the complainant organizations have failed to provide sufficient proof of violations of trade union rights, the Committee observes that certain elements of proof (although limited in nature) have been provided; in particular, the annexes sent by the complainant organizations contain various communications of 1995, 2004, 2005 and 2006 of the JLCADF, in which the JLCADF “takes note” of (registers) the updated executive committees and lists of members of various trade unions. Consequently, it would seem that for official acknowledgement to be obtained the list of members of the trade union must first be submitted. The Committee recalls that the list of members of a trade union given for registration purposes should be kept confidential in order to prevent acts of trade union discrimination. Furthermore, according to the complainant organization, under case law, the processing of strike notices regarding the signing of a collective labour agreement cannot be conditional upon the trade union providing proof that those workers involved in the strike notice are members of said trade union. In this regard, the complainant organization sends a communication from the JLCADF stating that one of the names on the list of workers provided by the executive committee does not appear on the register of the IMSS and giving the trade union in question three days to provide an explanation, with failure to do so leading to the file being shelved. Alternatively, the JLCADF requests the trade union to provide proof of the existence of the labour relationship of the workers it claims to represent.*

698. *However, the Committee observes that the complainant organizations have not provided sufficient proof regarding the alleged considerable delays concerning the processing by the authorities of documents linked to the exercise of trade union rights.*

699. *Taking into account the contradiction existing between the allegations and the Government's reply, as well as the previously mentioned annexes which contain certain elements of proof (albeit limited), regarding a number of alleged non-statutory requirements for the exercise of trade union rights, the Committee invites the Government to promote dialogue between the complainant organizations and the JLCADF to deal with the question of the functioning of the procedures and the concerns expressed by said organizations.*

The Committee's recommendation

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

The Committee invites the Government to promote dialogue between the complainant organizations and the JLCADF to deal with the question of the functioning of the existing procedures and the concerns expressed by the said organizations.

CASE NO. 2576

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

Complaint against the Government of Panama presented by

- **the National Union of Security Agency Employees (UNTAS) and**
- **Union Network International (UNI)**

Allegations: Acts of anti-union discrimination and interference by the company and the authorities; aggression and threats against union members

701. The Committee examined the substance of this case at its November 2008 meeting, when it submitted an interim report to the Governing Body [see 351st Report, paras 1099–1134, approved by the Governing Body at its 303rd Session].

702. The Government sent observations in communications dated 14 May 2009 and 1 March 2010.

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

A. Previous examination of the case

704. In its previous examination of the case at its November 2008 meeting, the Committee made the following recommendation on the issues that were still pending [see 351st Report, para. 1134]:

- (a) The Committee requests the Government to ensure that the union officials Mr Cubilla, Mr Adamson and Mr Aguilar have returned to their posts of work under normal conditions and that it keep the Committee informed in that regard.
- (b) The Committee requests the Government to send it: (1) the judgement of the Supreme Court of Justice in regard to the various measures taken by the Group 4 Securicor company and the question of whether the workers held a “de facto work stoppage”; (2) specific information in regard to the alleged anti-union nature of the dozens of dismissals that occurred during the restructuring of the Group 4 Securicor company with a view, according to the allegations, of weakening the union, as well as any judgement which the courts may have handed down in relation to those dismissals; and (3) information on whether the trade union organizations affected and the dismissed trade union leaders have instituted additional judicial action.
- (c) The Committee requests the Government to ensure that the relevant legislation in regard to check-off facilities for union members’ dues is complied with by the company.
- (d) The Committee requests the Government to take the necessary steps to send its specific observations concerning the allegations relating to: (1) the violent assault on and robbery of trade unionists exercising their right to protest in front of the company by individuals allegedly having received orders from the management to get rid of them, resulting in one worker having to be hospitalized; (2) the financial support provided by the company for the creation of a trade union; and (3) the threats of civil and penal sanctions against trade unionists having participated in peaceful demonstrations.
- (e) The Committee requests the Government to provide clarifications in regard to the alleged certification (recognition) of the trade union elections involving a very small group of dissidents from the union, to whom the company allegedly provided financial support, and to inform it whether the executive committee resulting from those elections has dislodged the one which filed the present case.
- (f) The Committee invites the Government to provide it with information on any measures taken as from November 2006 to give effect to the union’s request for the implementation of collective bargaining.

B. Additional observations sent by the Government

705. In its communication dated 14 May 2009, the Government states that it has replied to each of the questions raised by the Committee. It recalls that the allegations refer to: (1) the transfer of workers under the guise of corporate restructuring, with the intention and effect of weakening the trade union and undermining collective bargaining; (2) the dismissal and sanctioning of trade unionists who took part in demonstrations to assert their legal rights; (3) the company’s financial, material and legal assistance to criminals who violently attacked and robbed union leaders; (4) the instigation by the company of an internal dispute within the union and its material support for the emergence of a pro-company faction; and (5) the use of threats, penal sanctions and civil lawsuits against union members who took part in demonstrations. The Government states that Panama has established trade union rights backed by protective measures and that it actively protects and promotes the trade union movement, without any state interference in its internal affairs, by providing for technical and economic assistance, trade union immunity and penalties for unfair practices.

706. Regarding the question of unfair practices, the Government adds that the union is entitled by law to appeal to a criminal court or special labour court to investigate the said measures.

The Ministry of Labour and Labour Relations (MITRADEL) is not competent to hear the case and has accordingly followed the procedure laid down in the country's labour legislation and in the ratified international standards. It has complied fully with the law, and there is at present no outstanding dispute between the parties.

707. In its communication dated 1 March 2010 the Government states that UNTAS called a strike at the Group 4 Securicor company. In ruling No. 65 of 24 October 2006, the Third Labour Court decided not to ban the strike, which had halted the company's activities. The Government adds that this ruling was declared null and void, pursuant to article 498 of the Labour Code which states:

A strike may be declared illegal only in one of the following circumstances:

- (1) if it does not meet the requirements of articles 476, 477, 484, 487 and 489 (preliminary conciliation, advance notice, etc.);
- (2) if any acts of physical violence are perpetrated against people or property in the course of the strike;
- (3) strike may not be declared illegal for any reason other than the above. A ruling on a request for a strike to be declared illegal shall not enter into the substance of the dispute and shall not consider whether or not grounds exists for any requests, complaints, demands or protests submitted by the workers.

The Government points out that the head of Labour relations certified that no request to hold a strike had been presented and that the Higher Labour Tribunal therefore ruled on 26 October 2006 that the strike called by UNTAS was unlawful.

708. Regarding the alleged anti-union nature of the dozens of dismissals that followed the protest marches that UNTAS organized from 6 September 2006 onwards, the Government attaches decision No. 22 PJCD-2007 handed down by Conciliation and Decision Board No. 14 on 5 September 2007, which settled the labour dispute between an employee, Mr Ojier Hernán Serracin, and the company by declaring that his dismissal was unjustified. However, the Higher Labour Tribunal issued a ruling on 5 September 2007 revoking this decision and acquitting the company of the charge. The Government also attaches decision No. 32-PJCD-16-2007 of 29 September 2007, confirmed by the court of second instance on 29 May 2008, to the effect that Mr Luis Velásquez had failed to prove to the competent tribunal that his dismissal was unjustified. In so far as the proper channels were respected, the decision was taken in full jurisdictional independence; in other words, there was no interference by any public institution other than the competent bodies. The Government concludes from the above that the complaint lodged with the Assistant Public Prosecutor shows that it was the workers who used force to take over the company's premises and that there was never any question of trade union persecution but rather of a group of workers acting in violation of established labour standards.

709. The Government adds that, according to an investigation conducted by the General Labour Directorate, the union leaders who were dismissed (Mr Cubillas, Mr Adamson and Mr Aguilar) were involved in acts of violence that caused damage to the installations of Union International Network G4SW, and that it was because of this that the police responsible for maintaining law and order intervened. The acts of violence were certified by senior police officers (not attached to the Ministry of Labour and Labour Relations) who are responsible only for investigating labour disputes and helping the parties reach a friendly settlement. Under existing legal arrangements, the Ministry is not competent to take action in situations involving violence.

710. Regarding the financial support that the company allegedly provided to set up a new trade union, the Government states that it is unaware of any such occurrence. Trade unions have full access to the machinery provided for in article 338 of the Labour Code to denounce

situations such as that described which, if there is sufficient evidence, can be deemed an unfair practice. It must be borne in mind that, in the case of legitimate activities that are carried out in countries governed by laws and regulations, each sphere of activity has a set of established rules and control mechanisms that must not be allowed to disrupt public order, failing which the injured parties are entitled to place the matter before the civil or criminal authorities without any implication that they are opposed to the trade union movement.

- 711.** Regarding the deduction of union dues, the Government states that, in Panama, employers are required by law to deduct the ordinary and extraordinary union dues of all members of trade unions, with the sole condition that each worker be duly accredited (article 373 of the Labour Code). Article 405 further requires companies to deduct the union dues of all their workers who are covered by a collective agreement.
- 712.** The Government adds that it is the police authorities and the Public Prosecutor who are responsible for preventing violence and theft and that the Government is not competent to take action in this area. The Government's mission is to serve as a body that can oversee unions' actions and it does not interfere in their functioning or activities, in accordance with the principle of freedom of association.
- 713.** Lastly, the Government states that the National Assembly has, in third hearing, approved draft Act No. 94 "which incorporates new provisions concerning the duties of employers into the Labour Code which are designed to promote protective measures for security agents".

C. The Committee's conclusions

- 714.** *The Committee observes that the complaint concerns: (1) allegations relating to the dismissal of dozens of workers at the Group 4 Securicor company following peaceful protests in October 2006, even before the judicial authority had ruled on the lawfulness or otherwise of the action (the judicial authority considered there to have been a "de facto work stoppage", but the Supreme Court of Justice currently has before it an appeal against that decision); (2)(a) allegations relating to the year 2007 to the effect that the company had ordered two of its workers to attack demonstrating trade unionists who were occupying its premises in the early morning of 16 February 2007, with the aim of forcing them to leave the company's property; according to the complainant union, eight assailants (two of whom were arrested and subsequently released) seized money and belongings from the trade unionists; one of the assailants threatened them with a firearm, while one of the trade unionists was beaten and had to be hospitalized; (b) financial support provided by the company to a very small group of dissidents within the union who organized so-called elections that were certified by the Government; and (c) the failure (on the part of the company) to hand over trade union dues to the union. The Committee takes note of the Government's broad observation that the country's legislation guarantees trade union rights, including trade union immunity, and provides for sanctions in respect of unfair practices.*
- 715.** *The Committee notes the Government's statement that: (1) the Higher Labour Tribunal ruled on 26 October 2006 that the strike called by UNTAS was unlawful; (2) according to the complaint lodged with the Assistant Public Prosecutor, it was the workers who used force to take over the company's premises, and there was never any question of trade union persecution; (3) according to an investigation conducted by the General Labour Directorate, the union leaders who were dismissed (Mr Cubillas, Mr Adamson and Mr Aguilar) took part in violent activities that damaged the enterprise installations and it was because of this that the police responsible for maintaining law and order intervened; (4) it is not aware of any element relating to the company's alleged financial support for*

setting up a new trade union; and (5) in Panama employers are required by law to deduct the ordinary and extraordinary union dues of all members of trade unions, with the sole condition that each worker be duly accredited.

- 716.** *Regarding the alleged anti-union dismissal of union leaders Mr Cubilla, Mr Adamson and Mr Aguilar, the Committee notes that, according to the Government, these workers were involved in acts of violence that caused damage to the enterprise installations, which was why the police responsible for maintaining law and order intervened. The acts of violence were certified by senior police officers and by the labour administration (which is responsible only for investigating labour disputes and helping the parties reach a friendly settlement). The Committee recalls that, in its previous examination of the case, it observed that according to the allegations the judicial authority did not accede to the company's request for a suspension of the trade union immunity of union officials Cubilla, Adamson and Aguilar, and that the Committee therefore requested the Government to ensure that they had been able to return to their posts of work under normal conditions. Noting the Government's assertion that the situation has changed inasmuch as the demonstration was an act of violence and not a peaceful protest, the Committee requests the Government to inform it without delay of the current status of these workers and, specifically, whether their trade union immunity has since been suspended and whether any proceedings have been initiated in connection with what the Government describes as an act of violence against the enterprise installations. In the case that it is found that the dismissal was illegal, the Committee reiterates its earlier recommendation that the Government ensure that they have been able to return to their posts of work under normal conditions and that it keep it informed of developments.*
- 717.** *Regarding the alleged dismissal (as part of a corporate restructuring) of dozens of other trade unionists said to have been involved in the October 2006 protest march, the Committee takes note of Decision No. 22 PJCD-2007 of 5 September 2007 and Decision No. 32-PJCD-16-2007 of 29 September 2007, confirmed in second instance on 29 May 2008, to the effect that two of the plaintiffs had failed to prove to the competent tribunal that their dismissal was unjustified. However, the Committee notes that the Government does not provide any information as to whether the trade unions concerned or the union members themselves have initiated any further court action, and it can therefore not determine whether or not all the remaining dismissals were considered to have been justified. The Committee requests the Government to provide it with information on the subject without delay, together with copies of the court decisions handed down.*
- 718.** *Regarding the alleged unlawfulness of the strike called by UNTAS and the anti-union nature of the dismissals that occurred during the corporate restructuring, supposedly to weaken the trade union, the Committee takes note of the Higher Labour Tribunal's ruling of 26 October 2006 that the strike called by UNTAS was unlawful notably because the union had not followed the legal procedures in force, i.e. the requirements stipulated in article 476 of the Labour Code, notably the completion of the proceedings engaged and the advance notification of the regional or general labour inspectorate or directorate.*
- 719.** *Regarding the company's alleged failure to pass on union dues due to the union and to comply with the legislative provisions on the subject, the Committee notes the Government's statement that employers in Panama are required by law to deduct the ordinary and extraordinary union dues of all members of trade unions, with the sole condition that each worker be duly accredited. The Committee requests that the Government inform it whether the company has deducted any union dues that have not been credited to the trade union concerned and, if so, to ensure without delay that this is done.*

- 720.** *Regarding the alleged violent attack on trade unionists and the theft of their belongings by individuals who had received orders from the management to remove them from the premises, where they were exercising their right to protest against the company, the Committee notes that it is the police authorities and the Public Prosecutor who are responsible for preventing violence and theft and that the union is entitled by law to lodge an appeal with a criminal court. The Committee requests the Government and the complainant organizations to indicate whether there has been any investigation into the matter or if the victims have lodged any judicial appeals and to keep it informed of developments.*
- 721.** *Regarding the alleged financial support provided by the company for setting up a new trade union, the Committee notes the Government's statement that it is unaware of any such occurrence and its reliance on the country's laws and regulations. The Committee requests the Government to institute an inquiry into the allegations and to keep it informed accordingly.*
- 722.** *Regarding the other allegations – threatened civil or criminal sanctions against trade unionists who took part in the demonstrations, certification (recognition) of trade union elections involving a very small group of dissidents from the union and the union's request for collective negotiations (the list of demands that had been settled by an agreement concluded in September 2006 was resubmitted in October 2006), the Committee regrets to note that the Government has not provided any information on the subject. The Committee requests the Government to institute an inquiry without delay into the alleged threats of civil and criminal sanctions against trade unionists who took part in the demonstrations and to keep it informed of developments. It requests further that the Government send its observations without delay on the alleged certification (recognition) of trade union elections involving a very small group of dissidents from the union and indicate whether the executive committee elected on that occasion has dislodged the committee that filed the case under examination; it requests the Government to provide information on any steps taken since November 2006 to follow up the union's request for collective negotiations.*

The Committee's recommendations

- 723.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Regarding the alleged anti-union dismissal of union leaders Mr Cubilla, Mr Adamson and Mr Aguilar, the Committee recalls that, in its previous examination of the case, it observed that according to the allegations the judicial authority did not accede to the company's request for a suspension of their trade union immunity, and that the Committee therefore requested the Government to ensure that they had been able to return to their posts of work. Noting the Government's assertion that the situation has changed inasmuch as the demonstration was an act of violence and not a peaceful protest, the Committee requests it to inform it without delay of the current status of the workers involved and, specifically, whether they are still covered by their trade union immunity. The Committee also requests the Government to inform it whether any proceedings have been initiated in connection with what the Government describes as an act of violence against the installations of Union International Network G4SW.*
- (b) *Regarding the alleged dismissal (as part of a corporate restructuring) of dozens of other workers said to have been involved in the October 2006*

protest march, the Committee notes that the Government does not provide any information as to whether the trade unions concerned or the union members themselves have initiated any further court action, and it can therefore not determine whether or not all the remaining dismissals were considered to have been justified. The Committee requests the Government to provide it without delay with information on the subject, together with copies of the court decisions handed down.

- (c) Regarding the company's alleged failure to pass on union dues to the union or to comply with the laws and regulations on the subject, the Committee requests the Government to inform it whether the company has deducted any union dues that have not been credited to the trade union concerned and, if so, to ensure that this is done without delay.*
- (d) Regarding the alleged violent attack on trade unionists and the theft of their belongings by individuals who had received orders from the management to remove them from the premises, where they were exercising their right to protest against the company, the Committee requests the Government and the complainant organizations to indicate whether there has been any investigation into the matter or if the victims have lodged any judicial appeals and to keep it informed of developments.*
- (e) Regarding the alleged financial support provided by the company for setting up a new trade union, the Committee notes the Government's statement that it is unaware of any such occurrence and its reliance on the country's laws and regulations. The Committee requests the Government to order an inquiry into the allegations and to keep it informed accordingly.*
- (f) Regarding the other allegations – threatened civil or criminal sanctions against trade unionists who took part in the demonstrations, certification (recognition) of trade union elections involving a very small group of dissidents from the union and the union's request for collective negotiations (the list of demands that had been settled by an agreement concluded in September 2006 was resubmitted in October 2006) – the Committee regrets to note that the Government has not provided any information on the subject. The Committee requests the Government to institute an inquiry without delay into the alleged threats of civil and criminal sanctions against trade unionists who took part in the demonstrations and to keep it informed of developments. It requests further that the Government send its observations without delay on the alleged certification (recognition) of trade union elections involving a very small group of dissidents from the union and that it indicates whether the executive committee elected on that occasion has ousted the committee that filed the case under examination; it invites the Government to provide information on any steps taken since November 2006 to follow up the union's request for collective negotiations.*

CASE NO. 2706

INTERIM REPORT

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

- **the Sole Union of Workers of the Construction and Related Industries (SUNTRACS) and**
- **the Independent National Confederation of Labour Union Unity (CONUSI) and**
- **the Building and Wood Workers' International (BWI) associated itself with the complaint**

Allegations: The complainant organizations allege murders and acts of violence against trade union officials and members, the detention of trade union members, the violation of the right to collective bargaining, the establishment of a trade union by an enterprise and the dismissal of SUNTRACS members

724. The complaint is contained in a communication of the Sole Union of Workers of the Construction and Related Industries (SUNTRACS) and the Independent National Confederation of Labour Union Unity (CONUSI) of March 2009. SUNTRACS and CONUSI submitted additional information in a communication of 28 April 2010. The Building and Wood Workers' International (BWI) associated itself with the complaint in a communication of 27 May 2010.
725. The Government sent partial observations in communications of 21 September 2009 and 12 April 2010.
726. Panama has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

727. In their communications of March 2009 and 28 April 2010, SUNTRACS and CONUSI allege murders, assaults and acts of violence against trade union officials and members and mass detentions of protestors against a background of grave anti-union persecution in Panama, as well as violations of the right to collective bargaining, the establishment of a trade union by an enterprise and anti-union dismissals.

Acts of violence

728. The complainant organizations allege that, on Saturday, 11 August 2007, building workers belonging to SUNTRACS began strike action affecting the construction of the Panama-Colón highway, a project being run by the enterprise Construtora Norberto Odebrecht SA. The authorities were unable to guarantee the workers' right to strike, with the latter being prevented from entering the enterprise's premises and then being attacked by hired thugs claiming to be officials of the trade union controlled by the enterprise.

- 729.** The complainant organizations add that, on 13 August 2007, thugs hired by the enterprise physically and verbally abused the workers and members of the executive committee of SUNTRACS while they were picketing the enterprise's installations. The sub-secretary for monitoring of the executive committee of SUNTRACS, Mr David Niño, and Mr Adamson Ronald, the secretary for occupational safety and health of CONUSI, were injured as a result of this harassment. Moreover, Yamir Córdoba, Luis González (both members of the executive committee of SUNTRACS) and Mr Eustaquio Méndez (secretary for finances of CONUSI) were physically attacked.
- 730.** The complainant organizations allege that, on 14 August 2008, approximately 200 members of SUNTRACS, including trade union representatives and members of the executive committees of CONUSI and SUNTRACS, were again making their way towards the Panama-Colón highway construction site with the aim of protesting peacefully against the attacks carried out on the abovementioned trade union officials. Between 7 a.m. and 9 a.m., hired thugs and common criminals armed with guns and in the pay of the enterprise attempted to murder SUNTRACS and CONUSI officials. Shots were fired from within the building site at the demonstrators who were protesting peacefully in front of the enterprise's installations. As a consequence, trade union official and SUNTRACS member, Mr Osvaldo Lorenzo Pérez was killed and trade union officials José de los Santos Castillo Ceballos and Carlos Dimas Colindres Covilia were injured. The complainant organizations state that these events took place in the presence of members of the national police force, who remained suspiciously inactive thus allowing the hired thugs to carry out these criminal acts against the SUNTRACS and CONUSI members. SUNTRACS launched criminal proceedings in order to identify the authors and perpetrators of the murder of the trade union official Mr Osvaldo Lorenzo Pérez. However, almost two years after the event the case remains unsolved. The complainant organizations believe that a climate of impunity and complicity on the part of the State exists with regards these events.
- 731.** The complainant organizations state that, on 12 June 2007, SUNTRACS issued a public statement concerning the use of hired thugs as a part of the Isla Viveros project. Worker members of SUNTRACS consequently announced that they would carry out work stoppages and demonstrations against non-compliance with labour laws, precarious working, health and safety conditions and anti-union practices. As a result of the protests, trade union official Mr Luiyi Antonio Argüelles Moya was shot and killed by Sergeant Manuel Moreno of the Panamanian national police force on Isla Viveros on 16 August 2007. On the same day, trade union official and SUNTRACS press and communications secretary, Mr Raimundo Garcés, was arrested.
- 732.** The complainants state that trade union official Mr Argüelles Moya was murdered two days after the killing of Mr Osvaldo Lorenzo took place, but that, rather than investigating the complainants, the Government stated that SUNTRACS was the main party responsible for the events. SUNTRACS instituted criminal proceedings against Sergeant Manuel Moreno, the director of the national police force, the enterprise Maqtec SA and the mayoress of the judicial municipality, for the crime of homicide and breach of collective security. However, the complaint only pointed the finger of blame at Sergeant Moreno, exonerating the rest of those concerned. Almost two years have passed since the proceedings were launched but no sentence has been passed. The case is still pending before the Second High Court of the Judicial District of Panama, with no date as yet having been set for a hearing. The complainant organizations consider that the investigation process was carried out in a climate of absolute impunity, with the state apparatus taking the side of those presumed responsible.
- 733.** The complainant organizations state that, on 12 February 2008, the workers of SUNTRACS carried out a national strike against the rise in the cost of living and in favour of the approval of a safety and health regulation in the construction sector. A peaceful

demonstration held by the workers in the city of Colón was brutally suppressed. Against this background a SUNTRACS trade union official, Mr Al Iromi Smith, was murdered and workers Ronaldo Pinilia and Félix de León were assaulted by members of the national police force. Mr Al Iromi Smith was a leading SUNTRACS official in Colón Province, as well as being a community leader and an active member of the student movement. He took part in various processes aimed at demanding the rights of the workers and even publicly denounced acts of political repression carried out by the Government in the media.

- 734.** The complainant organizations state that thousands of workers protested in the streets on hearing of the death of Mr Al Iromi Smith. The Government responded by arresting around 500 workers who were held at national police barracks where representatives of the Judiciary sentenced them for breach of public order. These proceedings were carried out with no regard for any rights whatsoever, violating all guarantees of due process. Fines of over US\$100 were imposed on the workers (paid by SUNTRACS in order that the protestors might be freed) . The complainant organizations state that criminal proceedings were instituted against Eliseo Madrid Valdés and Miguel Ángel Pérez Ortega, members of the national police force, in the matter of the murder of trade union official Mr Al Iromi Smith. The preliminary proceedings carried out by the Third High Office of the Prosecutor of the First Judicial District of Panama are still ongoing and a number of anomalies have arisen. The complainant organizations consider that this delay, together with the faults made concerning the procedure, shows that the State has failed to ensure the right to freedom of association, given that the assaults and the murder were carried out in order to restrict the exercise of this right.
- 735.** The complainant organizations claim that, on 25 February, the national Ministry of the Economy and Finance announced that the Cabinet Council had approved a bill on tax reform which would involve the Government increasing the Goods and Services Transfer Tax from 5 to 7 per cent, alongside other measures prejudicial to the living conditions of workers and their families. On 15 March 2010, the President of the Republic of Panama proceeded to approve the Tax Reform Act. The complainant organizations allege that on 16 March construction workers belonging to SUNTRACS took part in a protest meeting in the streets of the city and handed out pamphlets to passing motorists and pedestrians. Members of the national police force, acting under the orders of the President of the Republic, proceeded to repress the demonstration for no reason whatsoever. The police used tear gas, rubber bullets and buckshot and arrested 224 individuals, including 47 SUNTRACS members. The complainant organizations state that the detainees were transferred to the main headquarters of the national police force, where they were held in overcrowded facilities with no food being provided. Furthermore, the police refused to allow anyone to bring the protestors clothes, underclothes or toiletries. The detainees were also denied access to drinking water, before being transferred to the La Joya Penitentiary Centre.
- 736.** The complainant organizations add that on 20 March, following irregular proceedings, worker members of SUNTRACS were taken before magistrates in Calidonia and Bella Vista, where fines were imposed on them without it being proved in court that they had participated in the acts of which they had been accused. Moreover, they were informed that the Auxiliary Prosecutor of the Republic would continue to investigate those SUNTRACS members who had already been sanctioned by the magistrates, meaning that they were to be judged twice for the same offence.
- 737.** The complainant organizations state that on 23 March the authorities of the Ministry of Labour and Labour Development harassed, slandered, insulted and threatened SUNTRACS members and their officials (in particular the trade union official Mr Saúl Méndez) in the press. They go on to state that in February the Government submitted a bill under which any job applicant must produce his/her police record in order to obtain a post.

The complainants allege that this bill was turned into a weapon to be used against the workers and the population in general, with participation in street protests being punished by prison sentences of six months to two years. This measure was used as a means of coercion following the events which took place on 16 March 2010.

Violation of the right to collective bargaining, establishment of a trade union by an enterprise, anti-union dismissals

738. The complainant organizations allege that the enterprise Constructora Norberto Odebrecht SA began work on a project known as the “Madden–Colón section” on 8 March 2007 and that, on 2 March 2007, the enterprise informed the Department of Social Organizations of the Ministry of Labour and Social Development that ten workers had joined a trade union established with the sole objective of legitimizing a supposed collective agreement submitted to the Ministry on 12 March 2007. According to the complainant organizations, it is clear that this alleged negotiation of a collective agreement was not carried out between the enterprise and a true trade union representation but that, in fact, the sole aim was to prevent those workers working on the construction project from exercising the collective freedoms of freedom of association and collective bargaining. The complainant organizations state that, following the signing of this false collective agreement, the enterprise required workers to join the “puppet” trade union as a prerequisite for working on the construction site. Many SUNTRACS worker members were forced to give up their membership and join the new trade union established by the enterprise. However, having obtained work and feeling that they were not represented, many workers rejoined SUNTRACS. The complainant organizations add that, in light of grave shortcomings regarding working conditions, the workers turned to SUNTRACS in order to denounce their precarious working situation, anti-union practices and the violation of the right to freedom of association. Therefore, on 2 May 2007, SUNTRACS submitted a list of demands to the enterprise Retraneq SA (a subcontractor for Odebrecht). However, as no satisfactory solution was found for the workers, SUNTRACS was obliged to call for strike action on 18 June 2007. On 23 May 2007, SUNTRACS also submitted a list of demands directly to the enterprise Odebrecht, but, owing to threats of serious reprisals and pressure placed by the enterprise on the worker members of SUNTRACS, the list was withdrawn. The complainant organizations allege that over 100 worker members of SUNTRACS were dismissed for refusing to join the trade union established by the enterprise.

B. The Government’s reply

739. In its communication of 21 September 2009, the Government states that the Ministry of Labour and Labour Development carried out a far-reaching investigation which crossed the boundaries of the institution’s jurisdiction. It was difficult to obtain relevant information regarding the events in question. As a result of the investigation doubts arose regarding the veracity of the allegations made by the complainant organizations. In some cases, the facts had been deliberately distorted and completely groundless accusations made which suggested that the Government was failing to comply with the ILO Conventions ratified by Panama. The Government states that, in order to clarify the situation, the Ministry has gathered the relevant information from various state bodies regarding the issues covered by the complaint submitted by SUNTRACS. As a result, the Government reports the following:

- As to the allegation relating to the negotiation of a collective agreement within the enterprise Retraneq SA, Resolution No. 171-DGT-RT-07, of 31 July 2007, states that the National Construction and Drilling Industry Workers’ Union of Panama (SINTICOPP) is responsible for negotiating lists of demands. Furthermore, Retraneq

SA signed an agreement regarding the Madden-Colón project, under which the Ministry of Labour and Labour Development (MITRADEL) was to mediate between SUNTRACS, SINTICOPP and the enterprise Retraneq SA. This enterprise did not take part in the negotiations carried out by MITRADEL. SUNTRACS declared that a strike would take place on 11 June 2007 targeting the enterprise Retraneq SA;

- With regards the murder of trade union official Mr Osvaldo Lorenzo Pérez, in order to determine the legal actions that the judicial body of Panama as an independent organ of the executive body, and in light of the fact that offences against human life are investigated ex officio, as stated in section 1951 of the Judicial Code of the Republic of Panama, the Supreme Court of Justice was requested to report on the legal proceedings carried out. In document No. SGP-1405, of 15 September 2009, the Supreme Court of Justice stated that, through a decision of 19 May 2009, the Second Court of Justice ruled that criminal proceedings should be initiated against Jorge Morgan, Eduardo Boyte Mathews, Jorge Coronado, Rogelio Ramos and Gustavo Santimateo Jean François for the crime of the intentional homicide of Mr Osvaldo Lorenzo Pérez.
- As to the murder of Mr Luiyi Argüelles Moya, a certified report was requested of the judicial body regarding the status of the investigations. Through document No. SGP-1405 of 15 September 2009, the Second High Court of Justice, through ruling No. 299 of 11 September 2009, initiated criminal proceedings against César Garay Carmona and Manuel Moreno Asprilla for the crime of the intentional homicide of Mr Luiyi Argüelles.
- As to the murder of trade union official Mr Al Iromi Smith, on 15 September 2009, the Supreme Court of Justice reported that the Second High Court of Justice had ordered that Mr Eliseo Madrid be arrested and that precautionary measures be taken regarding Mr Miguel Ángel Pérez Ortega. The case is currently ongoing.

740. The Government states that it does not nor will it in the future in any way persecute trade union officials or members. The Panamanian State, working through the judicial body, is making progress regarding these cases and has initiated criminal proceedings against those individuals suspected of being responsible for the deaths of the abovementioned trade union officials, thus ensuring that Panama is complying with due process as regards identifying those responsible for the events outlined in the complaint. As to the request for the organizations of the employers concerned in the case to provide the views of the enterprises involved in the case, the Government refers to the communications sent by the enterprises Maqtec SA, Grupo Viveros SA and Construtora Norberto Odebrecht SA.

741. In a communication of 18 September 2009, the enterprise Construtora Norberto Odebrecht SA of Panama states that it is the largest engineering and construction enterprise in Latin America and one of the largest such enterprises in the world. It has been providing integrated services in the engineering, supply, construction, installation and management of civil, industrial and specialized technology works for 65 years. The enterprise has completed over 2,000 projects around the world, in regions as diverse as Asia, Africa, Latin America and North America and in particular in the United States. As an enterprise, Odebrecht respects the rights of the workers, the fundamental principles of labour as set out by the ILO and the enterprise's own principles, and complies with national labour standards. Before beginning work in any country, the first thing the enterprise does is to hire local specialists, in particular in the fields of law, labour, finance, accounting, etc., so that they may provide guidance regarding the fundamental aspects of law, especially concerning taxation, labour, corporations, etc. This is done in order to avoid making mistakes which could later on be interpreted as violations of national law. In all of the projects undertaken by the enterprise, including those which are ongoing, the activities of

the enterprise regarding the workers have been carried out within the legal, regulatory framework, in particular the Labour Code and collective agreements.

- 742.** In 2006, the enterprise began its first project in Panama, the construction of an irrigation system known as the Remigio Rojas project, in Chiriquí Province. This project provided Panamanian producers with an innovative irrigation system which benefitted their agricultural activities, as well as directly generating employment for over 630 workers and many other indirectly related posts. Work then began on the construction of the Madden–Colón highway and the Coastal Beltway on one of the most important avenues of the Panamanian capital, along which over 70,000 vehicles pass every day. The enterprise states that, in order to comply with Panamanian labour law, the enterprise negotiated and signed a collective agreement with SINTICOPP, a trade union organization recognized by the Ministry of Labour and which represented the majority of the workers working on the Remigio Rojas project in Chiriquí. Thus, SUNTRACS did not present any valid proof to support its allegation that freedom of association had been violated and that there was no collective agreement in place and therefore this claim is incorrect and groundless.
- 743.** As to the Madden–Colón highway, once the Government allowed work to go ahead, a dialogue was initiated with SINTICOPP, which has legal representativity regarding the country's construction workers. This negotiation process was carried out completely in accordance with legislation.
- 744.** As to the list of demands submitted by SUNTRACS to the enterprise Retraneq SA, it should be pointed out that in the same complaint it is stated that this enterprise is a subcontractor for Odebrecht. Therefore, the list of demands that SUNTRACS claims to have presented to Odebrecht later on was not attributable to that enterprise, given that the relationship with Retraneq S.A. was one of subcontractation within the normal course of activities of both enterprises and not a relationship of legal subordination and economic dependence. Odebrecht had (and has) no obligations whatsoever towards the workers of Retraneq SA, the latter enterprise having been contracted to provide specialized services.
- 745.** With regards the Coastal Beltway and New Roadway projects, a collective agreement was negotiated and signed with SUNTRACS. Therefore, it is not true to say that Odebrecht fails to respect trade union freedoms or that it does not enter into negotiations given that it did sign a contract with SUNTRACS. The enterprise adds that it is important to point out that, alongside the abovementioned projects, it has undertaken another major project which is currently ongoing. The project in question is a 115 megawatt (MW) hydroelectric project, as a part of which a collective agreement was signed with SUNTRACS. Therefore SUNTRACS' claim to the effect that Odebrecht only signed a collective agreement with the trade union with regards the Coastal Beltway project is untrue. SUNTRACS officials have access to the enterprise should they wish to discuss any issues regarding the labour–management relationship, as was made clear in the collective agreements that were signed.
- 746.** As to the allegation that Odebrecht controls SINTICOPP, this claim is both groundless and bizarre. It is difficult to understand how SUNTRACS could claim that Odebrecht controls a trade union which was established long before the enterprise began working in Panama. Moreover, two collective agreements were signed with SUNTRACS relating to various projects. If SINTICOPP were really controlled by Odebrecht then the enterprise would hardly have signed collective agreements with other trade union entities.
- 747.** As to the unfortunate death of Mr Osvaldo Lorenzo Pérez, which occurred close to the site of the Madden–Colón project and for which, according to SUNTRACS's irresponsible claims, Odebrecht is to blame: on the morning of 14 August 2007, a large group (according to the complaint, around 200) of SUNTRACS members were bussed for free to the enterprise's installation at the camping resort of Chilibre. At this time the workers there

were beginning work but they were harassed by the SUNTRACS members. The workers gathered at the building site hut. They did not seek to establish any kind of contact with the SUNTRACS members. The SUNTRACS members had travelled from various parts of the country specifically in order to carry out a “protest” in front of the enterprise’s installations. Therefore, the claim contained in the complaint to the effect that the events that occurred amounted to a “premeditated and planned action” are utterly false, given that at no time did the enterprise plan to confront the SUNTRACS members or indulge in any interference which might provoke SUNTRACS members into harassing the enterprise’s workers at Chilibre. The tragic death of the SUNTRACS member occurred in the heat of the moment. This event was investigated by the competent authorities (the Office of the Public Prosecutor) and the enterprise has cooperated fully with every request made of it. Odebrecht has at all times worked closely with the national police, the Office of the Public Prosecutor and the judicial body in order to uncover the facts.

- 748.** Finally, the enterprise states that the complaint contains subjective claims made by SUNTRACS which neither the enterprise nor any authority which is not the judicial body are competent to make.
- 749.** In its capacity as the developer of the Isla Viveros project, the enterprise Grupo Viveros SA signed a civil works contract with the construction enterprise Maqtec SA for the construction of various works within the Isla Viveros project. Maqtec SA signed a four-year (2006–10) collective agreement with SINTICOPP on 27 October 2006. This agreement was registered by the Department for Labour Relations on 31 October 2006. On 11 January 2007, SUNTRACS submitted a list of demands to the General Labour Directorate of the Ministry of Labour and Labour Development. The first point of the list established the following: Claims. “1. That the enterprise, given that no collective agreement exists, should be obliged to negotiate the list of claims and thus grant a collective labour agreement between SUNTRACS and Maqtec SA”. The enterprise states that in light of this situation it is clear that the first request on the list together with the other claims were groundless, given that the enterprise Maqtec SA had already signed a collective agreement with another trade union in 2006 for a duration of four years.
- 750.** The enterprise states that the law clearly points out that a new collective agreement may only be signed with the enterprise if there is no pre-existing agreement in force or if the previous agreement has expired. Because of this situation the list of charges followed its course until a strike was called, illegally as it happens given that when voting on strike action took place SUNTRACS did not have enough workers to declare the strike legal as established by section 448 of the Labour Code. In this case they did not have the majority necessary to declare a legal strike. Thus, an arbitration process was initiated. The list was filed through an arbitration award of 26 March 2007.
- 751.** The enterprise adds that on 2 July 2007 SUNTRACS submitted a new list, with SINTICOPP submitting another one on 7 June 2007. The Ministry of Labour and Labour Development of Panama, acting on behalf of the General Labour Directorate of Panama, ruled that SINTICOPP (which at the time had the largest number of members working on the site) was the competent party with regards negotiations concerning the lists. SUNTRACS called a strike as of 29 June 2007. Events came to a head on that Thursday, with SUNTRACS members provoking and confronting worker members of SINTICOPP on various occasions. As a result, complainant No. CL06607 was submitted to the Office of the Public Prosecutor by Maqtec SA. The enterprise states that, owing to the insecurity and vandalism that affected the project, homeowners in Panama at the time could not access their properties.
- 752.** As a result of the events linked to the strike affecting the workers on the Maqtec SA site, houses Nos 13 and 14 were completely vandalized. According to information received, a

SUNTRACS protestor died during a clash with members of the police force on the site of the Isla Viveros project in the Las Perlas archipelago. The deceased was Mr Luiyi Argüelles, a SUNTRACS member, who, as far as we know, was responsible for mobilizing protesters and belonged to the shock unit within the project. He was not on the staff of any of the enterprises or suppliers involved in the project.

- 753.** The enterprise states that the Isla Viveros project is a special tourist project. It is situated on an island far from the mainland which has 35 km of beach and coastline that can be landed on at any point. The conflict in question was not limited to the area in and around the construction site. SUNTRACS took over the entire island by force. This island is private property, with full title of ownership, and in this case the fundamental guarantees provided for in the Constitution were violated. SUNTRACS submitted a criminal complaint against the head of the Panamanian national police force and those police officers present on the day the events took place. The same complaint incriminated the director of the Isla Viveros project (checks later carried out showed that he was not involved in the unfortunate events of 16 August 2007). As a result of this conflict, SUNTRACS and its regional branches at a provincial level held constant protests in the various provincial capitals with the aim of pressuring the enterprise into signing a collective agreement. Following negotiations and dialogue, Maqtec SA and SUNTRACS signed an agreement on 7 October 2007 in order to calm the situation and get work on the Isla Viveros project back on track. The project is now under way again and relations with SUNTRACS are the best in the country. It should be pointed out that the case of the police officers who were unfortunately involved in the death of Mr Luiyi Argüelles is before the Second High Court of Justice of Panama, with the charges currently being specified.
- 754.** The enterprise Maqtec SA sent a communication reiterating the statements made by Grupo Viveros SA.
- 755.** In its communication of 12 April 2010, the Government states that the Second High Court of Justice issued ruling No. 5-P-I, concerning the cases of Jorge Morgan Melchor, Rogelio Ramos Camargo and Miguel Ángel Ibarra, accused of the murder of Mr Osvaldo Lorenzo, a SUNTRACS member, on 18 March 2010. Under this ruling, Jorge Morgan Melchor and Miguel Ángel Ibarra were sentenced to 25 years in prison and barred from exercising public functions for a period of five years once their prison sentences had been completed. Moreover, Mr Rogelio Ramos was sentenced to 20 years in prison and barred from exercising public functions for five years. The Government reports that the cases concerning the murders of Mr Luiyi Argüelles and Mr Al Iromi Smith, members of SUNTRACS, are currently being examined by the courts and that it will provide information on any progress made in this regard.

C. The Committee's conclusions

- 756.** *The Committee observes that in the present case the complainant organizations allege murders, assaults, acts of violence against trade union officials and members and mass detentions of protestors, as well as violations of the right to collective bargaining, the establishment of a trade union by an enterprise and anti-union dismissals.*
- 757.** *As to the allegations regarding murders and other acts of violence against trade union officials and members and mass detentions of protestors in the construction sector, the Committee observes with concern that the complainant organizations refer to:*
- *The murder of SUNTRACS trade union official Mr Osvaldo Lorenzo Pérez, on 14 August 2007, during a demonstration at the Panama–Colón highway construction site, a project being run by the enterprise Odebrecht (according to the complainant, hired thugs and criminals in the pay of the enterprise used firearms against*

SUNTRACS members); and the injuries suffered by trade union officials Mr David Niño, a member of the SUNTRACS executive committee, and the secretary for finances of CONUSI, Mr Eustaquio Méndez;

- *The murder of trade union official Mr Luiyi Antonio Argüelles Moya on 16 August 2007 by a sergeant of the national police during a demonstration at the site of Maqtec SA’s Isla Viveros project; and the detention of the SUNTRACS press and communications secretary, Mr Raimundo Garcés.*
- *The murder of SUNTRACS official Mr Al Iromi Smith, the incident in which Donaldo Pinilla and Félix de León were attacked by police officers using firearms on 12 February 2008 while they were taking part in a peaceful demonstration as part of a national strike and the arrest of and imposition of fines on over 500 workers who were protesting as a result of the death of the trade union official.*
- *The violent repression and arrest by the police of 224 workers (including 47 members of SUNTRACS) participating in a demonstration on 16 March 2010 and the imposition of fines on the abovementioned workers.*
- *The submission by the Government of a bill establishing that job applicants must provide their “police records” (proving that they do not have a criminal record) prior to obtaining employment, which, in the view of the complainants, is an attempt to punish those having participated in the demonstrations.*

758. *The Committee notes the Government’s statement to the effect that: (1) as regards the legal proceedings concerning the murder of Mr Osvaldo Lorenzo Pérez, the Second High Court of Justice issued a ruling condemning Jorge Morgan and Miguel Ángel Ibarra to 25 years in prison and barring them from exercising public functions for a period of five years once their prison sentences had been completed. Moreover, Mr Rogelio Ramos was sentenced to 20 years in prison and barred from exercising public functions for five years; (2) the cases concerning the murders of Mr Luiyi Argüelles and Mr Al Iromi Smith are currently being examined by the courts and that it will provide information on any progress made in this regard.*

759. *Moreover, the Committee notes that, as regards the death of Mr Osvaldo Lorenzo Pérez, the enterprise Odebrecht states that: (a) on 14 August 2007, 200 SUNTRACS members demonstrated outside the enterprise’s installations, harassing workers who were beginning their working day; (b) it was during these events that the death of the trade union official occurred, and (c) at no time did the enterprise confront the SUNTRACS members. Furthermore it has cooperated fully with the national police, the Office of the Public Prosecutor and the judicial authority in order to establish the facts. Moreover, the enterprises Grupo Viveros SA and Maqtec SA state as regards the death of Mr Luiyi Argüelles that: (i) SUNTRACS declared a strike on 29 June 2007 during which acts of provocation and confrontation were perpetrated against workers belonging to another trade union; (ii) as a result of the violence, the homes of some of the enterprise’s workers were destroyed; (iii) the death of Mr Luiyi Argüelles, who was not employed by either of the enterprises, occurred during the events in question; (iv) an investigation showed that the director of the Isla Viveros project did not take part in the violence and the project is currently under way, with relations with SUNTRACS being much improved, an agreement having been signed with the trade union on 7 October 2007; and (v) the Second High Court of Justice of Panama is investigating the participation of those police officers involved in the death of Mr Luiyi Argüelles.*

760. *The Committee, although taking note of the efforts made to arrest and convict those responsible for the murder of Mr Osvaldo Lorenzo Pérez, deeply regrets the alleged acts of violence, regrets that the investigations aimed at identifying and punishing the culprits*

have yet to be concluded and recalls that a genuinely free and independent trade union movement cannot develop within the construction sector in a climate of violence which gives rise to the murder of trade union officials and assaults on trade union members. The Committee firmly expects that the ongoing investigations into the murders of Mr Luiyi Argüelles and Mr Al Iromi Smith will be concluded without delay and that those responsible for the events in question will consequently be punished and requests the Government to inform it of any rulings issued in this regard. Moreover, the Committee urges the Government without delay to send its observations regarding the following allegations: (1) the injuries suffered by trade union officials Mr David Niño, a member of the SUNTRACS executive committee, and the secretary for finances of CONUSI, Mr Eustaquio Méndez, on 14 August 2007; (2) the detention of SUNTRACS press and communications secretary, Mr Raimundo Garcés; (3) the incident in which police officers attacked workers Donaldo Pinilla and Félix de León using firearms on 12 February 2008 while they were taking part in a peaceful demonstration as part of a national strike and the arrest of and imposition of fines on over 500 workers who were protesting as a result of the death of the trade union official Mr Al Iromi Smith; (4) the violent repression and arrest by the police of 224 workers (including 47 members of SUNTRACS) participating in a demonstration on 16 March 2010 and the imposition of fines on the abovementioned workers; and (5) the submission by the Government of a bill establishing that job applicants must provide their “police records” (proving that they do not have a criminal record) prior to obtaining employment which, in the view of the complainants, is an attempt to punish those having participated in the demonstrations.

- 761.** As to the allegations regarding the establishment of a trade union by the enterprise Odebrecht at the site of the Madden–Colón highway project, the signing of a “false” collective agreement with the abovementioned trade union, the dismissal of over 100 workers belonging to SUNTRACS for having refused to join the trade union established by the enterprise and the refusal of the enterprise Retraneq SA (a subcontractor for Odebrecht, according to the complainants) to negotiate a list of claims submitted by SUNTRACS, the Committee notes that the Government states that: (1) through Resolution No. 171-DGT-RT-07, of 31 July 2007, the administrative authority ruled that SINTICOPP was responsible for negotiating lists of claims with the enterprise Retraneq SA; (2) Retraneq SA signed an agreement regarding the Madden–Colón project and, as a consequence, the Ministry of Labour and Labour Development attempted to mediate between SUNTRACS, SINTICOPP and the enterprise Retraneq SA, but the enterprise did not participate, and (3) SUNTRACS called for strike action affecting the enterprise Retraneq SA.
- 762.** The Committee also notes that the Government sent the observations transmitted by the enterprise Odebrecht in which it states that: (1) in compliance with legislation, the enterprise negotiated and signed a collective agreement with SINTICOPP, a trade union organization recognized by the Ministry of Labour which represented the majority of the workers; (2) this enterprise does not control SINTICOPP, a body which was established long before the enterprise began operating in Panama; (3) the list submitted by SUNTRACS to the enterprise Retraneq SA was not attributable (that is to say relevant) to that enterprise, given that the relationship between the enterprises is not one of legal subordination and economic dependence, and; (4) the enterprise has signed collective agreements with SUNTRACS regarding other construction projects, with the officials of the trade union having access to the enterprise should they wish to discuss any issues regarding the labour–management relationship.
- 763.** In these conditions, the Committee requests the Government to take promptly the necessary measures to carry out an investigation without delay regarding the allegations concerning the dismissal of over 100 workers belonging to SUNTRACS owing, according to the complainant, to their refusal to join another trade union established by the enterprise and

to inform the Committee of the results of this investigation and, given that the allegations date back to 2007, to report on the current state of labour relations between the enterprises concerned and the trade unions in the construction sector.

The Committee's recommendations

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

- (a) The Committee firmly expects that the ongoing investigations into the murders of Mr Luiyi Argüelles and Mr Al Iromi Smith will be concluded without delay and that those responsible for the events in question will consequently be punished and requests the Government to inform it of any rulings issued.*
- (b) The Committee urges the Government without delay to send its observations regarding the following allegations: (1) the injuries suffered by trade union officials Mr David Niño, a member of the SUNTRACS executive committee, and the secretary for finances of CONUSI, Mr Eustaquio Méndez, on 14 August 2007; (2) the detention of SUNTRACS press and communications secretary, Mr Raimundo Garcés; (3) the incident in which police officers attacked workers Messrs Donald Pinilla and Félix de León using firearms on 12 February 2008 while they were taking part in a peaceful demonstration as part of a national strike and the arrest of and imposition of fines on over 500 workers who were protesting as a result of the death of the trade union official Mr Al Iromi Smith; (4) the violent repression and arrest by the police of 224 workers (including 47 members of SUNTRACS) participating in a demonstration on 16 March 2010 and the imposition of fines on the abovementioned workers, and; (5) the submission by the Government of a bill establishing that job applicants must provide their "police records" (proving that they do not have a criminal record) prior to obtaining employment, which, in the view of the complainants, is an attempt to punish those having participated in the demonstrations.*
- (c) The Committee requests the Government to take promptly the necessary measures to carry out an investigation without delay regarding the allegations concerning the dismissal of over 100 workers belonging to SUNTRACS owing to their refusal to join another trade union allegedly established by the enterprise Odebrecht and to inform the Committee of the results of this investigation and, given that the allegations date back to 2007, to report on the current state of labour relations between the enterprises concerned and the trade unions in the construction sector.*
- (d) The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2648

INTERIM REPORT

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

- **the Trade Union of Workers and Employees of Cañas Paraguayas SA (SOECAPASA)**
- **the General Confederation of Workers (CGT)**
- **the Trade Union Confederation of Workers of Paraguay (CESITEP) and**
- **the Paraguayan Confederation of Workers (CPT)**

Allegations: the complainant organizations allege anti-union dismissals and transfers, as well as acts of violence against one woman member

765. The Committee last examined this case at its meeting in November 2009, when it presented an interim report to the Governing Body [see 355th Report, paras 654–963]. At its meeting in June 2010, the Committee made an urgent appeal to the Government and drew its attention to the fact that in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body at its 184th Session in November 1971, it could present a report on the substance of the case at its next meeting, even if it had not received the information or observations of the Government in due time. To date, no information has been received from the Government.

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

A. Previous examination of the case

767. The Committee recalls that at its meeting in November 2009, when examining the allegations of anti-union dismissals and transfers, as well as acts of violence against one woman member during a peaceful demonstration, it made the following recommendations [see 355th Report, para. 963]:

- (a) The Committee requests the Government to take the necessary measures to initiate an investigation into the alleged dismissals of the other two trade union officials, the transfer of SOECAPASA general secretary, Gustavo Acosta, and the mass transfer of workers following peaceful demonstrations held in order to inform the general public of the company's situation. The Committee requests the Government to keep it informed of developments in this regard. It also requests the Government, in consultation with the social partners, to ensure effective national procedures for the prevention and sanctioning of anti-union discrimination.
- (b) The Committee requests the Government to keep it informed with regard to the investigation carried out following the complaint lodged with the national police concerning the assault against Juana Erenio Penayo.

B. The Committee's conclusions

- 768.** *The Committee deeply regrets that, despite the time that has elapsed since the last examination of the case and given the seriousness of the alleged acts (dismissals of trade union leaders and mass transfers – including that of the general secretary of a trade union – for participating in peaceful demonstrations, and the assault of a woman worker during the demonstration), the Government has not provided the information requested, despite being urged to provide its observations or information regarding the case on a number of occasions, including by means of an urgent appeal. Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had hoped to receive from the Government.*
- 769.** *The Committee reminds the Government that the purpose of the whole procedure is to ensure respect for trade union freedoms both in law and in fact; this Committee is therefore convinced that, as the procedure protects governments from unreasonable accusations, governments on their side should recognize the importance of formulating, for objective examination, detailed replies concerning the substance of the allegations made against them [see First Report of the Committee, para. 31]. The Committee expects that in the future the Government will actively cooperate by providing the information or observations requested.*
- 770.** *Under these circumstances, the Committee finds itself obliged to reiterate the recommendations it made when it examined this case at its meeting in November 2009 [see 355th Report, para. 963].*

The Committee's recommendations

- 771.** *In the light of its foregoing interim conclusions, the Committee again invites the Governing Body to approve the following recommendations:*
- (a) The Committee deeply regrets that the Government has not provided the information requested or adopted the measures requested, and requests the Government to actively cooperate in the procedure in the future.*
 - (b) The Committee again urges the Government to take the necessary measures to initiate without delay an investigation into the alleged dismissals of the other two trade union officials, the transfer of SOECAPASA general secretary, Gustavo Acosta, and the mass transfer of workers following peaceful demonstrations held in order to inform the general public of the company's situation. The Committee requests the Government to keep it informed of developments in this regard. It also requests the Government, in consultation with the social partners, to ensure effective national procedures for the prevention or sanctioning of anti-union discrimination.*
 - (c) The Committee again urges the Government to keep it informed with regard to the investigation carried out following the complaint lodged with the national police concerning the assault against the worker, Juana Erenio Penayo.*

CASE NO. 2594

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

**Complaint against the Government of Peru
presented by
the Latin American Central of Workers (CLAT)**

***Allegations: The complainant organization
alleges dismissals, threats of dismissal and other
acts of intimidation following the establishment
of a trade union at Panamericana Televisión SA
(now called Panam Contenidos SA)***

772. The Committee examined this case at its June 2009 meeting, when it submitted an interim report to the Governing Body [see 354th Report, paras 1064–1085, approved by the Governing Body at its 305th Session (June 2009)].

773. The Government sent additional observations in communications dated 27 May 2009 and 20 October 2010.

774. 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

775. At its June 2009 meeting, the Committee made the following recommendations [see 354th Report, para. 1085]:

- The Committee once again urges the Government to take measures without delay so that a thorough investigation takes place at Panam Contenidos SA with regard to the alleged dismissals, transfers and other anti-union acts that have reportedly been carried out since the establishment of the trade union, and to inform it of the outcome of that investigation. Furthermore, the Committee requests the Government, if the allegations in question are shown to be valid, to take the necessary measures to ensure that the workers who were dismissed and redeployed for anti-union reasons are reinstated in their posts and paid the wages and other benefits owed to them, and that the fines for such violations are significantly increased so as to constitute sufficiently dissuasive sanctions.
- The Committee requests the Government to keep it informed of the various procedures and actions under way to ensure that the company fulfils its legal obligations as regards labour and trade union matters in relation to the present case.

B. The Government's reply

776. In its communication dated 27 May 2009, the Government repeats what it said in earlier communications that the Committee took into account when it examined the case in June 2009. The Government adds that the Fifth Sub-Directorate of the Labour Inspectorate addressed memorandum No. 016-2009-MTPE/2/12.350 dated 16 February 2009 to the labour inspector working on this case. The Government states that the Ministry of Labour and Employment Promotion is still conducting investigations into the incidents alleged by

the employees of Panam Contenidos SA; the ILO would be informed of their findings in due course.

777. In its communication of 20 October 2010, the Government indicates that: (1) the report of the Regional Directorate of Labour and Employment Promotion of Lima-Callao concludes, following an inspection conducted at the company, that no breach of labour standards has been revealed; (2) the final report prepared by the authorized inspectors indicates that a new administration, which respects the labour rights, now heads the company. The offences referred to in the complaint were committed by the former administration; and (3) judicial proceedings concerning the dismissal of workers Maria Eliza Vilca Peralta, Ana Maria Sihuay Parodi, Carmen Rosa Mora Silva and Liliana Jesús Sierra Farfán are ongoing.

C. The Committee's conclusions

778. *The Committee recalls that, when it examined the case at its June 2009 meeting, it urged the Government to take measures without delay so that a thorough investigation was conducted at Panam Contenidos SA with regard to the alleged dismissals, transfers and other anti-union acts that had reportedly been carried out since the establishment of a trade union, and to inform it of the outcome of that investigation. It requested the Government to keep it informed of the steps being taken to ensure that the company fulfils its legal obligations as regards labour and trade union matters in relation to the present case [see 354th Report, para. 1085].*

779. *In this regard, the Committee notes the information provided by the Government that: (1) the report of the Regional Directorate of Labour and Employment Promotion of Lima-Callao concludes, following an inspection conducted at the company, that no breach of labour standards has been revealed; (2) the final report prepared by the authorized inspectors indicates that a new administration, which respects the labour rights, now heads the company. The offences referred to in the complaint were committed by the former administration; and (3) judicial proceedings concerning the dismissal of workers Maria Eliza Vilca Peralta, Ana Maria Sihuay Parodi, Carmen Rosa Mora Silva and Liliana Jesús Sierra Farfán are ongoing. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings in question. The Committee requests the Government, if the dismissals in question are proven to be illegal, to take the necessary measures to ensure that the workers who were dismissed and redeployed for anti-union reasons are reinstated in their posts and paid the wages and other benefits owed to them, and that the fines for such violations are significantly increased so as to constitute sufficiently dissuasive sanctions.*

The Committee's recommendation

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

The Committee requests the Government to keep it informed of the outcome of the judicial proceedings concerning the dismissed workers. The Committee also requests the Government, if the dismissals in question are proven to be illegal, to take the necessary measures to ensure that workers who were dismissed and redeployed for anti-union reasons are reinstated in their posts and paid the wages and other benefits owed to them, and that the fines for such violations are significantly increased so as to constitute sufficiently dissuasive sanctions.

CASE NO. 2661

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

Complaint against the Government of Peru presented by

- **the Union of Agricultural Public Sector Workers (SUTSA) and**
- **the Federation of Trade Union of Agricultural Public Sector Workers (FESUTSA)**

Allegations: The complainant organizations allege refusal to grant union leave and the subsequent dismissal of a trade union official; they also object to a number of legislative provisions which, in their view, violate the principles of freedom of association

- 781.** The Committee examined this case at its November 2009 meeting, when it submitted an interim report to the Governing Body [see 355th Report, paras 1053–1067, approved by the Governing Body at its 306th Session (November 2009)].
- 782.** The Government forwarded its new observations in a communication dated 20 October 2010.
- 783.** 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. Previous examination of the case

- 784.** In its previous examination of the case at its November 2009 meeting, the Committee made the following recommendation on the issues that were still pending [see 355th Report, para. 1067]:
- (a) The Committee trusts that the judicial authority will give a ruling in the near future on the dismissal of Mr Offer Fernando Ñaupari Galarza, the General Secretary of the SUTSA national executive committee, and requests the Government to keep it informed in this regard, and to inform it of the outcome of any other legal proceedings relating to this allegation.
 - (b) The Committee urges the Government to communicate without delay its observations on the allegations made by the FESUTSA, which has raised objections to a number of legislative provisions which, in its view, violate the principles of freedom of association and facilitate mass dismissals in the public sector resulting in the dismantling and demise of trade unions.

B. The Government's reply

- 785.** In its communication dated 20 October 2010, the Government states that the National Civil Service Authority has provided information indicating that: (1) legislation challenged by the complainant is intended to modernize the State and its effectiveness; and (2) contrary to the complainant's assertion – the general legislation on trade union rights, including rights to collective bargaining and to strike, applies to the civil servants concerned because

the criticized legislation does not regulate these issues and does not mention trade union rights. On the other hand, there are no grounds to affirm that the laws challenged by the complainant restrict the participation of workers' representatives before the adoption of standards or taking measures. Regarding this aspect of human resources, article 3 of Supreme Decree No. 009-2010-PCM applies.

786. Finally, concerning information requested with regard to the judicial proceedings concerning the dismissal of the General Secretary of the national executive committee of the Union of Agricultural Public Sector Workers (SUTSA), Mr Offer Fernando Ñaupari Galarza, the Government indicates that the Transitional Labour Court of Huancayo declared the request presented by this trade union leader inadmissible. The Government also indicates that it will forward a copy of the decision. Regarding the appeal, filed by the same trade union leader on the non-recognition of trade union leave, it was rejected by various courts including the Constitutional Court.

C. The Committee's conclusions

787. *The Committee recalls that in the present case the allegations concern: (1) obstacles in granting union leave to a trade union official and his subsequent dismissal, and (2) the violation of the principles of freedom of association by a number of legislative provisions.*

788. *Regarding the first allegation, the Committee noted the Government's statement that it was awaiting information that it had requested from the judicial authority regarding the dismissal of Mr Offer Fernando Ñaupari Galarza, General Secretary of the national executive committee of the Union of Agricultural Public Sector Workers (SUTSA). The Committee notes the Government's statement that the Transitional Labour Court declared the appeal filed by the abovementioned trade union leader inadmissible and that it will forward a copy of the decision. Regarding the appeal, filed by the same union leader on the non-recognition of trade union leave, it was rejected by various courts including the Constitutional Court.*

789. *Regarding the allegations of the Federation of Trade Union of Agricultural Public Sector Workers (FESUTSA) raising objections to a number of legislative provisions which, in its view, violate the principles of freedom of association and facilitate mass dismissals in the public sector resulting in the dismantling and demise of trade unions, the Committee notes the information from the National Civil Service Authority transmitted by the Government. The Committee will examine the relevant legislative provisions below in light of this information.*

790. *The Committee notes the allegation that Legislative Decree No. 1023 establishing the National Civil Service Authority does not provide for trade union representation on its executive board. It observes that the Authority is responsible, inter alia, for "planning and formulating human resources policies in the civil service, organizing the performance and distribution of work, etc." (article 10(a) of the aforementioned decree). Similarly, the principal functions of the executive board are "to establish standards by means of general resolutions and directives and to approve overall policy" (article 16(a) and (b) of the decree). On this point, the complainant organization alleges that Decree No. 1025 approving the training and performance standards for the civil service contains no provision for the presence of union representatives. The Committee confirms that the decree does not refer to any consultation of union representatives in connection with the training and assessment of personnel in the service of the State. The Committee notes that in its response, the Government indicates that under Supreme Decree No. 009-2010-PCM to develop the Plan for development of people at the service of the State, the competent authority must integrate a committee comprising a representative of senior management, a*

representative of the office responsible for budget, a representative of the office of human resources and a staff representative elected by it.

- 791.** *The Committee stresses how important it is that national human resources policies in the public service, including vocational training arrangements, be drawn up in consultation with the most representative trade union organizations. It has previously emphasized the importance it attaches to the promotion of dialogue and consultations on matters of mutual interest between the public authorities and the most representative occupational organizations of the sector involved [see **Digest**, op. cit., para. 1067]. The Committee suggests that the Government initiate a dialogue with the most representative organizations of the public sector on the possible establishment of consultation machinery. It requests the Government to keep it informed on the subject.*
- 792.** *The Committee notes the allegation that Legislative Decree No. 1024, which establishes and governs the terms of reference of managers in the public service, does not provide for the right to organize, take strike action or engage in collective bargaining. The Committee notes the information provided by the National Civil Service Authority according to which the legislative decree does not regulate the rights of workers covered by it, precisely because these workers are subject to general legislation applicable to public servants, including as regards the rights of collective bargaining and strike. It observes that article 24 of the Civil Service Act (Legislative Decree No. 276) stipulates that “the rights of civil servants shall include (ll) the establishment of trade unions in accordance with the law and (m) the power to take strike action as determined by the law”. Furthermore, articles 120 and 122 of the regulations issued under that Act (Supreme Decree No. 005-90-PCM) provide for the right for civil servants to join trade unions and for union leaders to be their legal representatives. It is the Committee’s understanding that the Civil Service Act applies also to managers in the public service, and it requests the Government to clarify the matter.*
- 793.** *The Committee notes the allegation that Legislative Decree No. 1026, which provides for special optional arrangements for regional and local governments wishing to modernize their entire institutional procedures, is designed so as to eliminate the institution of trade unions by doing away with the right to stable employment. The Committee observes that, under its second heading, the said decree provides for the possibility of transferring human resources from the national to the regional government as part of a process of decentralization. The Committee recalls that transfers of employees for reasons unconnected with their trade union affiliation of activities are not covered by Article 1 of Convention No. 98. The Committee also observes that, according to the Government, workers covered by Decree No. 1026 are also subject to general legislation (which contains provisions and penalties for anti-union discrimination).*
- 794.** *The Committee also notes the allegation that Executive Resolution No. 1159-2005-MTC/11 governing the assistance and continuance of personnel of the Ministry of Transport and Regional Executive Resolution No. 000480-2008-GR-JUNIN governing the assistance and continuance of government employees of Junín restrict the freedom of action of union leaders in the performance of their union duties. On the subject of leave for purposes of union representation, the Committee notes that both resolutions stipulate that duly justified leave in the course of a month may not exceed one working day, save in cases of urgent and clearly established need (articles 58 and 36, respectively). It is the Committee’s understanding that these resolutions modify the previous system of union leave, as claimed by the complainant organization, and that this is an issue that could be resolved in the framework of collective bargaining. The Committee refers to Article 6 of Convention No. 151, which has been ratified by Peru, which states: “1. Such facilities shall be afforded to the representatives of recognized public employees’ organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently,*

both during and outside their hours of work. 2. The granting of such facilities shall not impair the efficient operation of the administration or service concerned.” The Committee calls on the Government to initiate a dialogue in order to seek a negotiated solution to the problem of trade union leave, bearing in mind that, in certain major public bodies, restricting such leave to one day a month is perhaps not sufficient to allow union representatives to carry out their functions properly.

795. Furthermore, regarding the allegation that regional Executive Resolution No. 000480-2008-GR-JUNIN prohibits all forms of trade union activity within the premises of the institution, the Committee notes that the complainant organization draws attention to the first article of Chapter VIII, which prohibits the conduct by civil servants of activities that are unrelated to their duties during or outside the working day within the premises of the institution and stipulates that any festivities that may be planned must be held outside normal working hours for attending to the public. The Committee notes the Government’s statements that the officials concerned are subject to general legislation on trade union rights. The Committee requests the Government to indicate whether the provision mentioned by the complainant organization entails a ban on the conduct of union activities at the place of work even when they have been authorized by the employer or are provided for in collective agreements.

796. Regarding the last allegation, to the effect that Legislative Decree No. 1057 governing special arrangements for the administrative service contract system does not allow for the right to organize, the Committee observes that the complainant organization merely mentions the fact. However, the Committee points out that the fact that the decree does not refer to the right to organize does not mean that civil servants recruited under these arrangements are denied this right. The Committee observes that the Government’s reply does not specifically refer to this issue. It recalls that the matter is under examination by the authorities, as noted in the conclusions reached by the Committee in Case No. 2687:

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. ... 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. [See 357th Report, Case No. 2687 (Peru), paras 885 and 890.]

The Committee firmly expects that the authorities will very soon resolve this matter and requests the Government to keep it informed in this respect.

The Committee’s recommendations

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

(a) The Committee suggests that the Government initiate a dialogue with the most representative occupational organizations of the public sector on the possible establishment of consultation machinery with regard to the human resources policy. The Committee requests the Government to keep it informed on the subject.

- (b) *The Committee calls on the Government to initiate a dialogue in order to seek a negotiated solution to the problem of trade union leave, bearing in mind that, in certain major public bodies, restricting such leave to one day a month is perhaps not sufficient to allow union representatives to carry out their functions properly.*
- (c) *The Committee requests the Government to indicate whether the first article of Chapter VIII of regional Executive Resolution No. 000480-2008-GR-JUNIN entails a ban on the conduct of union activities at the place of work even when they have been authorized by the employer or are provided for in collective agreements.*
- (d) *The Committee firmly expects that the authorities will very soon resolve the matter of the right of personnel employed under the administrative service contract system to join trade unions, and it requests the Government to keep it informed of developments.*

CASE No. 2724

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

**Complaint against the Government of Peru
presented by
the National Union of State Health Service Nurses (SINESSS)**

Allegations: The complainant organization alleges non-compliance with the collective agreement concluded with the State Health Service (ESSALUD), objects to the decision by ESSALUD to refund to union members the amounts deducted for union dues, using union funds for this purpose, and alleges that ESSALUD imposed sanctions on two union leaders for making statements to the press

- 798.** The complaint is contained in a communication from the National Union of State Health Service Nurses (SINESSS) dated 18 May 2009. SINESSS sent new allegations in communications dated 21 August and 13 October 2009.
- 799.** The Government sent its observations in communications dated 17 November 2009, 25 May and 20 October 2010.
- 800.** 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

- 801.** In its communication of 18 May 2009, SINESSS alleges non-compliance with a collective agreement concluded with the State Health Service (ESSALUD). The complainant organization indicates that ESSALUD is a public body attached to the Ministry of Labour and Employment Promotion that offers coverage to policy holders and their dependants through the provision of preventive, supportive and restorative health-care benefits and economic and social benefits under the contributory social health insurance scheme in Peru. SINESSS is a primary-level trade union organization which is duly entered and recorded in the register of trade union organizations of public servants of the Ministry of Labour, assembling and representing 8,000 nurses who work across the entire network of ESSALUD health establishments in all regions of Peru.
- 802.** On 16 February 2002, the Government of Peru promulgated Act No. 27669 (the Nursing Act) and on 22 June 2002 it approved, through the Ministry of Health and by Supreme Decree No. 004-2002-SA, the regulations relating to Act No. 27669. These legal standards (section 19 of Act No. 27669 and section 17 of Supreme Decree No. 004-2002-SA, respectively) provided that and imposed regulations to the effect that the time spent on handovers (nursing reports) forms part of a nurse's daily working hours. Prior to the promulgation of Act No. 27669 and its regulations as approved by Supreme Decree No. 004-2002-SA, nurses in all nursing positions were required at the end of a shift to spend time not considered to be part of the working hours on a change-of-shift handover, which would take 20–30 minutes and was intended to relay information on the status of the patients, equipment and property entrusted to their care during their time in a given department or work position, known as a “nursing report”. As this time was not considered to be part of the working day, this meant, in practice, that nurses were required to work hours in excess of those established by law, without these even being considered as overtime, which, in practice, constituted an act of discrimination with regard to other workers. This situation was corrected by the abovementioned legal provisions.
- 803.** The complainant organization indicates that, during the collective bargaining process carried out in 2005, ESSALUD and SINESSS concluded a collective agreement on 26 May, comprising 22 points settling matters relating to the pay and working conditions of ESSALUD nurses. Point 9 of this agreement provided for the recognition of a 20-minute period for handover purposes (nursing report) in accordance with the provisions of section 19 of Act No. 27669 and section 17 of Supreme Decree No. 004-2002-SA. The collective agreement in question was approved by ESSALUD's highest authority on 2 June 2005, by Executive Board Decision No. 390-PE-ESSALUD-2005. As a result of the collective agreement, the recognition of a 20-minute handover period as part of a nurse's daily working hours has applied with effect from 16 February 2002 (when Act No. 27669 entered into force), as reflected in point 9 of the collective agreement; this continues to apply to date.
- 804.** In implementing the collective agreement, and pursuant to the provisions of section 2 of Decision No. 390-PE-ESSALUD-2005, the general management of ESSALUD issued circular letter No. 058-GG-ESSALUD-2005 dated 8 September 2005. In this document, it is stated that: “As specified in letter No. 6252-GDP-ESSALUD-2005, given that the criteria established in the Act in question and its regulations (in reference to Act No. 27669 and Supreme Decree No. 004-2002-SA) include information not only with regard to patients, but also with regard to property and handovers between professionals, all nursing positions shall require a reporting system, taking into account that nurses other than those who take over outpatient care must submit a nursing report to the department head, supervisor or coordinator, as appropriate, and/or to the professional responsible for the establishment.” Similarly, by circular letter No. 57-GG-ESSALUD-2006, dated 13 November 2006, the general management of ESSALUD specified that letter

No. 058 GG-ESSALUD-2005 remained applicable. The complainant organization indicates that, nevertheless, on 4 March 2009, ESSALUD issued Decision No. 217-GG-ESSALUD-2009, by which it approved Directive No. 002-GG-ESSALUD-2009 “Guidelines for preparing care schedules for health workers with and without professional qualifications in the care centres of the social health insurance system (ESSALUD)”. Section XIII of this directive, on nursing staff, states in paragraph XIII.3 that “the nursing report (20 minutes) is given within working hours and in the inpatient and intensive care departments ...”.

- 805.** According to SINESSS, through the abovementioned provision, ESSALUD has violated the collective agreement concluded with SINESSS by unilaterally limiting the recognition of a 20-minute handover period as part of the working day only to nurses who work in inpatient and intensive care departments, while point 9 of the collective agreement and circular letter No. 058-GG-ESSALUD-2005, dated 8 September 2005, implementing it, provide that the recognition of a 20-minute handover period (nursing report) as part of the working day is applicable for all nursing positions. This has meant the exclusion of nurses who work in the outpatient departments of health establishments and the reintroduction of working hours longer than those established by law for this group of nurses, which is illegal and discriminatory. This situation had been corrected and rectified by Act No. 27669 and its regulations (Supreme Decree No. 004-2002-SA), under which agreement was reached on point 9 of the collective agreement between ESSALUD and SINESSS.
- 806.** The application of paragraph XIII.3 of Directive No. 002-GG-ESSALUD-2009 means in practice that nurses who work in outpatient departments have a working day of six hours and 20 minutes, which added together make a working week of 37 hours and 20 minutes and, consequently, a working month of 156 hours, which is in violation of the provisions of section 17 of Act No. 27669 (the Nursing Act) and its regulations as approved by Supreme Decree No. 004-2002-SA under which the nurses’ working hours shall not exceed 36 hours per week or the equivalent of 150 hours per month.
- 807.** According to the complainant organization, it should be noted that, in accordance with point 9 of the collective agreement concluded between ESSALUD and SINESSS and the additional ratifying documents issued by ESSALUD from 2005 to date, a 20-minute handover period has been recognized as being part of the working day for nurses in all nursing positions, without exception, in the health establishments operated by ESSALUD, and for this reason the issuance of Directive No. 002-GG-ESSALUD-2009 and, in particular, its paragraph XIII.3 is a blatant violation of the collective agreement. In these circumstances, SINESSS submitted a complaint to the Chief Executive of ESSALUD and the Minister of Labour, requesting the annulment of Directive No. 002-GG-ESSALUD-2009, and specifically paragraph XIII.3, for violating the collective agreement, which was concluded in the form of a written undertaking dated 26 May 2005. In the absence of a reply to this complaint, SINESSS called a nationwide strike to be held for an indefinite period from 18 May 2009, involving more than 8,000 nurses working in 325 health establishments throughout the country.
- 808.** In its communication dated 21 August 2009, SINESSS alleges acts of interference in the internal affairs of the trade union organization by the ESSALUD authorities. The complainant organization indicates that, pursuant to an agreement by the highest decision-making body of the trade union organization adopted under sections 8, 10(d), 24, 26 and 31(a) of its constitution, as reflected in the minutes of the national meeting of SINESSS stewards dated 13 and 21 May 2009, it requested by letter No. 285-S-ORG-CEN-SINESSS-2009 the deduction of members’ dues through a check-off system. These deductions were made from the July 2009 payroll, with the corresponding transfer of funds being made to the union. It is worth noting that, as such

deductions are made pursuant to an agreement of the highest decision-making body of the union, the individual authorization of the nurses belonging to SINESSS is not required. According to SINESSS, the ESSALUD authorities, in a communication containing false and biased statements circulated to ESSALUD establishments across the country and in letter No. 3990-GCRH-OGA-ESSALUD-2009 to the union, have questioned and objected to the deduction of members' dues. Furthermore, they have indicated that they will refund the amounts deducted from each of the members and, in this regard, have announced their unilateral decision to use the funds raised through regular contributions for this purpose. SINESSS, in letters Nos 236 and 237-S.DEF.CEN-SINESSS-2009, has contacted the General Manager and the Head of Human Resources of ESSALUD indicating its objection to this plan and pointing out that the ESSALUD authorities have neither the right nor the legal authority to evaluate, question, monitor or disregard acts pertaining to the internal affairs of the union (including requirements relating to financial deductions made by SINESSS from its members under its constitution and pursuant to the agreements adopted by the decision-making bodies of the trade union organization). SINESSS requested ESSALUD to refrain from taking such action, yet ESSALUD has ignored this request and committed its violation in August 2009.

- 809.** In its communication of 13 October 2009, SINESSS indicates that the Peruvian newspaper *El Comercio* published a report in its 15 June 2009 edition alleging that disposable medical equipment was being reused in ophthalmic and laparoscopic surgeries performed at ESSALUD's Edgardo Rebagliati Martins National Hospital, seriously endangering the health and lives of thousands of patients receiving care in that hospital. The complainant organization states that, given that the newspaper report made reference to the nurses at the Edgardo Rebagliati Martins National Hospital as the users responsible for operating and cleaning the disposable equipment and to the seriousness of the case, and after having filed a complaint with the authorities without receiving a response (thereby first of all exhausting the administrative channels involving the responsible officials), and with the aim of safeguarding the health of patients, SINESSS, through Ms Cecilia Grados Guerrero, the General Secretary of its National Executive Council, together with Ms Carmen Chávez Cabrera, the General Secretary of the Edgardo Rebagliati Martins National Hospital Nurses' Union, called a press conference on 19 June 2009, with a view to confirming the newspaper report. At that conference, it was confirmed that disposable medical equipment was being reused, alerting the authorities and the public of this risk to the health of patients. Likewise, the limits of the nurses' responsibility with regard to the hazardous practice of reusing disposable equipment were clearly defined.
- 810.** SINESSS indicates that, on 7 August 2009, the ESSALUD authorities, by Management Decision No. 178-GAP-GCRH-OGA-ESSALUD-2009, ordered the initiation of administrative disciplinary proceedings against Ms Cecilia Grados Guerrero and Ms Carmen Chávez Cabrera, on charges of serious misconduct for having made statements to the press and making it public knowledge that surgical medical equipment was being reused in an ESSALUD hospital. SINESSS considers that this was inadmissible because the day after the complaint the ESSALUD authorities stopped the reuse of medical equipment at the national level, in particular at the hospital where this practice was widespread, indicating that the union was right. SINESSS adds that, on 28 September 2009, ESSALUD's Standing Committee on Administrative Disciplinary Proceedings decided by a majority vote and against the workers' representative, to impose a disciplinary sanction of a six-month suspension without pay against Ms Cecilia Grados Guerrero, General Secretary of the SINESSS National Executive Council, and a 12-month suspension without pay against Ms Carmen Chávez Cabrera, General Secretary of the Edgardo Rebagliati Martins National Hospital Nurses' Union, charging them with serious misconduct for making their statements without the authorization of the ESSALUD authorities. They were accused of having breached the ban preventing public servants from expressing their views in the media with regard to state affairs, as is provided for under the

legal regulations for public servants set out in Legislative Decree No. 276; they were also accused of having removed from the hospital the surgical medical equipment that was falsely used as evidence of the charges.

- 811.** When imposing the disciplinary sanction, the ESSALUD authorities disregarded their status as union leaders and representatives of 8,000 ESSALUD nurses, in which capacity they had made their statements to the press, thereby violating the right to freedom of association as enshrined in the Constitution of Peru and in the ILO Conventions ratified by the Government of Peru. According to SINESSS, it is a matter of serious concern that this disciplinary sanction was imposed and implemented despite the recommendations made by the Ombudsperson, given that this constitutes a violation of the fundamental rights to freedom of expression, opinion and information and freedom of association, and the right to work of trade union leaders as enshrined in the Constitution of Peru. SINESSS claims that union leaders at the national and grass-roots levels are now facing harassment aimed at silencing any allegations that run counter to the political interests of government officials.

B. The Government's reply

- 812.** In its communications of 17 November 2009 and 20 October 2010, the Government recalls that the observations it has been requested to provide refer to a complaint made by SINESSS for violation of the collective agreement concluded between that union and ESSALUD. The Government states that it is important to note that article 28 of Peru's Political Constitution guarantees the right to organize and to bargain collectively. Furthermore, as the Government of Peru has ratified ILO Conventions Nos 87 and 98, the provisions of these international instruments are binding on national territory.
- 813.** The Government, referring to the legislation in force on the subject, indicates that Act No. 27669 (the Nursing Act), dated 16 February 2002, stipulates the following in relation to working hours and handovers: section 17: The working hours of a nurse shall not exceed 36 hours per week or the equivalent of 150 hours per month, including time spent on day and night duties. Paid rest for holidays not worked will be counted within the weekly or monthly caregiving hours in the manner provided for by the regulations. Section 19 provides: The continuity of nursing care requires change-of-shift handovers between professionals. Furthermore, the regulations relating to the Nursing Act, dated 22 June 2002, approved by Supreme Decree No. 004-2002-SA provide in section 17: The working hours of nurses shall not exceed 36 hours per week or the equivalent of 150 hours per month, including the time spent on day and night duties, in accordance with the applicable labour regime. Paid rest for holidays not worked will be counted within the weekly or monthly caregiving hours in accordance with the applicable labour regime. Section 19: The handover period is the time used by a nurse at the end of a shift to report to the nurse on the next shift on the situation of patients and any developments, as well as on the staff, property and other matters. The handover forms part of the working day
- 814.** The Government adds that, by official letter No. 105-GCRH-OGA-ESSALUD-2009, ESSALUD demonstrated that the complaint filed by SINESSS predated the issue of General Management Decision No. 855-GG-ESSALUD-2009 of 3 August 2009, approving the consolidated text of Directive No. 002-GG-ESSALUD-2009, which amended various aspects of the original directive. Paragraph XIII.3 thereof states as follows: "The nursing report (20 minutes) is submitted within working hours and applies to all nursing positions that involve caregiving work. Nurses other than those taking over outpatient care must submit the nursing report to the department head, supervisor, coordinator and/or professional responsible for the establishment, as appropriate."
- 815.** The Government states in relation to the actions of the labour administrative authority that the National Directorate of Labour Inspection reported that the inspections concluded that

the subject of the inspection – ESSALUD – has, since the entry into force of General Management Decision No. 855-GG-ESSALUD-2009 of 3 August 2009, been complying with the collective agreement with regard to handovers (20-minute nursing report) in the cities of Lima, Junín, Piura and Loreto.

816. The Government states that Peruvian labour legislation governing freedom of association is consistent with the rules and principles of the ILO. Therefore, in accordance with ILO Convention No. 98, the legislation protects the right to organize and provides that the employer should refrain from any acts aimed at obstructing, restricting or undermining workers’ right to organize. Article 28 of the Political Constitution of Peru states that collective agreements are binding in the areas covered by their provisions. In accordance with this constitutional provision, section 42 of the amended consolidated text of the Collective Labour Relations Act, approved by Supreme Decree No. 010-2003-TR, reaffirms the binding nature of the collective agreement. This feature reflects the dual nature of the collective agreement, i.e. its binding aspect (which places obligations on the parties that adopted it) and its normative aspect (which places obligations on the persons on whose behalf it was concluded, to whom it applies or will subsequently apply). According to the Constitutional Court, which is the highest authority with the power to interpret the Political Constitution of Peru, the notion of “binding in the areas covered by their provisions” is considered to refer to the normative nature of the labour agreement. Binding implies that in the collective agreement the parties may establish the scope and limitations, or exclusions, that may independently be agreed upon in accordance with the law.

817. In its communication dated 25 May 2010, the Government states with regard to the deduction of SINESSS members’ dues through a check-off system that official letter No. 124-GCRH-ESSALUD-2009 from ESSALUD central human resources management indicates the following:

- ESSALUD was notified of the fines imposed on SINESSS members for failure to observe its statutes by letter No. 285-S-ORG-CEN-SINESSS-2009 so that the respective deductions from wages could be made. ESSALUD made the deductions and then the supporting documents were checked and found to include only the minutes of the national plenary assembly of stewards and not the individual authorizations from the workers concerned regarding the deduction of special dues that had been requested;
- ESSALUD received numerous complaints from SINESSS members stating that the deductions from their wages had not been authorized, that they were excessive and an undue burden on their family finances. These communications were received by phone and in writing;
- SINESSS was informed by letter No. 3990-GCRH-OGA-ESSALUD-2009 that, since a key legal requirement for payment by the check-off system had not been established, the deductions made would be refunded, and a deadline of 48 hours was imposed for rectifying the omission;
- according to ESSALUD, this personnel-related action does not constitute interference. On the contrary, it is strictly in line with the law (third transitional provision of Act No. 28411 (General Act concerning the national budget system) and section 28 of Supreme Decree No. 010-2003-TR (single consolidated text of the Collective Labour Relations Act), which state that the employer, at the request of the union and with the written authorization of the union member concerned, is obliged to deduct legal, ordinary and special trade union dues from wages);

- ESSALUD points out that the claim by SINESSS that individual authorizations from members of the union are not necessary when the union's highest decision-making body (the national plenary assembly of stewards) has adopted a decision is completely unfounded and contrary to the regulations; and
- it is incorrect to claim that ESSALUD's refusal to deduct the special dues, when no permission was given by the workers, has interfered in the decision-making of the union leaders.

818. The Government adds that the Lima–Callao Regional Directorate of Labour and Employment Promotion indicated in report No. 715-2009-MTPE/2/12.1 that:

- pursuant to inspection order No. 18058-2009-MTPE/2/12.3 ESSALUD was inspected in relation to freedom of association, and the investigations and checks undertaken established that 1,974 workers are SINESSS members, according to the payroll for September 2009;
- SINESSS provided the written authorization from the union members for the deduction of ordinary union dues (these being deducted as usual as shown in the payrolls and payslips for August 2009); however, as regards the deduction of special dues, the union did not present any evidence of written authorization from the nurses belonging to the union, and the inspected entity [ESSALUD] was therefore under no obligation to deduct special trade union dues from the workers' wages;
- the terms of section 28 of Supreme Decree No. 010-2003-TR approving the single consolidated text of the Collective Labour Relations Act were not complied with. This piece of legislation applies to the statements made by SINESSS in its letter No. 329-S-ORG-CEN-SINESSS-2009 informing ESSALUD that membership affects the deduction of special dues, which it wishes to implement pursuant to the agreement adopted at the special national plenary assembly of stewards and ratified in a special plenary (since it is regarded as an agreement adopted by the highest decision-making body, it does not require individual authorization by the SINESSS nurses, which also contravenes article 51 of the Constitution, Article 8 of ILO Convention No. 87 and sections 10 and 27 of Supreme Decree No. 010-2003-TR); and
- in the light of the above, it should be pointed out that the inspections conducted at ESSALUD failed to reveal any infringements in the area of collective labour relations with respect to the 1,974 workers on the payroll for September 2009.

819. As regards the alleged acts of harassment and violation of the freedom of expression of the SINESSS leaders, the Government states that by official letter No. 175-SG-ESSALUD-2010 of 5 April 2010, ESSALUD provided information on the administrative proceedings in progress concerning Ms Irma Cecilia Grados Guerrero and Ms Carmen Chávez Cabrera, with specific mention of the following:

- the human resources general management partially upheld the appeal lodged by Ms Carmen Chávez Cabrera and Ms Irma Cecilia Grados Guerrero against Management Decision No. 229-GAP-GCRH-ESSALUD-2009 imposing on them the respective sanctions of a 12-month suspension without pay and a six-month suspension without pay. Amending the aforementioned decision, General Management Decision No. 1053-GCRH-OGA-ESSALUD-2009 imposed on both workers the disciplinary sanction of a five-month suspension without pay for misconduct, in accordance with section 28(a) and (f) of Legislative Decree No. 276 (Basic Administrative Career and Public Sector Remuneration Act), on the grounds set forth in the preamble to the aforementioned decision; and

- Ms Carmen Chávez and Ms Irma Grados instituted *amparo* proceedings (for protection of their civil rights) and an injunction was issued in their favour. They have now been reinstated.

820. Finally, the Government indicates that: (1) in line with the statements made by ESSALUD and the labour inspectorate, seeking individual authorization from the members of SINESSS with regard to the deduction of special union dues is in accordance with the law and in general with Peruvian regulations governing collective labour law; (2) by the latest decision issued by the ESSALUD human resources management, the administrative sanction imposed on Ms Irma Grados and Ms Carmen Chávez has been amended to a five-month suspension without pay. Moreover, both union representatives have instituted *amparo* proceedings, an injunction has been issued in their favour, and as a result they have now been reinstated; and (3) as regards ESSALUD's lack of compliance with the collective agreement concluded on 26 May 2005, which provided for recognition of a 20-minute period for handover purposes (nursing report), two out of the three inspections undertaken in the country have concluded that the requirement to include the time for submission of the nursing report within working hours is being complied with in all areas providing hospital care.

C. The Committee's conclusions

821. *The Committee notes that in the present case the complainant organization alleges non-compliance with the collective agreement concluded with ESSALUD, objects to the decision by ESSALUD to refund to union members the amounts deducted for union dues using union funds for this purpose and alleges that ESSALUD imposed sanctions on two union leaders for making statements to the press.*

822. *With regard to the alleged non-compliance with the collective agreement between SINESSS and ESSALUD (specifically, it is claimed that, pursuant to a decision by ESSALUD in March 2009, the application of point 9 of the collective agreement with regard to the recognition as working time of a 20-minute handover period is incorrectly restricted to nurses working in inpatient and intensive care departments), the Committee notes the Government's statement that: (1) the filing of the complaint predated the issue of a new ESSALUD decision dated 3 August 2009, which provides that the nursing report is submitted during working hours and applies to all nursing positions; (2) the Fifth Labour Inspection Subdirectorate issued an inspection order and the National Directorate of the Labour Inspection indicated that the inspections concluded that ESSALUD has been complying with the collective agreement since the entry into force of the decision of 3 August 2009 concerning handovers (20 minutes) during the working day in the cities of Lima, Junín, Loreto and Piura. Taking all this information into account and observing in particular that the administrative authority appears to be monitoring compliance with the collective agreement concluded between the parties, the Committee will not pursue its examination of these allegations any further.*

823. *As regards the allegation that ESSALUD decided to refund to union members the amounts deducted for union dues, using union funds for this purpose, the Committee notes the Government's indication that ESSALUD made the following statements: (1) ESSALUD established that it had in its possession only the minutes of the national plenary assembly of stewards and not the individual authorizations from the workers concerned regarding the deduction of special dues that had been requested (section 28 of Supreme Decree No. 010-2003-TR provides that the authorization of the union members concerned is required); (2) ESSALUD received numerous complaints from SINESSS members, by phone and in writing, stating that the deductions from their wages had not been authorized and that they were excessive and an undue burden on their family finances; (3) by letter No. 3990-GCRH-OGA-ESSALUD-2009, SINESSS was informed that, since a key legal*

requirement for payment by the check-off system had not been established, the deductions made would be refunded, and a deadline of 48 hours was imposed for rectifying the omission; (4) this personnel-related action does not constitute interference but, on the contrary, is strictly in line with the law, and the claim by SINESSS that individual authorizations from members of the union are not necessary when the union's highest decision-making body (the national plenary assembly of stewards) has adopted a decision is completely unfounded and contrary to the regulations. The Committee also notes the Government's statement that ESSALUD was inspected, that on that occasion SINESSS provided the written authorization from union members for the deduction of standard union dues but, with respect to the deduction of special union dues, did not present any evidence of written authorization from the nurses belonging to the union, and that ESSALUD was therefore under no obligation to deduct special union dues from wages and hence no breach of labour legislation occurred.

824. The Committee recalls that on numerous occasions it has 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" and 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 of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 475–476]. This being the case, the Committee requests the Government to ensure that ESSALUD continues to deduct union dues from the members of SINESSS who have requested it.
825. With regard to the allegation that the sanction of a six-month suspension without pay was imposed on Ms Cecilia Grados Guerrero, General Secretary of the SINESSS National Executive Board, and a 12-month suspension without pay was imposed on Ms Carmen Chávez Cabrera, General Secretary of the Edgardo Rebagliati Martins National Hospital Nurses' Union, for their union activities, the Committee notes the Government's statement that: (1) the human resources general management partially upheld the appeal lodged by the workers concerned against the sanctions that were imposed; (2) consequently, the decision in question was amended and the disciplinary sanction of a five-month suspension without pay for misconduct, in accordance with the Basic Administrative Career and Public Sector Remuneration Act, was imposed on both workers; and (3) the workers in question instituted amparo proceedings and an injunction was granted in their favour, as a result of which they have now been reinstated. The Committee notes that, according to the allegations, these leaders confirmed to the press a newspaper report on the use of equipment posing a health risk to patients but defined the limits of responsibility of the nurses mentioned by the press. The Committee notes that, according to the complainant organization, ESSALUD did not take measures to protect these nurses, which is why the union leaders, after exhausting administrative channels, decided to respond to the press. The Committee recalls the importance of the principle that "the right to express opinions through the press or otherwise is an essential aspect of trade union rights" [see **Digest**, *op. cit.*, para. 155]. The Committee also points out that "in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language" [see **Digest**, *op. cit.*, para. 154]. The Committee trusts that the final outcome of the amparo proceedings instituted by Ms Cecilia Grados Guerrero and Ms Carmen Chávez Cabrera against the administrative decision imposing on them the sanction of a five-month suspension without pay will take full account of these principles and will ensure that the freedom of expression which is essential for the meaningful exercise of trade union rights is respected. The Committee requests the Government to keep it informed in this regard.

The Committee's recommendations

826. *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 ESSALUD continues to deduct union dues from the members of SINESSS that have requested it.*
- (b) *The Committee requests the Government to keep it informed of the final outcome of the amparo proceedings instituted by Ms Cecilia Grados Guerrero, General Secretary of the SINESSS National Executive Board, and Ms Carmen Chávez Cabrera, General Secretary of the Edgardo Rebagliati Martins National Hospital Nurses' Union, against the administrative decision imposing on them the sanction of a five-month suspension without pay.*

CASE No. 2716

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

Complaint against the Government of the Philippines presented by

- **the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) and**
- **the National Union of Workers in the Hotel, Restaurant, and Allied Industries (NUWHRAIN) – Dusit Hotel Nikko Chapter**

supported by

- **the Alliance of Progressive Labour (APL)**
- **the Bukluran ng Manggagawang Pilipino (BMP)**
- **the Confederation of Independent Unions in the Public Sector (CIU)**
- **Manggagawa para sa Kalayaan ng Bayan (MAKABAYAN)**
- **the National Labor Union (NLU)**
- **Partido ng Manggagawa (PM)**
- **the Public Services Labor Independent Confederation (PSLINK)**
- **the Alliance of Coca-Cola Unions of the Philippines (ACCUP)**
- **the Automotive Industry Workers Alliance (AIWA)**
- **the League of Independent Bank Organization (LIBO)**
- **the National Alliance of Broadcast Unions (NABU)**
- **the Postal Employees Union of the Philippines (PEUP)**
- **Pinag-isang Tinig at Lakas ng Anak Pawis (PIGLAS)**
- **the Philippine Metalworkers Alliance (PMA) and**
- **the Workers Solidarity Network (WSN)**

Allegations: The complainants allege that, in a decision concerning anti-union dismissals in the context of a labour dispute, the Supreme Court of the Philippines held that workers who shaved or cropped their hair engaged in an unprotected illegal strike, and thus upheld the dismissal of 29 trade union officers and allowed dismissal of 61 trade union members, in violation of the principles of freedom of association

- 827.** The complaint is set out in a communication dated 19 May 2009 from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF), and in a communication dated 7 July 2009 from the National Union of Workers in the Hotel, Restaurant, and Allied Industries (NUWHRAIN) – Dusit Hotel Nikko Chapter, supported by the Alliance of Progressive Labor, Bukluran ng Manggagawang Pilipino, the Confederation of Independent Unions in the Public Sector, Manggagawa para sa Kalayaan ng Bayan, the National Labor Union, Partido ng Manggagawa, the Public Services Labor Independent Confederation, the Alliance of Coca-Cola Unions of the Philippines, the Automotive Industry Workers Alliance, the League of Independent Bank Organization, the National Alliance of Broadcast Unions, the Postal Employees Union of the Philippines, Pinag-isang Tinig at Lakas ng Anak Pawis, the Philippine Metalworkers Alliance, and the Workers Solidarity Network.
- 828.** The Government submitted partial observations in a communication dated 15 January 2010.
- 829.** The Philippines has ratified the Freedom of Association and Protection of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 830.** In their communications dated 19 May and 7 July 2009, the complainant organizations refer to a decision of the Supreme Court of the Philippines rendered on 11 November 2008, concerning the dismissal of 90 employees of the Dusit Hotel Nikko, all of whom were members or officers of the NUWHRAIN – Dusit Hotel Nikko Chapter. The events leading up to the Court's decision began on 24 October 2000, when the NUWHRAIN – Dusit Hotel Nikko Chapter submitted its proposed collective bargaining agreement to the hotel management, as it had done regularly since 1978. However, the parties were unable to reach an agreement and, on 20 December 2001, the union filed a notice of strike with the National Conciliation and Mediation Board (NCMB). After the NCMB failed in its attempts to resolve the deadlock, on 14 January 2002, union members voted to go on strike. On 17 January 2002, several male union members, with their hair closely cropped, attended the union's general membership assembly in the union's office, located in the basement of the hotel. The next day, other male union members reported for work with hair that was either similarly cropped or completely shaved. Acting on instructions from the hotel's management, hotel security guards prevented these men from entering the hotel premises, declaring that they have violated the hotel's grooming standards. As a result, the workers believed that they had been illegally locked out and began to picket the hotel. Other members joined the picket after they were also prevented from entering the hotel's premises. Because of the high number of employees who had been prevented from working, the hotel was forced to temporarily suspend operation of three of its restaurants. On 20 January 2002, the hotel issued notices of preventive suspension to more than

200 trade union officers and members, including women, who had not altered their hairstyles, charging them with violations of their duty to bargain in good faith, violations of the hotel's grooming standards, participation in an illegal picket, participation in an illegal strike and the commission of illegal acts during an illegal strike. On the next day, 21 January 2002, the union filed a second notice of strike on the basis of unfair labour practice, alleging an illegal lockout in violation of article 248(a) of the Labor Code. While continuing its picket outside the hotel, the union members submitted responses to the hotel's charges.

- 831.** On 26 January 2002, the hotel dismissed 29 union officers and 61 union members. The hotel also suspended 81 employees for 30 days, 48 employees for 15 days, four employees for ten days, and three employees for five days. The union declared and staged a strike on the same day, and continued to picket the hotel premises. On 31 January 2002, the union filed a third notice of strike, alleging unfair labour practices. The union argued that its officers and members did not stage a strike on 18 January 2002 because, on this day, they actually reported for work but were prevented by the hotel's security guards from working. Under the legislation, there is a strike when the temporary work stoppage was caused by the workers' concerted refusal to work. The hotel argued that the union members staged a strike on 18 January 2002 because the shaving of heads amounted to a strike as it forced the hotel to prevent the workers from working. Moreover, that strike was an illegal strike because the shaving of heads was done during the 30-day-cooling-off period and was in violation of the no strike clause of the collective agreement. The union counter-argued that the shaving of heads did not violate any law and that there could not be an illegal strike when there was no strike to speak of in the first place. On the same day (31 January 2002), a Secretary of Labor and Employment assumed jurisdiction over the dispute, certified the dispute to the National Labor Relations Commission (NLRC) for compulsory arbitration, and issued a return-to-work order, giving the hotel the option of reinstating the terminated and suspended employees onto the payroll due to the "special circumstances attendant to their reinstatement".
- 832.** On 1 February 2002, the hotel exercised this option, directing some of the employees to return to work, while others were only reinstated onto the payroll. In response, on 15 March 2002, the union filed a motion for reconsideration of the order, which the Secretary of Labor and Employment denied. After this denial, the union filed a petition for *certiorari* before the Court of Appeals, contesting the payroll reinstatement option granted by the Secretary of Labor and Employment on the grounds that the option violated article 263(g) of the Labor Code, which requires the readmission of strikers "under the same terms and conditions prevailing before the strike or lockout". The union argued that actual reinstatement should have been enforced, and that payroll reinstatement was insufficient.
- 833.** The Court of Appeals dismissed the union's petition, which prompted the union to file a petition to the Supreme Court, in which it questioned whether the Secretary of Labor and Employment had the discretion to order a payroll reinstatement in lieu of actual reinstatement.
- 834.** On 9 October 2002, the NLRC rendered its decision on the case, resolving virtually all unresolved issues with regard to the collective agreement in favour of the hotel, declaring the union members' haircuts as "amounting to a strike", declaring the "strike" illegal for alleged violations of the "30-day-cooling off period", the seven-day strike ban, and the "no strike" provision of the collective agreement. The NLRC further declared that, even if the procedural rules had been followed, the strike would still have been illegal because of the illegal acts committed by the union members. It therefore upheld the dismissal of 29 union officers for leading an illegal strike on 18 January 2002, upheld the dismissal of 61 union members for committing illegal acts (obstructing of ingress to and egress from the hotel) and upheld the suspension of 136 union members.

- 835.** On 7 February 2003, the NLRC denied the union's motion for reconsideration. The union petitioned the Court of Appeals for *certiorari*, contending that the NLRC had committed a grave abuse of discretion. On 19 January 2004, the Court of Appeals dismissed this petition. The union then filed a petition for *certiorari* to review the decision of the Court of Appeals with the Supreme Court. On 11 November 2008, the Supreme Court issued its ruling on both petitions.
- 836.** The Supreme Court held that the concerted action of trade union members and officers to shave their heads constituted an unprotected activity and a just cause for the dismissal of the union officers, because such an action: (1) would embarrass the hotel; (2) defied the hotel's authority to enforce its grooming standards; (3) suggested something was amiss; (4) insinuated that something out of the ordinary was afoot; (5) was coercive in nature, as it pressured the hotel to give in to the union's demands; and (6) constituted an illegal strike. The Supreme Court therefore upheld the dismissal of the 29 union officers for participating in an illegal strike on 18 January 2002. Regarding the 61 union members, the Court considered that the hotel failed to identify anyone of them to have committed illegal acts and therefore ordered their reinstatement. However, the Court also gave the hotel the option of terminating the workers' employment if they had already been replaced.
- 837.** According to the complainants, the conduct of the union members and officers did not constitute a violation of the hotel's grooming standards, which require only that a male employee's hair not touch his collar or obstruct either of his ears. The cropping or shaving of the employees' hair could not have violated either of these requirements. Furthermore, complainants suggest that, even if the union officers did violate the hotel's grooming standards, the maximum penalty the hotel could have imposed on the officers was an oral reprimand. The hotel's own rules could not justify the dismissal of all 29 union officers. Moreover, despite the centrality of the grooming standards' specifications to the outcome of the case, the Supreme Court did not reproduce or consider the specifics of the grooming standards in its opinion, or explain why it sustained the dismissal of nine female union officers who did not alter their physical appearances.
- 838.** The complainants further consider that the 90 union officers and members could not be justly dismissed because they purportedly embarrassed the hotel. The right of workers to engage in concerted actions or even in actual strikes and pickets cannot be denied protection because its exercise would be "embarrassing" to the employer. The right to self-organization or freedom of association was intended to further the rights and interest of labour and not to praise or flatter the employer. Likewise, the workers' right to engage in concerted actions, pickets and strikes cannot be denied protection because such actions defy the hotel's authority or because such actions "suggest something is amiss or that something out of the ordinary is afoot". Workers have the right to communicate the facts of the labour dispute and to express their sentiment or displeasure by shaving their heads. Through that, workers exercise their freedom of expression. The complainants characterize the Supreme Court's decision as an expansion of the legal definition of "strike" to include peaceful modes of speech or expression which are allegedly detrimental to the employer's reputation. The complainants argue that this definitional expansion, if it becomes binding law in the Philippines, would constitute a violation of Convention No. 87. The complainants further state the workers' shaving of heads cannot be denied protection just because of its coercive nature. Work stoppage, strikes and pickets are coercive in nature, yet these economic weapons are lawful.
- 839.** The complainants challenge the Court's designation of the employees' actions as a strike on the grounds that the employees were prevented from reporting for work by hotel security and then preventively suspended. The dismissed employees could not have refused to work or go on strike, as they were deprived of the opportunity to choose to work in the first place. In dismissing the workers, the hotel prevented them from striking. The

complainants claim that the Supreme Court did not challenge these facts, but failed to address this alleged contradiction in its reasoning.

840. With respect to 61 trade union members, the complainants indicate that the Court ordered their reinstatement without back wages and gave the hotel the option to terminate their employment if a replacement for these workers had been found. According to the complainants, it was certain that the hotel would exercise this option because, after more than seven years, all of the workers had been replaced. The complainants point out that the dismissal of all officers and members meant the union's demise. In this respect, the complainants indicate that, shortly after the dismissals, the hotel management encouraged the establishment and eventual certification of an organization called Dusit Hotel Employees Labor Union. The complainant argues that this demonstrates that the hotel's true intentions in dismissing the union members and officers was to eliminate the legal collective bargaining agent for the hotel employees, the NUWHRAIN – Dusit Hotel Nikko Chapter, which had been the certified collective bargaining agent for employees since 1978.

B. The Government's reply

841. In its communication of 15 January 2010, the Government indicates that a high-level ILO mission, which was carried out on 22–29 September 2009, identified four areas for future action on Convention No. 87 in the Philippines, including: (1) a three- to four-year technical cooperation programme (TCP) on training and capacity building to strengthen labour market governance; (2) the potential establishment of a high-level tripartite, inter-agency monitoring body for alleged trade union rights violations; (3) proposed legislative amendments to certain Labor Code provisions; and (4) the resolution of long-standing Committee on Freedom of Association cases through innovative approaches, and the resolution of active cases pertaining to alleged extra-judicial killings and the militarization of economic zones.

842. The Government notes that plans for a three- to four-year TCP have already been subjected to a multi-stakeholder review and are currently being finalized. Pending implementation of the TCP, the Government and the ILO have initiated a short-term awareness programme on the principles of freedom of association, the first manifestation of which was a three-day National Tripartite Conference on Principles of Freedom of Association. As a result of the Conference, the social partners signed joint statements with the Armed Forces of the Philippines, the Philippine National Police (PNP), and the Philippine Economic Zone Authority. Two additional regional conferences were slated to take place before the end of March 2010.

843. In relation to the proposed legislative reforms, the Government reports that the Executive Branch has drafted two bills, which are currently undergoing tripartite consultations for submission to the National Tripartite Industrial Peace Council, in preparation for their submission to appropriate committees of both Houses of the 15th Congress. The first bill seeks to amend article 263(g) of the Labor Code, by limiting the circumstances under which the Secretary of Labor and Employment and the President can assume jurisdiction over labour disputes to disputes which affect the provision of services the ILO defines as "essential". The second bill incorporates amendments that liberalize the exercise of trade union rights, repeal the requirement of prior authorization for receipt of foreign assistance, and remove criminal sanctions as a penalty for participation in illegal strikes on the grounds of non-compliance with administrative requirements. Additionally, the Government reports that the Executive Branch will implement the following interim administrative measures: (1) the creation of joint guidelines on the conduct of PNP personnel and private security guards during strikes and lockouts, effective March 2010; and (2) revised department order No. 40, series of 2003, which will necessitate the

fulfilment of procedural requirements prior to the Secretary of Labor's assumption of jurisdiction over labour disputes.

- 844.** The Government indicates that, as concerns the Dusit Hotel's dismissal of 29 union officers and reinstatement of 61 union members, the Supreme Court's decision of 11 November 2008 responded to the issues raised in connection with the claimed expansion of the definition of "strike" in violation of Convention No. 87. This decision is final and executory.
- 845.** The Government indicates that the ILO mission met with the relevant parties and was provided with information pertaining to the case. The mission also met with the Chief Justice of the Supreme Court, who communicated to the mission that the Court's interpretation in the Dusit case did not only concern the workers' haircuts, but was also related to the violence committed by the workers during the course of their actions. According to the Chief Justice, the Court's decision hinged on the workers' violations of the law and the collective bargaining agreement, and that, as a result, the workers' freedom of expression could be lawfully suppressed.
- 846.** The Government indicates that the mission suggested conciliating the dispute towards a solution such as reinstatement of the workers in another service. In response to this suggestion, the Government representatives have met with the relevant parties and have commenced exploratory talks on possible "out-of-the-box" solutions to the conflict. The Government further indicates that it will submit progress reports to the ILO on developments in the case.

C. The Committee's conclusions

- 847.** *The Committee notes that the complainant organizations, the IUF and the NUWHRAIN – Dusit Hotel Nikko Chapter contest a decision by the Supreme Court of the Philippines concerning alleged anti-union dismissals in the context of a labour dispute, whereby it held that workers who shaved or cropped their hair had engaged in an unprotected illegal strike, thus confirming the dismissal of 29 trade union officers and allowing the dismissal of 61 additional trade union members, in violation of the principles of freedom of association.*
- 848.** *The Committee notes the Government's indication that the Supreme Court's decision is final and executory. The Government indicates that, while it has no authority to alter this decision, it has met with the relevant parties and has commenced exploratory talks on possible "out-of-the-box" solutions to the conflict.*
- 849.** *The Committee notes that the specific allegations in this case have been examined by the national judiciary, including the Supreme Court, which has rendered a final decision. In this respect and at the outset, the Committee wishes to emphasize that it is not taking a position as to whether the interpretation of the national legislation by the courts is founded in light of the particular circumstances of this case. The mandate of the Committee consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions. [See **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 6].*
- 850.** *The Committee notes the events which led to the 11 November 2008 decision of the Supreme Court, as they appear in the Court's decision, a copy of which was provided by the complainants. On 24 October 2000, the union submitted its collective bargaining agreement negotiation proposals to the hotel. Negotiations ensued, but the parties failed to agree on mutually acceptable terms and conditions. On 20 December 2001, the union filed*

a notice of strike on the ground of the bargaining deadlock with the NCMB. As conciliation hearings were unsuccessful, on 14 January 2002, a strike vote was conducted and a decision to go on strike adopted. On 18 January 2002, a number of union members came to work with closely cropped hair or shaved heads. The hotel prevented these workers from entering the premises claiming that they violated the hotel's grooming standards. In view of the hotel's action, the union staged a picket outside the hotel premises. Later, other workers were also prevented from entering the hotel causing them to join the picket. Experiencing lack of manpower, the hotel had temporarily ceased operations in three restaurants.

- 851.** *On 20 January 2002, the hotel issued notices to union members, preventively suspending them and charging them with the following offences: (1) violation of the duty to bargain in good faith; (2) illegal picket; (3) unfair labour practice; (4) violation of the hotel's grooming standards; (5) illegal strike; and (6) commission of illegal acts during the illegal strike. The next day, the union filed a second notice of strike on the ground of unfair labour practice and violation of a legislative provision on illegal lockout. On 26 January 2002, the hotel terminated the services of 29 union officers and 61 trade union members; and suspended 81 employees for 30 days, 48 employees for 15 days, four employees for ten days and three employees for five days.*
- 852.** *On 31 January 2002, the union filed a third notice of strike, while continuing picketing the hotel. On the same day, the Secretary of Labor and Employment assumed jurisdiction over the labour dispute and certified the case for compulsory arbitration by the NLRC. Pending the outcome of the arbitration, the Secretary issued a return-to-work order but gave the hotel an option to reinstate the dismissed and suspended workers in the payroll in lieu of actual reinstatement, which the hotel exercised. On 15 March 2002, the union filed a motion for reconsideration of the order. On the same day, the Secretary of Labor and Employment dismissed the motion. The union filed a petition for certiorari before the Court of Appeals contesting the payroll reinstatement option. In its 6 May 2004 decision, the Court of Appeals affirmed the decisions of the Secretary of Labor and Employment.*
- 853.** *In its decision issued on 9 October 2002, the NLRC held that the 18 January 2002 concerted action was an illegal strike in which illegal acts were committed by the union and that the strike violated "no strike, no lockout" provision in the collective agreement and thereby caused the dismissal of 29 trade union officers and its 61 members. The NLRC explained that the strike which occurred on 18 January 2002 was illegal because it failed to comply with the mandatory 30-day cooling-off period and the seven-day strike ban, as the strike occurred 29 days after the submission of the strike notice on 20 December 2001 and four days after the submission of the strike vote on 14 January 2002. According to the NLRC, even if the union had complied with the temporal requirements mandated by law, the strike would nonetheless be declared illegal because of the illegal acts committed by the union officers and members. On 19 January 2004, the Court of Appeals affirmed the ruling of the NLRC. The union petitioned the Supreme Court.*
- 854.** *The Committee notes that on 11 November 2008, the Supreme Court issued its ruling, examined below. The Committee further notes that a high-level ILO mission visited the country in September 2009 and met with the relevant parties, including the Chief Justice of the Supreme Court.*
- 855.** *The Committee notes that the union's petitions basically raise the following issues: (1) whether the Secretary of Labor and Employment has discretion to impose payroll reinstatement when he or she assumes jurisdiction over labour disputes, rather than simply full reinstatement; and (2) whether on 18 January 2002, by reporting to work with shaved or cropped hairstyle and subsequently picketing the hotel premises, trade union officers*

and members conducted an illegal strike and therefore could be validly dismissed for that reason.

- 856.** *The Committee notes the relevant passages of the decision. In particular, with regard to the question whether the Secretary of Labor and Employment can impose “payroll” reinstatement instead of “actual” reinstatement, the Court reasons as follows:*

Thus ..., in assumption of jurisdiction cases, the Secretary should impose actual reinstatement in accordance with the intent and spirit of article 263(g) of the Labor Code. As with most rules, however, this one is subject to exceptions.

...

The peculiar circumstances in the present case validate the Secretary’s decision to order payroll reinstatement instead of actual reinstatement. It is obviously impracticable for the hotel to actually reinstate the employees who shaved their heads or cropped their hair because this was exactly the reason they were prevented from working in the first place. Further, as with most labor disputes which have resulted in strikes, there is mutual antagonism, enmity, and animosity between the union and the management. Payroll reinstatement, most especially in this case, would have been the only avenue where further incidents and damages could be avoided. Public officials entrusted with specific jurisdictions enjoy great confidence from this Court. The Secretary surely meant only to ensure industrial peace as she assumed jurisdiction over the labor dispute. In this case, we are not ready to substitute our own findings in the absence of a clear showing of grave abuse of discretion on her part.

...

- 857.** *The Court then proceeds to determine whether the acts of “(1) Reporting to work with ... bald or cropped hairstyle on 18 January 2002; and (2) The picketing of the hotel premises on 26 January [sic] 2002” were legal. It concludes the following:*

... the Union is liable for conducting an illegal strike for the following reasons:

First, the Union’s violation of the hotel’s grooming standards was clearly a deliberate and concerted action to undermine the authority of and to embarrass the hotel and was, therefore, not a protected action. The appearances of the hotel employees directly reflect the character and well-being of the hotel, being a five-star hotel that provides service to top-notch clients. Being bald or having cropped hair per se does not evoke negative or unpleasant feelings. The reality that a substantial number of employees assigned to the food and beverage outlets of the hotel with full heads of hair suddenly decided to come to work bald-headed or with cropped hair, however, suggests that something is amiss and insinuates a sense that something out of the ordinary is afoot. Obviously, the hotel does not need to advertise its labor problems with its clients. It can be gleaned from the records before us that the Union officers and members deliberately and in apparent concert shaved their heads or cropped their hair. This was shown by the fact that after coming to work on 18 January 2002, some Union members even had their heads shaved or their hair cropped at the union office in the hotel’s basement. Clearly, the decision to violate the company rule on grooming was designed and calculated to place the hotel management on its heels and to force it to agree to the union’s proposals.

In view of the union’s collaborative effort to violate the hotel’s grooming standards, it succeeded in forcing the hotel to choose between allowing its inappropriately hairstyled employees to continue working, to the detriment of its reputation, or to refuse them work, even if it had to cease operations in affected departments or service units, which in either way would disrupt the operations of the hotel. This Court is of the opinion, therefore, that the act of the union was not merely an expression of their grievance or displeasure but, indeed, a calibrated and calculated act designed to inflict serious damage to the hotel’s finances or its reputation. Thus, we hold that the union’s concerted violation of the hotel’s grooming standards which resulted in the temporary cessation and disruption of the hotel’s operations is an unprotected act and should be considered an illegal strike.

Second, the union's concerted action which disrupted the hotel's operations clearly violated the CBA's "no strike, no lockout" provision ...

...

Third, the union officers and members' concerted action to shave their heads and crop their hair not only violated the hotel's grooming standards but also violated the union's duty and responsibility to bargain in good faith. By shaving their heads and cropping their hair, the union officers and members violated then section 6, Rule XIII, of the Implementing Rules of Book V of the Labor Code. This rule prohibits the commission of any act which will disrupt or impede the early settlement of the labor disputes that are under conciliation. Since the bargaining deadlock is being conciliated by the NCMB, the union's action to have their officers and members' heads shaved was manifestly calculated to antagonize and embarrass the hotel management and in doing so effectively disrupted the operations of the hotel and violated their duty to bargain collectively in good faith.

Fourth, the union failed to observe the mandatory **30-day cooling-off period** and the **seven-day strike ban** before it conducted the strike on 18 January 2002. The NLRC correctly held that the union failed to observe the mandatory periods before conducting or holding a strike. Records reveal that the union filed its notice of strike on the ground of bargaining deadlock on 20 December 2001. The 30-day cooling-off period should have been until 19 January 2002. On top of that, the strike vote was held on 14 January 2002 and was submitted to the NCMB only on 18 January 2002; therefore, the seven-day strike ban should have prevented them from holding a strike until 25 January 2002. The concerted action committed by the union on 18 January 2002 which resulted in the disruption of the hotel's operations clearly violated the above-stated mandatory periods.

Last, the union committed illegal acts in the conduct of its strike. The NLRC ruled that the strike was illegal since, as shown by the pictures presented by the hotel, the union officers and members formed human barricades and obstructed the driveway of the hotel. There is no merit in the union's argument that it was not its members but the hotel's security guards and the police officers who blocked the driveway, as it can be seen that the guards and/or police officers were just trying to secure the entrance to the hotel. The pictures clearly demonstrate the tense and highly explosive situation brought about by the strikers' presence in the hotel's driveway.

858. With regard to "the consequent liabilities of the Union officers and members for their participation in the illegal strike" the Court determines the following:

... Article 264(a), paragraph 3, of the Labor Code provides that "**[a]ny union officer who knowingly participates in an illegal strike and any worker or union officer who knowingly participates in the commission of illegal acts during a strike may be declared to have lost his employment status x x x**". The law makes a distinction between union officers and mere union members. Union officers may be validly terminated from employment for their participation in an illegal strike, while union members have to participate in and commit illegal acts for them to lose their employment status. Thus, it is necessary for the company to adduce proof of the participation of the striking employees in the commission of illegal acts during the strikes.

Clearly, the 29 union officers may be dismissed pursuant to article 264(a), paragraph 3 of the Labor Code which imposes the penalty of dismissal on "**any union officer who knowingly participates in an illegal strike**". We, however, are of the opinion that there is room for leniency with respect to the union members. It is pertinent to note that the hotel was able to prove before the NLRC that the strikers blocked the ingress to and egress from the hotel. But it is quite apparent that the hotel failed to specifically point out the participation of each of the union members in the commission of illegal acts during the picket and the strike. For this lapse in judgement or diligence, we are constrained to reinstate the 61 union members.

Further, [the Court] held in one case that union members who participated in an illegal strike but were not identified to have committed illegal acts are entitled to be reinstated to their former positions but without backwages.

...

In this light, [the Court] stand by [its] recent rulings and reinstate[s] the 61 union members without backwages.

...

*In view of the possibility that the hotel might have already hired regular replacement for the afore-listed 61 employees, the hotel may opt to pay **separation pay** computed at one (1) month's pay for every year of service in lieu of **reinstatement**, a fraction of six (6) months being considered one year of service.*

- 859.** *The Committee notes that the NUWHRAIN – Dusit Hotel Nikko Chapter, a collective bargaining agent since 1978, submitted a collective agreement to the hotel management for negotiation on 24 October 2000. About 14 months later, on 20 December 2001, no agreement had been reached. The NCMB failed to resolve the deadlock. While the Committee does not have before it the information as to the reasons why the agreement could not be reached, it wishes to recall that collective bargaining implies a give-and-take process and that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest**, op. cit., para. 935]. In the present case, the Committee has insufficient information to determine whether the negotiations were carried out in bad faith by either party, but cannot concur with the Court that the expression of protest by the workers following nearly one year and a half of failed negotiations and conciliation can be seen as a violation of a duty to bargain in good faith.*
- 860.** *The Committee further notes that, on 31 January 2002, the Secretary of Labor and Employment referred the dispute to compulsory arbitration. In this respect, the Committee recalls that the imposition of a compulsory arbitration procedure if the parties do not reach agreement on a draft collective agreement raises problems in relation to the application of Convention No. 98 and that recourse to compulsory arbitration in cases where the parties do not reach agreement through collective bargaining is permissible only in the context of essential services in the strict sense of the term (i.e. 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 992 and 994]. The Committee notes, as it did in examining Cases Nos 2195, 2252 and 2488, concerning the Philippines, that article 263(g) of the Labor Code permits the Secretary of Labor and Employment to submit a dispute to compulsory arbitration, thus bringing an end to a strike, in situations going beyond essential services or an acute national crisis. The Committee takes due note of the Government's indication in the present case that, in the framework of legislative reforms, the Executive Branch has drafted two bills, which are currently undergoing tripartite consultations for submission to the National Tripartite Industrial Peace Council, in preparation for their submission to appropriate committees of both Houses of the 15th Congress. One of these bills seeks to amend article 263(g) of the Labor Code by limiting the circumstances under which the Secretary of Labor and the President can assume jurisdiction over labour disputes to disputes which affect the provision of services the ILO defines as "essential". The Committee requests the Government to keep it informed in this regard.*
- 861.** *With regard to the events of 18 January 2002, the Committee notes that two separate events took place: first, some workers reported to work with cropped hairstyles and were not allowed to work; following that, a picket was staged outside the hotel by these workers and joined by others.*
- 862.** *With regard to the first event, the Committee notes the complainants' argument that, by qualifying the act of reporting to work with shaved heads or cropped hair styles as a strike action, the Supreme Court has expanded the definition of strike. The complainants maintain that, if this definition were to become binding law in the Philippines, it would*

constitute a violation of Convention No. 87. The Committee considers that, while there can be various types of strike action, generally, a strike is a temporary work stoppage (or slowdown) wilfully effected by one or more groups of workers with a view to enforcing or resisting demands or expressing grievances, or supporting other workers in their demands or grievances. In the present case, while having shaved their heads, the employees had not stopped working. The Committee takes into account the concerns expressed by the hotel management with regard to its image and notes that the action by some of the union members have been found by the Supreme Court as having infringed the grooming standards of the hotel. The Committee considers that equating the mere expression of discontent, peacefully and lawfully exercised, with a strike per se results in a violation of the freedom of association and expression.

- 863.** *With regard to the subsequent protest actions by trade union officers and members, the Committee notes differing information provided by the complainant and the Government in relation to the conduct of the picket which took place on 18 January 2002. It further notes the findings of the NLRC and the Supreme Court on that point. According to the complainants, workers joined the picket because they were prevented from entering the hotel premises by hotel security guards. The Court, however, considered that the picket constituted a voluntary strike action which had not respected the mandatory time requirements and concludes that trade union officers and members had apparently prevented the hotel employees from entering the premises while the guards and/or police officers were just trying to secure the entrance to the hotel. The Committee notes that the Court, considering that the picket constituted an unprotected and illegal strike, confirmed the dismissal of 29 trade union officers pursuant to article 264(a) of the Labor Code. As regards the 61 trade union members, the Committee notes from the Court's ruling that there was no proof indentifying them individually as having committed illegal acts. The Court thus ordered their reinstatement, while offering an option to the hotel management of simply paying a "separation pay" to be computed at one month salary for every year of service in lieu of reinstatement. The Committee notes from the complaint that the hotel opted to compensate the separation.*
- 864.** *The Committee observes that, as the final ruling was handed down more than six years after the dismissals, the Court found this fact sufficient to justify an option of separation pay instead of the reinstatement of the 61 trade union members. The Committee wishes to emphasize in this regard that respect for the principles of freedom of association requires that workers who consider that they have been prejudiced because of their trade union activities should have access to expeditious means of redress. The longer it takes for the proceedings concerning the reinstatement of trade unionists 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 to a point where it becomes impossible to return to the status quo ante. In these circumstances, the Committee must express its concern that all 61 trade union members, despite not having been individually identified in the conflict, have been let go with a limited amount of compensation.*
- 865.** *The Committee deems it appropriate to place this conflict in its context, i.e. a 15-month labour conflict in an enterprise. Noting that, according to the complainants, the dismissal of 90 trade union officers and members resulted in practice in the union's demise, the Committee observes that the dismissals of these workers on such a massive scale has had dire consequences for the union and may likely have a negative impact on future freely chosen union representation at the hotel.*
- 866.** *In this respect, the Committee notes the Government's indication that it has met with the relevant parties and commenced exploratory talks on possible "out-of-the-box" solutions to the conflict. The Committee requests the Government to bear in mind during these talks that 90 union members were dismissed in a context of heightened tensions and actions on*

all sides with a consequentially severe impact on the worker-chosen representation at the hotel. Considering that the Court's judgement makes reference to, among other things, the expression of protest through the shaving of heads as illegal strike action in a manner contrary to the principles of freedom of association, the Committee requests the Government, within the context of the exploratory talks, to review with the hotel management and the dismissed workers concerned the feasibility of their reinstatement and for those who cannot be immediately reinstated, the possibility of including them in work rosters for their re-engagement on a priority basis or of adequately compensating them. It further requests the Government, within this context, to review the adequacy of the separation payment provided to the 61 dismissed trade union members with a view to ensuring that they are sufficiently compensated proportionate to the losses incurred. The Committee requests the Government to keep it informed of the progress made in its talks to reach a satisfactory solution for all concerned.

The Committee's recommendations

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

- (a) The Committee requests the Government to keep it informed with regard to the initiated legislative reform, which according to the Government should result, among others, in amending article 263(g) of the Labor Code.***
- (b) Noting the Government's indication that it has met with the relevant parties and commenced exploratory talks on possible "out-of-the-box" solutions to the conflict, the Committee requests the Government, within this context, to review with the hotel management and the dismissed workers concerned the feasibility of their reinstatement and for those who cannot be immediately reinstated, the possibility of including them in work rosters for their re-engagement on a priority basis or of adequately compensating them. It further requests the Government to review the adequacy of the separation payment provided to the 61 dismissed trade union members with a view to ensuring that they are sufficiently compensated proportionate to the losses incurred. The Committee requests the Government to keep it informed of the progress made in reaching a satisfactory solution for all concerned.***

CASE NO. 2729

INTERIM REPORT

**Complaint against the Government of Portugal
presented by
the General Federation of Portuguese Workers –
National Inter-Union Body (CGTP-IN)**

Allegations: Adoption of legal provisions that are prejudicial to the exercise of the right to bargain collectively; restrictions on the right to bargain collectively in a postal and telecommunications company

- 868.** The complaint was presented in a communication from the General Confederation of Portuguese Workers – National Inter-union Body (CGTP–IN) dated 17 July 2009.
- 869.** In the absence of any reply from the Government, the Committee has been obliged to adjourn its examination of the case on two occasions. At its meeting in June 2010 [see 357th Report, para. 5], the Committee addressed an urgent appeal to the Government drawing its attention 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 its observations or information have not been received in due time. To date the Government has not sent any information.
- 870.** Portugal 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 organization

- 871.** In communications dated 17 July 2009, the CGTP–IN alleges that the recent revision of the Labour Code has introduced a new juridical concept, namely the possibility of “choosing” a collective agreement. Specifically, article 479 of the new Labour Code recognizes the right of non-unionized workers to choose individually the collective agreement or arbitration ruling they wish to have applied to them whenever the company concerned has concluded one or more collective agreements or arbitration rulings. The complainant organization argues that, by placing these workers in a more advantageous position than unionized workers, the provision both discourages unaffiliated workers from joining a trade union and encourages those who are affiliated to cancel their membership; whereas the collective agreement concluded by their union applies to its members automatically, non-members can choose the agreement that suits them best.
- 872.** The CGTP–IN considers that the provision undermines the rights of trade unions and their members and is therefore anti-union in nature. The provisions previously in force allowed collective agreements and arbitration rulings to be extended to non-unionized workers.
- 873.** The complainant organization adds that under article 497 of the Labour Code employers can use their dominant position in the labour relationship to influence non-unionized workers’ choice of collective agreement and even encourage unionized workers to leave their union if the collective agreement it signs is not the one that suits them best. In other words, employers can now promote some unions rather than others, in violation of the ILO’s Conventions.
- 874.** The CGTP–IN also refers to obstacles to collective bargaining that CTT Correios de Portugal, SA – the country’s state-owned postal service administered by the Ministry of Public Works, Transport and Communications – has placed in the way of the Postal and Communications Workers’ Trade Union (SNTCT), which represents around 65 per cent of the workers of the company and allied service, i.e. 7,791 of the roughly 12,000 workers.
- 875.** In 2006, the SNTCT and the other trade union associations signed a collective agreement with the company which the SNTCT denounced on 27 April 2007; negotiations with a view to revising the agreement began on 24 May 2007. On 10 March 2008, the company and one union association representing about 24 per cent of the workers reached an “agreement of principle” that entered into force on 15 April 2008. The company gave all the other trade unions three days to make their position on the subject known. The SNTCT, which chose not to subscribe to the agreement of principle, thus continued to be governed by the 2006 collective agreement. However, the company declared that the 2006 agreement would expire on 8 November 2008 and, having persuaded workers to sign up to

it “individually”, began to apply the 2008 agreement also to the SNTCT and announced that it would apply the general provisions of the Labour Code to any workers who refused.

- 876.** The SNTCT requested the Labour Court of Lisbon to issue a judicial injunction to the effect that its members would continue to be covered by the 2006 collective agreement, or else that their rights under the agreement would be stipulated in their contracts. The 2006 agreement did not mention any expiry date – except in the case of wages and other monetary provisions where the relevant clauses were valid for 12 months – but merely specified a minimum period of validity of 24 months. Consequently, the agreement had not expired and would remain in effect until revised by another agreement concluded by the same signatories (clause 3 of the agreement provides for its possible revision but not its expiry). The complainant organization states that any other interpretation constitutes an infringement of the country’s Constitution, but the position of the Ministry of Labour and Social Solidarity is quite different.
- 877.** Moreover, according to article 560 of the Labour Code, the rights deriving from a collective agreement can be curtailed only by another collective agreement which as a whole is more advantageous. However, a comparison of the provisions of the 2006 and 2008 agreements shows clearly that the workers’ rights under the latter are significantly restricted.
- 878.** Arguing that the 2006 collective agreement is no longer valid, the company has reduced to five the number of union officials (for over 1,800 workplaces) who are entitled to full union rights, and to three hours and 45 minutes per day the maximum time available for union activities. This is clearly insufficient and a violation of Article 2 of ILO Convention No. 135. In this way, the company has effectively banned union meetings of the SNTCT and has taken disciplinary action against the participants in those meetings that have been held.
- 879.** Meanwhile, the members of the SNTCT have been invited or pressured to sign up individually to the 2008 collective agreement if they wish to be covered by it and thus entitled to a 2.8 per cent wage increase and other benefits. The company hopes in this way to weaken the SNTCT’s membership, as a result of which the Criminal Investigation and Action Department, which is responsible for investigating criminal charges, has now become involved. The Ministry of Labour has also been arranging conciliation meetings between the SNTCT and the company.
- 880.** The complainant organization states that the unilateral imposition of a collective agreement, negotiated with trade unions with a minimal representation of about 25 per cent of the workers and against the wishes of 65 per cent of the workers represented by the SNTCT, is contrary to the ILO’s Conventions on collective bargaining.
- 881.** The complainant organization adds that, in response to the company’s request for mediation, a mediator appointed by the Ministry of Labour communicated a proposal to the SNTCT on 17 June 2008 which it accepted, along with the other trade union associations, but which the company then rejected. Subsequently the company put forward a number of proposals for voluntary arbitration, whereupon the SNTCT asked the Ministry of Labour to impose a revision of the 2006 collective agreement by compulsory arbitration, on the grounds that the lengthy negotiations that had already taken place had been fruitless and that the company had shown bad faith throughout the process and clearly had no intention to negotiate. Ninety days later the Ministry had still not replied. Instead, at the company’s request it came out in favour of the expiry of the 2006 agreement and published an announcement that it would expire on 7 November 2009. Given the circumstances, the SNTCT appealed to the Circuit Administrative Tribunal to issue provisional measures.

B. The Committee's conclusions

- 882.** *The Committee regrets that, despite the length of time that has passed since the complaint was first presented, the Government has not responded to the complainant organization's allegations even though it has been invited on several occasions to send its comments and observations on the case and has received an urgent appeal to do so.*
- 883.** *Under these circumstances and in accordance with the applicable procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a substantive report on the case without being able to take into account the information it has sought from the Government.*
- 884.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for examining allegations of violations of freedom of association is to ensure respect for trade union rights in law and in practice. The Committee is convinced that, while this procedure protects governments against unreasonable accusations, they must recognize the importance for the protection of their own good name of formulating for objective examination detailed replies concerning the allegations brought against them (see First Report of the Committee, para. 31).*
- 885.** *The Committee observes that in its initial allegation, the complainant organization voices its opposition to article 497 of the Labour Code, which allows non-unionized workers to choose the collective agreement or arbitration ruling they wish to have applied to them whenever the company concerned has concluded one or more collective agreements or arbitration rulings. In the complainant organization's opinion, this provision discourages union membership and opens the door to employers exerting pressure on workers to choose the agreement that the employer prefers.*
- 886.** *The Committee observes that article 497 of the Labour Code reads as follows:*
1. Where one or more collective agreements or arbitration rulings are applicable within an enterprise, any worker who is not affiliated to any trade union organization may choose the instrument which shall apply in his or her case.
 2. The application of the agreement as provided for in paragraph 1 shall be effective until its expiry, without prejudice to the provision contained in the following paragraph.
 3. In the case of a collective agreement with no specified expiry date, workers shall be covered by the agreement for a minimum of one year.
 4. A worker may revoke his or her choice, in which case the provision of paragraph 4 of the preceding article shall apply.

Paragraph 4 of article 496 reads:

4. In the event that the worker, the employer or an association to which either of them belongs ceases to be affiliated to the body that concluded the collective agreement, the said agreement shall continue to be applicable until its scheduled expiry date or, if no expiry date is scheduled, for a period of one year, or at all events until the collective agreement revising it enters into force.

- 887.** *The Committee recalls that systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 950]. In the first instance national systems tend to provide that the collective agreement concluded*

by the most representative trade union applies to all the workers, whether or not they are members; in the second instance, each agreement normally applies to the members of each organization that signed the agreement concerned. The Committee also recalls that some systems provide for all the trade unions to negotiate a single agreement with the company or bargaining unit concerned. In the case of Portugal the legislation grants non-unionized workers the right to choose the collective agreement they desire when one or more have been concluded within the company. The complainant organization considers that this discourages union membership and can give rise to interference by the employers so that non-unionized workers choose the collective agreement that the employer wants, for example so as to weaken a given trade union.

- 888.** *In this respect, the Committee considers that non-unionized workers are in a better position to determine which union has best succeeded in defending the interests of the occupational category to which they belong by means of the collective agreement it has concluded with the company, and that their right to choose does not undermine the principle of promoting free and voluntary collective bargaining laid down in Article 4 of Convention No. 98, as it is not restricted by the existence of more than one collective agreement within an enterprise.*
- 889.** *As the complainant organization observes, the employer is in a position to try to influence or pressure the non-unionized workers to sign up to one collective agreement rather than another. Nevertheless, the Committee notes that Article 2 of Convention No. 98 stipulates that there must be adequate protection against acts of interference by the employer and that Portugal's legislation does contain provisions to this effect, notably article 55 of the Constitution which expressly guarantees the independence of trade union associations vis-à-vis the employers and the State and provides for appropriate channels for appealing against any infringement of this right. The Committee observes further that the Committee of Experts on the Application of Conventions and Recommendations has not criticized Portugal's legislation in this respect. That being so, the Committee will not pursue any further its examination of the allegation concerning article 497 of the Labour Code.*
- 890.** *The Committee observes that the complainant organization also alleges that the employer, CTT Correios de Portugal, SA, has engaged in practices that are contrary to the principle of collective bargaining and designed to weaken the SNTCT by negotiating a collective agreement with minority unions and excluding the SNTCT (which represents 65 per cent of the workforce) and by inviting or pressuring its members to opt for the agreement concluded in 2008 with minority trade unions. The 2008 agreement curtails the benefits covered by the 2006 agreement, which was concluded by all the trade unions, inasmuch as it declares the latter to have expired, drastically reduces full-time leave for carrying out trade union activities and effectively restricts other rights, such as the right to hold union meetings which has allegedly given rise to disciplinary measures. The Ministry of Labour has backed the company's position and, moreover, has failed to respond to the SNTCT's request for compulsory arbitration to resolve the dispute, which has gone on for far too long and has shown the efforts made so far to have been fruitless.*
- 891.** *The Committee observes that behind the complaint lie questions of interpretation and appreciation which it understands have been submitted to the judicial authorities, notably the question of whether the 2008 collective agreement as a whole is less advantageous than the 2006 agreement and whether the latter, which covers the company's entire workforce, is still applicable despite the fact that a subsequent agreement was concluded in 2008 with minority trade unions. Given the situation, the Committee urges the Government to send its observations without delay on the alleged infringement of the right to bargain collectively and the adoption by CTT Correios de Portugal, SA and the authorities of anti-union practices that are prejudicial to the SNTCT, and also to send it the administrative and judicial rulings handed down (including those handed down by the*

Criminal Investigation and Action Department), together with information on any developments in the dispute since the complaint was presented in July 2009, so that the Committee can reach an opinion on the allegations in full possession of the facts.

The Committee's recommendations

892. *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 sent its observations on the complaint despite the fact that the Committee has had to adjourn its examination of the case on several occasions and despite the urgent appeal it addressed to the Government at its meeting in June 2009.*
- (b) The Committee urges the Government to send its observations without delay on the alleged infringement of the right to bargain collectively and the adoption by the CTT Correios de Portugal, S.A, and the authorities of anti-union practices that are prejudicial to the SNTCT, and also to send it the administrative and judicial rulings handed down (including those handed down by the Criminal Investigation and Action Department), together with information on any developments in the dispute since the complaint was presented in July 2009, so that the Committee can reach and opinion on the allegations in full possession of the facts.*

CASE NO. 2715

INTERIM REPORT

**Complaint against the Government of the
Democratic Republic of the Congo
presented by
the Congolese Labour Confederation (CCT)**

Allegations: The complainant alleges anti-union discrimination against the president of the national trade union delegation of the Customs and Excise Office (OFIDA), and especially his dismissal

893. The complaint was presented in communications dated 6 and 13 April, 14 September and 23 November 2009, and 27 January and 5 August 2010.

894. As the Government has not replied, the Committee has been obliged to postpone its examination of this case. At its May–June 2010 meeting [see 357th Report, para. 5, approved by the Governing Body at its 308th Session], the Committee issued an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body in 1972, it could present a report on the substance of these cases even if its observations or information had not been received in time. To date, the Government has not sent any information whatsoever.

895. The Democratic Republic of the Congo 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 organization's allegations

- 896.** In its communication dated 6 April 2009, the Congolese Labour Confederation (CCT) denounces the harassment and intimidation of employees of the Customs and Excise Office (OFIDA) who are members of OFIDA's trade union delegation, and specifically of the delegation's national president and staff representative on OFIDA's management committee, Mr Lubamba Kabeya. According to the complainant, the management committee decided to dissolve the trade union delegation in March 2005. Subsequently, in July 2005, Mr Lubamba Kabeya was the victim of arbitrary arrest at the behest of the High Court of Kinshasa/Gombe following a request from his employer for an official inquiry (requisition d'information). He was later illegally dismissed without the mandatory prior authorization from the labour inspectorate under article 258 of the Labour Code. The CCT draws special attention to the difficult situation in which Mr Lubamba Kabeya finds himself as he has been without financial resources since his dismissal in 2005. The complainant also denounces the employer's refusal so far to follow the General Labour Inspectorate's recommendation that it reinstate the trade union delegation.
- 897.** In its communication dated 13 April 2009, the complainant also refers to serious interference by OFIDA in the trade union elections held the previous March. Among other things, it denounces the intimidation and harassment of candidates presented by the CCT and OFIDA's unilateral decision on 16 March 2009 to bar them from the elections without any valid reason. The complainant has appealed through all possible channels to have the elections declared null and void, but to no avail.
- 898.** In its communication dated 14 September 2009, the complainant describes the steps it has taken to bring the situation to the attention of the public authorities, particularly the Ministry of Justice and the Ministry of Employment, Labour and Social Welfare, and expresses its concern at the administration's silence. In an official communication to the Public Prosecutor, the General Labour Inspector recognized that the dissolution of the OFIDA trade union delegation followed by the holding of trade union elections was a violation of the law and confirmed that he did not authorize the termination of Mr Lubamba's contract by his employer.
- 899.** In its communications dated 23 November 2009 and 27 January 2010, the complainant denounces the dilatory and discriminatory administration of justice, owing to social status of the person responsible for the situation, namely, Mr Rugziwa Magera, general delegated administrator of OFIDA, currently on official mission for the General Customs and Excise Directorate (DGDA).
- 900.** In its communication dated 5 August 2010, the CCT states that, by letter No. 2829/D.23/10501/MOP/2010 of 26 May 2010, the Public Prosecutor ordered the General Labour Inspector to comply with the spirit of its letter dated 14 June 2005 reinstating union delegate Lubamba Kabeya in his trade union function along with his entire team. The General Labour Inspector accordingly took decision No. 22/METPS/IGT-JLL/JMK/003/2010 on 18 June 2010 and issued internal directive No. 22/METPS/IGT/021/2010. The complainant denounces the renewed refusal of the DGDA (formerly OFIDA), by letter No. DGDA/DG/DRH/1510, to comply with the decisions of the General Labour Inspector. The CCT denounces the repercussions of the Director General's refusal on its trade union activities which are at a standstill in the

DGDA over the personal situation of Mr Lubamba Kabeya, who has been deprived of any financial resources since 2005.

B. The Committee's conclusions

- 901.** *The Committee regrets that, despite the length of time that has passed since the complaint was first presented, the Government has not responded to the complainant's allegations even though it has been invited on several occasions to send its comments and observations on the case and has received an urgent appeal to do so. Noting furthermore that this is the fourth consecutive case on which the Government has failed to provide any information in response to the allegations presented, the Committee urges the Government to be more cooperative in the future.*
- 902.** *Under these circumstances and in accordance with the applicable procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee finds itself obliged to present a substantive report on the case without being able to take into account the information it has sought from the Government.*
- 903.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for examining allegations of violations of freedom of association is to ensure respect for trade union rights in law and in practice. The Committee is convinced that, while this procedure protects governments against unreasonable accusations, they must recognize the importance for the protection of their own good name of formulating for objective examination detailed replies concerning the allegations brought against them (see First Report of the Committee, paragraph 31).*
- 904.** *The Committee notes that the present case concerns the perpetration of acts of harassment and intimidation against trade union officers by the DGDA since 2005, notably the dismissal of the president of the trade union delegation, and its interference in union elections.*
- 905.** *The incidents denounced by the complainant can be summarized as follows: in March 2005, the members of the trade union delegation of the OFIDA were suspended and the delegation itself dissolved by OFIDA's administrative committee, following which new elections were organized without any account being taken of the legal provisions in force.*
- 906.** *The Committee notes the complainant's statement that in July 2005 the president of the staff union delegation and staff representative on OFIDA's management committee, Mr Lubamba Kabeya, was the victim of arbitrary arrest at the behest of the High Court of Kinshasa/Gombe following a request by his employer for an official inquiry (requisition d'information). He was later illegally dismissed without prior authorization from the labour inspectorate as required under article 258 of the Labour Code. The Committee notes that, as early as 2005, the General Labour Inspectorate recommended his reinstatement in his post but that OFIDA failed to implement its recommendations. 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 edition, 2006, para 799].

907. The Committee concludes, from its information that the General Labour Inspectorate called for the reinstatement of the president of OFIDA's union delegation and of his team as long ago as 2005, that it has been recognized that the dismissal of Mr Lubamba Kabeya was decided in violation of the legal texts in force. The Committee notes that in its latest communication the complainant states that in May 2010 the Public Prosecutor ordered the General Labour Inspector to comply with the spirit of its letter dated 14 June 2005 reinstating union delegate Lubamba Kabeya in his trade union duties along with his team, and that the General Labour Inspector accordingly took decision No. 22/METPS/IGT-JLL/JMK/003/2010 on 18 June 2010 and issued internal directive No. 22/METPS/IGT/021/2010. The Committee observes that five years have now elapsed without the General Labour Inspectorate's 2005 decision reinstating OFIDA's union delegation being implemented. The Committee recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see **Digest**, *op. cit.*, para. 826].
908. The Committee notes the statement that, by letter of 15 July 2010, the Director General of the DGDA (formerly OFIDA) refused to comply with the decisions of the General Labour Inspector. The Committee expresses its concern at the length of time that has elapsed without any solution being found to the problem, which may prevent the trade union delegation from defending its members' interests effectively and continues to aggravate the personal situation of Mr Lubamba Kabeya, who the CCT says has been without any financial resources since he was dismissed. Recalling that the responsibility for applying the principles of freedom of association rests ultimately with the Government, the Committee urges the Government without delay to take all the steps at its disposal to follow up the General Labour Inspectorate's decision to reinstate all the members of the OFIDA (now DGDA) union delegation and to ensure that Mr Lubamba Kabeya is reinstated in his post and is paid the wages that are in arrears and all benefits due to him.
909. The Committee notes further that the complainant denounces serious interference by the DGDA in the trade union elections held in March 2009. According to the CCT, the candidates on its list were the victims of intimidation and harassment, and OFIDA decided to exclude the CCT's candidates without any valid reason. The Committee also notes that the CCT's appeals to the public authorities have all been in vain. The Committee takes note of the documents provided by the CCT in this respect, in particular the notice dated 14 June 2005 given by the General Labour Inspector to the direction of the OFIDA recommending to cancel the current process of trade unions' elections declared to be illegal; the notice of 18 June 2010 given by the General Labour Inspector to the direction of the DGDA (ex OFIDA) requesting to cancel the trade unions' elections organized in April 2005 and March 2009 which had been declared illegal; the order issued by the General Labour Inspector of 10 July 2010 for an inspection visit to the DGDA; the mission report on the inspection visit dated 19 July 2010 which takes note of the reluctance of the direction of the DGDA vis-à-vis the mission and recommends that the prosecutor inform the direction of the DGDA of the decision of the General Labour Inspector of 18 June 2010 and ensure its implementation with the support of the police forces if necessary. The Committee recalls that workers and their organizations should have the right to elect their representatives in full freedom and the latter should have the right to put forward claims on their behalf [see **Digest**, *op. cit.*, para. 389]. Furthermore, legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of

*interference by employers against workers and workers' organizations to ensure the practical application of Articles 1 and 2 of Convention No. 98 [see **Digest**, op. cit., para. 862]. Given the circumstances, the Committee requests that the Government take all the necessary measures to implement the decision of the General Labour Inspector requesting to cancel the trade unions' elections held in the OFIDA in April 2005 and in the DGDA in March 2009 and ensure that any elections held in the DGDA in future comply with the principles of non-interference referred to above.*

The Committee's recommendations

910. *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 responded to the complainant's allegations even though it has been invited on several occasions to send its comments and observations on the case and has received an urgent appeal to do so. Noting furthermore that this is the fourth consecutive case on which the Government has failed to provide any information in response to the allegations presented, the Committee urges the Government to be more cooperative in the future.*
- (b) Recalling that the responsibility for applying the principles of freedom of association rests ultimately with the Government, the Committee urges it without delay to take all the steps at its disposal to follow up the General Labour Inspectorate's decision to reinstate all the members of the OFIDA (now DGDA) union delegation, and to ensure that Mr Lubamba Kabeya is reinstated in his post and is paid the wages that are in arrears and all benefits due to him.*
- (c) The Committee requests that the Government take all the necessary measures to implement the decision of the General Labour Inspector requesting to cancel the trade unions' elections held in the OFIDA in April 2005 and in the DGDA in March 2009, and ensure that any elections held in the DGDA in the future comply with the principles of non-interference referred to above.*

CASE NO. 2422

INTERIM REPORT

Complaint against the Government of the Bolivarian Republic of Venezuela
presented by
the Single National Union of Public, Professional, Technical and Administrative Employees of the Ministry of Health and Social Development (SUNEP-SAS)
supported by
Public Services International (PSI)

Allegations: Refusal of the authorities to negotiate a draft collective agreement or lists of demands with SUNEP–SAS; refusal to grant trade union leave to SUNEP–SAS officials; dismissal proceedings against trade unionists; and other anti-trade union measures

- 911.** The Committee examined this case at its March 2010 meeting and presented an interim report to the Governing Body [see 356th Report, paras 1558–1581, approved by the Governing Body at its 307th Session (March 2010)].
- 912.** The Single National Union of Public, Professional, Technical and Administrative Employees of the Ministry of Health and Social Development (SUNEP–SAS) sent new allegations in a communication dated 19 May 2010. The Government sent new observations in a communication dated 24 May 2010.
- 913.** The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 914.** In its previous examination of the case at its March 2010 meeting, the Committee made the following recommendations on the pending issues [see 356th Report, para. 1581]:
- (a) The Committee invites the complainant organization to rectify, in form and in substance, the points signalled by the administrative authority relating to the amendments to the SUNEP–SAS statutes, and requests the Government, once that rectification is accomplished, to fully comply without delay with the principle of non-interference by the authorities in trade union affairs and, in particular, the right of trade unions to draw up their by-laws.
 - (b) The Committee urges the Government to take measures to ensure that the labour authorities and the National Electoral Council stop interfering in the internal affairs of SUNEP–SAS, such as the elections of its executive committee, and to guarantee that the right to bargain collectively of this trade union is upheld, without discriminating against it in respect of other organizations. The Committee requests the Government to keep it informed in this regard.
 - (c) Finally, the Committee requests the Government to indicate whether it has implemented the Committee’s previous recommendations to guarantee that SUNEP–SAS does not have its trade union premises confiscated.

B. New allegations from the complainant organization

- 915.** In its communication dated 19 May 2010, SUNEP–SAS refers to the issues previously raised and points out that the authorities continue to infringe its rights as a trade union. Even though intervention by the National Electoral Council (CNE) constitutes interference in trade union autonomy, SUNEP–SAS contacted the CNE once again in writing on 11 March 2009 requesting the procedure for the election of its executive committee to be started, but there has been no reply to date. The Ministry of People’s Power for Health, citing supposed “electoral default” (delays in elections since 2007), has been refusing trade union leave, the exercise of the right to engage in collective bargaining and the payment of debts to the union (139,954 bolívares fuertes) to cover the cost of social and educational

programmes (deriving from collective agreements) between 2000 and 2010. In general, SUNEP–SAS alleges a hostile attitude on the part of the Ministry authorities responsible for labour or health matters expressed in its refusal to receive the union’s officials, even though the union and these ministries have headquarters in the same building, and in its response to the union’s written requests and appeals, which is characterized by months of delays and excessive formalities concerning points for rectification (emphasizing grammatical or editorial errors, use of stamps, etc.), as in the case of the union’s reform of its rules (the union then undertook the necessary rectification and the Ministry considered it inadequate).

- 916.** The complainant union also refers to the conclusions of the Committee on Freedom of Association, noting with interest the Government’s statement to the effect that trade unionist Mr Yuri Girardot Salas Moreno (who had been dismissed) was working, since the judicial proceedings which he had initiated had been settled in his favour [see 356th Report, para. 1573]. SUNEP–SAS adds, however, that on 25 March 2010 the second-level judicial authority examined an appeal by the Government and quashed the ruling ordering the reinstatement of the trade unionist.

C. The Government’s reply

- 917.** In its communication dated 24 May 2010, the Government states with regard to the allegations concerning the CNE that, by means of Decision No. 090528-0264 of 28 May 2009 published in *Electoral Gazette* No. 488 of 29 May 2009 of the Bolivarian Republic of Venezuela, the CNE issued the regulations concerning technical advice and logistical support with respect to trade union elections. When these regulations came into force, the regulations for the election of trade union authorities issued by the CNE by means of Decision No. 041220-1710, published in *Electoral Gazette* No. 229 of 19 January 2005, were repealed. Moreover, by means of Decision No. 090528-0265, also of 28 May 2009 and published in *Electoral Gazette* No. 488, the CNE issued the regulations for guaranteeing the human rights of workers in trade union elections.

- 918.** The Government adds that these regulations establish the parameters for defining action by the electoral authority whenever its technical advice and logistical support for organizing electoral procedures are requested voluntarily by trade unions. These regulations protect the principles and human rights relating to participation in leadership, trade union democracy, the voting rights of trade union members and the free election of union representatives and their subsequent re-election or replacement, guaranteeing reliability, equality, impartiality and transparency, disclosure of legal documents, good faith, economy and efficiency in proceedings and processes, and respect for freedom of association.

- 919.** Consequently, as has been stated on various occasions, there is no interference by the CNE in the election of trade union officers. Specifically, with regard to SUNEP–SAS, all requests made by the representatives of this organization have been met by the labour administrative authorities concerned, in accordance with the procedures laid down in the national legislation and international conventions, with timely responses to the union in line with the law. The Government therefore requests the Committee to take due note of this information. The CNE regulations were amended, taking into account the recommendations of the ILO supervisory bodies, and at no time did these regulations violate or undermine the right to freedom of association.

- 920.** As regards the request that SUNEP–SAS should not be deprived of its union premises, the Government points out that it has no information concerning the supposed confiscation of this organization’s union premises. In order to deal with this allegation, more information and specific details are needed from the complainants. In the Bolivarian Republic of

Venezuela, the social, labour and union rights of workers are observed and guaranteed in strict compliance with the established legal system and the undertakings made at the international level.

- 921.** As regards the situation of the SUNEP–SAS executive committee, the Government declares that this body is in a situation of “electoral default” since its last elections were held on 30 November 2004 and no new elections have been held to cover the present term of office, namely 2004–07, as per the union’s own rules. Hence the executive committee has no authority to negotiate a collective agreement, framework contract or labour regulations; it merely has the capacity to perform administrative tasks.
- 922.** The Government emphasizes that it is not a question of any refusal to engage in collective bargaining with the trade union or of any refusal by the health sector authorities or the Government itself to open a dialogue. The issue is that of compliance by any trade union in the country with the legal requirements for representing workers in discussions and negotiations relating to collective labour agreements.

D. The Committee’s conclusions

- 923.** *The Committee observes that the pending issues refer to: (1) intervention by the authorities, specifically the CNE, in elections for the executive committee of the SUNEP–SAS trade union; (2) the resulting situation of “electoral default” (delays in elections) which is preventing the union from participating in collective bargaining; and (3) the confiscation of the SUNEP–SAS trade union premises. In its new allegations, SUNEP–SAS claims that on 25 March 2010 the second-level court quashed the judicial ruling ordering the reinstatement of union leader Mr Yuri Girardot Salas Moreno. The union also indicates that: (1) the Ministry has not approved the reform of the union’s rules even though, according to the complainant organization, action was taken to rectify points raised in observations from the Ministry of People’s Power for Labour (the remedial action that was deemed inadequate had already been referred to by the Government in its reply to the previous examination of the case); (2) the problems with regard to holding union elections are persisting (refusal by the CNE to acknowledge receipt of communications from SUNEP–SAS); (3) refusal to grant union leave; and (4) failure by the authorities to pay a number of debts to the union arising from collective agreements.*
- 924.** *The Committee notes with regret that in its reply the Government only provides observations concerning some of the pending issues, essentially those relating to union elections and the exercise of the complainant union’s right to engage in collective bargaining, asking the union to supply further details with regard to the alleged confiscation of union premises.*
- 925.** *The Committee notes in particular that the Government maintains in its reply that the complainant organization is in a situation of “electoral default” because the term of office of its executive committee ended in 2007 and, as there has been no record of a new election procedure since then, the union has no authority to engage in collective bargaining. The Committee further notes the Government’s statement that according to the regulations in force there is no interference by the CNE in union executive committee elections; the CNE acts whenever the unions concerned voluntarily request its technical advice and logistical support in connection with the holding of elections.*
- 926.** *The Committee emphasizes that the complainant union has attached a copy of a communication dated 25 February 2009 which it sent to the CNE requesting that elections be convened, organized and conducted, and also that the union has not received any reply.*

927. *The Committee observes that the complaint and the numerous attachments presented by the complainant union show that the union has experienced difficulties in amending its rules, in holding its union elections without interference from the authorities and, consequently, in availing itself of union leave and the right to engage in collective bargaining. In this respect, the Committee wishes to recall that at its March 2009 meeting it already urged the authorities to open a constructive dialogue with SUNEP–SAS to resolve the issues raised in the present case [see 353rd Report, para. 1427].*

928. *The Committee also wishes to refer to the most recent conclusions from its March 2010 meeting, which are reproduced below [see 356th Report, paras 1578 and 1579]:*

The Committee deeply deplores the fact that the Government has not complied with its previous recommendation that the health sector authorities open a constructive dialogue with SUNEP–SAS to resolve the issues relating to the refusal to bargain collectively with this organization. The Committee regrets that the Government is invoking “overdue elections” and recalls that in earlier examinations of the case it strongly criticized the interference of the National Electoral Council (which is not a judicial authority) in the elections of the executive committee of SUNEP–SAS in 2004 (the executive committee was recognized years later, following various appeals and after having lost the possibility of bargaining collectively); it also regrets the excessive delay in the processing of the appeals lodged [see 342nd Report, paras 1034 et seq. and 348th Report, paras 1344 et seq.].

The Committee observes that the Government invokes another alleged electoral delay since 2007 in order not to recognize the executive body of SUNEP–SAS. The Committee urges the Government to take measures to ensure that the labour authorities and the National Electoral Council stop interfering in the internal affairs of SUNEP–SAS, such as the elections of its executive committee (the Committee recalls that both it and the Committee of Experts and the Committee on the Application of Standards have, on several occasions, criticized the role and actions of the National Electoral Council and have asked it not to intervene in the elections of trade union executive committees), and to guarantee that the right to bargain collectively of this trade union is upheld, without discriminating against it in respect of other organizations. The Committee stresses that the Government cannot invoke an allegedly voluntary resort to the CNE, whereas in practice it is the body supervising union elections, without the endorsement of which the union executive committees are considered invalid. The Committee requests the Government to keep it informed in this regard.

929. *The Committee notes that the complainant union indicates that its headquarters are in the same building as the Ministry of People’s Power for Labour and complains that the authorities do not allow it to hold the meetings which it requests, that there are substantial delays in written administrative formalities, and that purely formal requirements are excessive. The Committee again urges the Government to open a direct, constructive dialogue with the complainant organization on the issues that have been raised (reform of the union’s rules, elections to the executive committee, exercise of the right to engage in collective bargaining and taking of union leave) and also with regard to: (1) payment of the authorities’ debts to the union for the implementation of educational and social programmes; and (2) confiscation of union premises (regarding which the Government calls for further information from the complainant). The Committee expects that a prompt solution to these issues can be found and requests the Government to keep it informed. According to the Committee’s understanding, the complainant feels that intervention by the CNE in its election procedures is obligatory. If recourse to the CNE is voluntary, as stated by the Government, the Committee requests the Government to give clear explanations and assurances in writing to the complainant organization that it can hold its elections without any intervention by the CNE and to transmit a copy of this communication. Accordingly, the Committee expects that SUNEP–SAS will be able to hold its elections in full freedom in the very near future and merely inform the Government of their outcome.*

- 930.** *As regards the dismissal of union official Mr Yuri Girardot Salas Moreno (whose reinstatement had been ordered by the first-level judicial authority), the Committee notes the complainant's statement that the reinstatement order has been quashed by the second-level judicial authority. The Committee notes that this latest ruling cites trade union leave to which the union official was not entitled as grounds for his dismissal.*
- 931.** *In view of the fact that the judicial authority of the first level ordered the reinstatement of union official Mr Yuri Girardot Salas Moreno (although this decision was quashed at second level), that the grounds for dismissal were the taking of union leave to which he was not entitled and that there is nothing in the legal ruling to suggest that the union official acted in bad faith, the Committee urges the Government to take steps to reinstate him without delay and to ensure that he receives full compensation, including payment of lost salary and other benefits.*
- 932.** *In more general terms, the Committee expresses its deep concern at the problems faced by the complainant in exercising its trade union rights.*

The Committee's recommendations

- 933.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) Expressing its deep concern at the problems faced by the complainant in exercising its trade union rights, the Committee again urges the Government to open a direct, constructive dialogue with SUNEP-SAS on the pending issues: reform of the union's rules; elections to the executive committee; exercise of the right to engage in collective bargaining; taking of union leave; payment of the authorities' debts to the union for the implementation of educational and social programmes; and confiscation of union premises.*
 - (b) The Committee expects that a prompt solution to these issues can be found and that the Government will guarantee the trade union rights of SUNEP-SAS, and requests the Government to keep it informed in this regard.*
 - (c) The Committee requests the Government, if recourse to the CNE in trade union elections is voluntary, as the Government has stated, to give clear explanations and assurances in writing to SUNEP-SAS that it can hold its elections without any intervention by the authorities, and to transmit a copy of such a communication.*
 - (d) In view of the fact that the judicial authority of the first level ordered the reinstatement of union official Mr Yuri Girardot Salas Moreno (although this decision was quashed at second level), that the grounds for dismissal were the taking of union leave to which he was not entitled and that there is nothing in the legal ruling to suggest that the union official acted in bad faith, the Committee urges the Government to take steps to reinstate him without delay and to ensure that he receives full compensation, including payment of lost salary and other benefits.*

CASE NO. 2674

INTERIM REPORT

**Complaint against the Government of
the Bolivarian Republic of Venezuela
presented by
the Confederation of Workers of Venezuela (CTV)**

*Allegations: Obstacles to collective bargaining
with public sector trade unions and actions by
the authorities to expropriate trade union
federations affiliated to the CTV or deprive them
of their premises*

- 934.** The Committee examined this case at its March 2010 meeting and presented an interim report to the Governing Body [see 356th Report, paras 1582–1629, approved by the Governing Body at its 307th Session (March 2010)].
- 935.** The Government sent new observations in a communication dated 24 May 2010.
- 936.** The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 937.** At its March 2010 meeting, the Committee made the following recommendations on the matters that remained pending [see 356th Report, para. 1629]:
- The Committee deplores the fact that, despite two years having elapsed since the submission of a draft collective agreement by the FVM, it has still not been concluded, and expresses the firm hope that the collective agreement will be signed in the very near future. The Committee requests the Government to keep it informed in this regard.
 - The Committee requests the Government to bargain with FEDEUNEP and FETRASALUD or to allow them to participate in bargaining in their respective sectors, and to report to it in this regard.
 - With regard to the allegation concerning the forced expropriation by the Falcón State Government of FETRAFALCON's offices, the Committee observes that the state of Falcón has still not paid FETRAFALCON the full amount for the premises expropriated for reasons of public utility through the amicable resolution mechanism and requests the Government to keep it informed of the result of the process under way. The Committee also requests the Government to urge the Falcón state executive to pay the debt it owes to FETRAFALCON.
 - With regard to the allegation that, on 3 April 2006, a group of people linked to the national Government seized the headquarters of FETRAMERIDA and, since then, with Government support, has continued to occupy it, preventing its legitimate users from utilizing it, the Committee notes that the Government requests further details in order to be able to obtain information on the alleged occupation. The Committee deeply regrets that the Government has approached neither FETRAMERIDA nor the regional executive to obtain more details. The Committee invites the complainant to provide further information concerning its allegations and invites the Government to request information without delay from the regional authorities in the state of Mérida, so that the Committee

can examine this allegation without delay. It also invites the Government to ensure that the occupation of trade union premises ceases.

- With regard to the allegation in which the CTV adds that, on 26 March 2007, the building that served as headquarters for FETRAMIRANDA was seized by court order, at the instigation of the regional government, and then, according to the complainant, on 26 March 2008, the unions were evicted from their offices, which were “taken” by Government supporters belonging to official units known as “missions”, the Committee requests the Government to remove the occupiers (Government supporters, according to the CTV) and to guarantee FETRAMIRANDA’s use of the premises until the claim over title to the property is resolved.
- Observing that, as can be seen from this and previous cases, the CTV and its trade union federations have been the subject of actions or omissions by the authorities intended to harass or damage them, the Committee underlines the fact that the spirit of Convention No. 87 calls for impartial treatment of all trade union organizations by the authorities, even if they criticize the social or economic policies of national or regional executives, as well as avoidance of reprisals for pursuing legitimate trade union activities.

B. The Government’s reply

- 938.** In its communication dated 24 May 2010, the Government refers to the discussions relating to the draft collective agreement of the Venezuelan Teachers’ Federation (FVM). It declares that on 12 May 2009 the Fifth Education Workers’ Collective Agreement (2009–11), between the Ministry of People’s Power for Education, on the one hand, and the National Teachers’ Alliance (SINAFUM), the Federation of Teaching Staff of Venezuela (FEV) and the FVM, on the other, was registered and approved. The agreement covers more than 500,000 teaching staff, both serving and retired. The negotiations took place in an atmosphere of social peace, highlighting the autonomy of the labour administration and its desire to promote harmony and act as facilitator, stimulating and promoting discussions regarding the collective agreement for the benefit of all workers in the sector.
- 939.** As regards the situation of the National Federation of Public Employees (FEDEUNEP), the Government states that the organization is in “electoral default”, inasmuch as executive committee elections, for a period of five years, were last held on 25 October 2001, and to date there is no indication in the federation’s records that any new elections have been held. Hence the federation has no authority to take action, hold discussions or engage in collective bargaining, in accordance with section 128 of the regulations implementing the Organic Labour Act; it is authorized merely to deal with administrative matters.
- 940.** The Government indicates that there is no refusal by the Government to engage in collective bargaining with this or any other organization; it is a question of fulfilment of the requirements laid down in the national legislation for any trade union in the country to represent workers in the discussion and negotiation of collective labour agreements. Accordingly, section 128 of the regulations implementing the Organic Labour Act states that the members of the executive committees of trade unions whose term of office has expired shall be unable to take action or represent the union except in relation to purely administrative matters.
- 941.** Hence, FEDEUNEP has no authority to negotiate the draft collective agreement, since the term of office of its executive committee has expired and the organization has given no evidence that it has undertaken any other electoral process to rectify the situation. Once the situation has been rectified, bargaining in relation to the draft collective labour agreement can take place, in conformity with national labour law and in strict compliance with ILO Convention No. 98.

- 942.** As regards the situation of the Federation of Health Workers (FETRASALUD), the Government states that its executive committee is also in “electoral default”, since there is no evidence that fresh elections have been conducted since 21 September 2001, the date of the last executive committee elections. The above shows categorically that the Ministry of People’s Power for Labour and Social Security has not denied any of the abovementioned trade unions the right of collective bargaining or has acted in any way detrimental to the workers’ interests. The national Government fully complies with ILO Convention No. 98, the Venezuelan State fully guarantees the right to organize and collective bargaining, since these are fundamental labour rights, and it complies fully with the internal procedures laid down in the national laws which give effect to the international Conventions signed and ratified by the Republic.
- 943.** As regards the allegation relating to the Federation of Workers of the State of Falcón (FETRAFALCON), the Government states that on 29 December 2005, in accordance with a prior agreement to settle disputes by compromise, FETRAFALCON sold premises to the regional executive of the State of Falcón, using the amicable settlement mechanism laid down by the Act on expropriation in the public interest, in order to comply with the procedure established by law and by order issued by the Falcón State Governor. The Government adds that the parties reached an agreement on payment whereby the Falcón State executive paid part of the total price of the property at the time of legal registration of the sale, part would be paid for the plot of land and the remainder for the outbuildings constructed on the property. The Government states that the representatives of FETRAFALCON received the payment corresponding to the sale registration and the payment for the land. However, the aforementioned federation has given no evidence to date of being the owner of the outbuildings. Consequently, the Falcón State executive cannot make the payment relating to the outbuildings until it has proof that FETRAFALCON owns them, as this would otherwise contravene the legislation in force.
- 944.** As regards the allegation relating to the Federation of Workers of the State of Miranda (FETRAMIRANDA), the Government declares that the seizure of the land and outbuildings occupied by FETRAMIRANDA was duly ordered by the Political and Administrative Chamber of the Supreme Court of Justice on 5 June 2007, under section 588 of the Venezuelan Code of Civil Procedure in conjunction with section 585, in view of the fact that the aforementioned federation failed to present any deed of ownership. Furthermore, there is no indication that this property of the Venezuelan State is being “occupied by Government supporters”.
- 945.** As regards the alleged occupation of the former offices of the Federation of Workers of the State of Mérida (FETRAMERIDA), the Government states that the allegations are totally invalid and unfounded, since the premises formerly used as headquarters by FETRAMERIDA are currently occupied by a group from the Bolivarian University of Venezuela. It is therefore incorrect to claim that “a group of people linked to the national Government seized the headquarters of the Mérida State Federation of Workers”.
- 946.** Hence, far from giving rise to the present complaint of violation of freedom of association, the State of Venezuela, in the context not only of safeguarding its legitimate interests to the benefit of society but also of strengthening the trade union movement, has contributed towards the elimination of inequalities within the trade unions in the country. Accordingly, the Government, following the guidelines laid down in international human rights Conventions, including those relating to labour rights in this case, as well as the guidelines of the ILO supervisory bodies, has acted in such a way as to prevent discrimination with regard to the trade unions or avoid favouring one union “stream” over another.

C. The Committee's conclusions

947. *The Committee notes with interest the Government's statements to the effect that on 12 May 2009 the Fifth Education Workers' Collective Agreement (2009–11) between the Ministry of People's Power for Education, on the one hand, and three trade unions, including the FVM, on the other, was registered and approved.*
948. *As regards the alleged refusal of the public authorities to negotiate with the FEDEUNEP and FETRASALUD trade unions, the Committee observes that the Government merely repeats its previous statements to the effect that trade unions in a state of "electoral default" (i.e. which have not elected a new executive committee on expiry of the previous committee's term of office) cannot engage in collective bargaining, in accordance with section 128 of the regulations implementing the Organic Labour Act. The Committee would like to refer to its previous conclusions, which are reproduced below [see 356th Report, paras 1618–1619]:*

With regard to the alleged refusal by the authorities to negotiate with FEDEUNEP on a draft framework agreement to regulate working conditions in the public sector, and the authorities' alleged refusal to let FETRASALUD participate in collective bargaining in its sector since 2000, the Committee regrets to observe that the Government justifies its refusal on the grounds that both federations have been in "electoral default" since 2006 because they have not provided evidence of executive committee elections since that year. The Committee wishes to point out, in this regard, that it has repeatedly criticized the intervention of the National Electoral Council (which is not a judicial body) in elections to trade union executive committees.

In various earlier cases, the Committee has observed how this body and its activities have stymied the results of trade union elections until lengthy procedures with uncertain outcomes have been resolved, and that this type of intervention has had a negative impact on organizations belonging to the CTV; it is therefore not surprising that these union organizations disown the electoral system guided by the National Electoral Council, which has itself been the subject of many objections, not only from the Committee on Freedom of Association, but also from the Committee of Experts and the Conference Committee on the Application of Standards, for its violations of Article 3 of Convention No. 87. In particular, the Committee would like to refer to the conclusions of the Committee on the Application of Standards in its June 2009 discussion of the application of Convention No. 87, in which it urged the Government to take the necessary measures without delay to ensure that intervention of the National Electoral Council in proceedings of union elections, including its intervention in cases of complaints, was only possible when the organization explicitly so requested, and to take active steps to amend all the legislative provisions incompatible with the Convention to which the Committee of Experts had objected. The Committee on the Application of Standards also requested the Government to intensify social dialogue with representative organizations of workers and employers. This being the case, and bearing in mind that the federations within the CTV unite numerous organizations and thousands of workers, the Committee requests the Government to bargain with FEDEUNEP and FETRASALUD or to allow them to participate in bargaining in their respective sectors, and to report to it in this regard.

The Committee reiterates these conclusions and recommendations.

949. *As regards the Committee's recommendation regarding payment to the FETRAFALCON federation for the expropriated building using the amicable settlement mechanism and more generally regarding settlement of Falcón State's debts to the federation, the Committee notes the Government's statements to the effect that the representatives of FETRAFALCON already received the payment corresponding to the sale registration and the payment for the land. The Committee notes the Government's statement, however, that FETRAFALCON has given no evidence of being the owner of the outbuildings and that, consequently, according to the law, the Falcón State executive cannot make the payment relating to the outbuildings until FETRAFALCON proves that it owns them. The*

Committee requests the complainant organization to send its comments and provide further information in this respect.

- 950.** *As regards the allegation relating to the occupation of the FETRAMERIDA federation premises (in which it is claimed that a group of people linked to the Government seized the federation headquarters and since then has continued to occupy them, preventing the legitimate tenants from making use of the premises), the Committee observes that the complainant organization has not provided the additional information requested. The Committee notes the Government's additional observations to the effect that the former FETRAMERIDA headquarters building is currently being used by a group from the Bolivarian University of Venezuela and consequently the allegation that a group of people linked to the Government seized the FETRAMERIDA headquarters is false. The Committee again requests the complainant to provide further details in relation to the allegations.*
- 951.** *As regards the allegations concerning the seizure by court order in 2007 of the FETRAMIRANDA federation headquarters at the request of the regional government, the eviction of the trade unions from the premises and the subsequent occupation by Government supporters, the Committee notes the Government's statements to the effect that: (1) the seizure order was issued by the court because the federation in question failed to present any deed of ownership; and (2) there is no indication that this property of the Venezuelan State is being "occupied by Government supporters". The Committee recalls that in its recommendation regarding this allegation it asked the Government to remove the occupiers and to guarantee FETRAMIRANDA's use of the premises until the dispute regarding ownership of the property is resolved. The Committee invites the complainant to send its comments on the Government's new reply and on the current status of the building in which its headquarters were located.*
- 952.** *The Committee considers itself bound to reiterate the general recommendation that it made during the previous examination of the case, which is reproduced below [see 356th Report, para. 1629(h)]:*

Observing that, as can be seen from this and previous cases, the CTV and its trade union federations have been the subject of actions or omissions by the authorities intended to harass or damage them, the Committee underlines the fact that the spirit of Convention No. 87 calls for impartial treatment of all trade union organizations by the authorities, even if they criticize the social or economic policies of national or regional executives, as well as avoidance of reprisals for pursuing legitimate trade union activities.

The Committee's recommendations

- 953.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee again requests the Government to engage in collective bargaining with FEDEUNEP and FETRASALUD or to allow them to participate in bargaining in their respective sectors, and to keep it informed in this regard.*
 - (b) The Committee invites the complainant organization to send comments and further information regarding the allegations relating to the status of the FETRAFALCON and FETRAMERIDA premises, taking particular account of the Government's latest reply.*
 - (c) The Committee invites the complainant organization to send its comments on:*

- (1) *the Government's new reply to the allegations concerning the FETRAMIRANDA trade union federation and recalls that in its recommendation regarding this allegation, it asks the Government to remove the occupiers and to guarantee FETRAMIRANDA's use of the premises until the dispute regarding ownership of the property is resolved; and*
- (2) *the current status of the building in which the former headquarters of the aforementioned federation were located.*

CASE NO. 2727

INTERIM REPORT

**Complaint against the Government of
the Bolivarian Republic of Venezuela
presented by
the Venezuelan Workers' Confederation (CTV)**

*Allegations: the Venezuelan Workers' Confederation (CVT) alleges that: (1) the Office of the Attorney-General has brought charges of boycotting against six workers at the enterprise *Petróleos de Venezuela SA (PDVSA)* for staging protests to demand their labour rights; (2) protests have been criminalized, legal proceedings at various enterprises have been initiated and union officials have been dismissed in connection with these protests; (3) three officials of the Bolivarian Union of Workers in the Construction Industry in *El Tigre* and two union delegates in the *Los Anaucos* area were murdered in June 2009; (4) more than 200 workers and union officials in the construction sector were murdered by contract killers; and (5) the public authorities have persistently refused to bargain collectively in the oil, electricity and national university sectors, among others*

- 954.** The Committee examined this case at its meeting in March 2010 and presented an interim report to the Governing Body [see 356th Report, paras 1630 to 1654, approved by the Governing Body at its 307th Session (March 2010)].
- 955.** The Government sent its observations in a communication dated 24 May 2010.
- 956.** The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

957. In its previous examination of the case in March 2010, the Committee made the following recommendations regarding the matters still pending [see 356th Report, para. 1654]:

- (a) The Committee expresses its grave concern at the serious allegations of murders of workers and union officials and urges the Government to act diligently and swiftly to resolve these cases fully.
- (b) With regard to the allegations concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, general secretary, Mr Jesús Argenis Guevara, organizational secretary, and Mr Jesús Alberto Hernández, culture and sports secretary) and of two trade union delegates in the Los Anaucos area in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran), the Committee requests the Government to explain the reasons for the termination of the criminal proceedings and expects that new investigations will be initiated and will yield results in the near future and will enable the perpetrators to be identified and punished. The Committee requests the Government to keep it informed in this regard.
- (c) Concerning the allegations in relation to the contract killings of more than 200 workers and union officials in the construction sector, the Committee requests the trade union to provide the Government without delay with a list of these murders and the circumstances involved so that the Government can undertake the appropriate investigations without delay. The Committee requests the Government to keep it informed in this regard.
- (d) As regards the allegations concerning the Office of the Attorney-General's preparation of criminal charges against and detention of six workers at PDVSA because, during a protest in defence of their labour rights, they paralysed the enterprise's activities, the Committee requests the Government to take the necessary measures to have the criminal proceedings brought against the six union officials at PDVSA dropped and to ensure their release without delay. The Committee also requests the Government to take the necessary steps to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services so that it does not apply to services which are not essential in the strict sense of the term and so that in no event may criminal sanctions be imposed in cases of peaceful strikes. The Committee requests the Government to keep it informed in this regard. The Committee draws this case to the attention of the Committee of Experts.
- (e) Relating to the allegations concerning the criminalization of protests and the initiation of judicial proceedings at various enterprises in the oil, gas and steel sectors, and the dismissal of union officials as a result of these protests, the Committee requests the complainant to send the text of the accusations allegedly made against the union members in question.
- (f) With regard to the criminal court proceedings against 110 workers for claiming their rights, the Committee requests the complainant organization to supply supplementary information concerning these allegations, specifically, the names of those involved and the activities they are alleged to have undertaken, so that the Government can send its observations in this regard.
- (g) The Committee invites the complainant organization to indicate whether the collective bargaining rights of its affiliates have been respected in the bargaining processes mentioned by the Government.
- (h) The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of this case.

B. The Government's reply

958. In its communication dated 24 May 2010, the Government refers to the events which occurred in El Tigre, in the state of Anzoátegui, and reiterates that concerning the murders of Mr Wilfredo Rafael Hernández, Mr Jesús Argenis Guevara and Mr Jesús Alberto

Hernández on 24 June 2009 on the road from El Tigre to Caico Seco in front of the La Maravilla finca, in the state of Anzoátegui, the Office of the Attorney-General requested on 25 November 2009 the closing of the case (a *nolle prosequi*) in accordance with the provisions in section 318(3) of the Code of Criminal Procedure and pursuant to section 48(1) of this Code, discontinuing the criminal proceedings against the accused, Mr Pedro Guillermo Rondón, because of his death while committing a common crime of which he was allegedly the perpetrator.

959. The Government specifies that the discontinuance of criminal proceedings is based on a number of grounds established in section 48 of the Venezuelan Code of Criminal Procedure, namely:

Section 48. Grounds. Criminal proceedings are discontinued in the event of:

1. The death of the accused.
2. Amnesty.
3. The withdrawal or abandonment of the private prosecution brought by the aggrieved party.
4. Payment of the maximum fine, prior to the admission of the offence, for offences that are punishable by fine.
5. The application of the principle of opportunity, subject to the provisions of this Code.
6. Fulfilment of compensation agreements.
7. Compliance with obligations and expiry of the deadline for the conditional suspension of the proceedings, following verification by the judge in the respective hearing.
8. The lapse of the statute of limitation, except where this is waived by the accused.

960. The Government goes on to say that one of the grounds for discontinuing criminal proceedings is the death of the person charged with the offence; from the discontinuance of the proceedings, the request for a *nolle prosequi* arises in accordance with section 318 of the aforementioned Code, which reads as follows:

Section 318. Nolle prosequi. A *nolle prosequi* shall be entered when:

1. The act which is the subject of the proceedings is not carried out or cannot be attributed to the accused.
2. The alleged act is atypical or constitutes a ground of justification, innocence or exemption from punishment.
3. The criminal proceedings have been dropped or are *res judicata*.
4. Despite the lack of certainty, there is no reasonable possibility of including new data in the investigation and there are no reasonable grounds to request the trial of the accused.
5. It is so established by this Code.

961. To this end, the Government highlights that entering a *nolle prosequi* “puts an end to the proceedings and has the force of *res judicata*. Thereby preventing any new trial from being brought against the accused or defendant ... thus removing all restraining orders which have been ruled” (section 19, Code of Criminal Procedure). Nevertheless, despite the *nolle prosequi* in the proceedings against Mr Pedro Guillermo Rondón due to the discontinuance of the criminal proceedings caused by his death, the Office of the Attorney-General reported that it would continue its investigations into these events.

962. With regard to the events which took place in the Los Anaucos area, in the state of Miranda, the Government declares that on 17 December 2009 the Office of the Attorney-General submitted an indictment against Mr Richard David Castillo and Mr Jorge Mizael

López for committing aggravated homicide and illegally bearing a firearm, leading to the death of David Alexander Zambrano and Freddy Antonio Miranda Avendaño, trade union officials. The preliminary hearing was held on 2 February 2010 at the competent monitoring court, which established probable cause, moving proceedings onto the trial phase and setting a date for the oral and public hearing for 5 June 2010.

963. With regard to the case brought for the detention of six workers of PDVSA–GAS, Mr Larry Antonio Pedroza, Mr José Antonio Tovar, Mr Juan Ramón Aparicio Martínez, Mr Jaffet Enrique Castillo Suárez, Mr Rey Régulo Chaparro Hernández and Mr José Luis Hernández Álvaro, the Government indicates that the said persons were brought before the appropriate court for the offence of boycotting, provided for and punishable under section 139 of the decree having the rank, value and force of the Act for the Defence of Persons in Accessing Goods and Services. The Office of the Attorney-General took this opportunity to request the application of the ordinary procedure and of a preventive detention measure, to which the judicial body agreed. Subsequently, following an exhaustive investigation and due process, the Office of the Attorney-General submitted, on the basis of the witness reports and the results of the technical inquiry, technical legal examination and photomontage, a formal indictment against the aforementioned persons, establishing the relevant courts and the date of the preliminary hearing for 23 March 2010 even though the date was then postponed to 2 June 2010 for failure to appear by one of the accused.

964. The Government points out, with regard to section 139 of the Act for the Defence of Persons in Accessing Goods and Services, that this Act was published in the *Official Gazette* of the Bolivarian Republic of Venezuela on 24 April 2009, and that its purpose is to defend, protect and safeguard the rights and interests of individuals and groups in accessing goods and services in order to meet the population's needs and protect social peace, justice, and the right to life and health of the population. More specifically, section 139 of this Act establishes the following:

Section 139. Anyone who, jointly or individually, plans or carries out an action or is responsible for an omission that directly or indirectly impedes the production, manufacture, importation, warehousing, transport, distribution or sales of commodities classified as being of prime necessity shall be liable to a prison term of between six and ten years.

965. This section refers to the offence of boycotting. It is necessary to clarify that it does not set out criminal sanctions for staging a strike which does not affect commodities classified as prime necessities for the population given that, in the Bolivarian Republic of Venezuela, striking is a constitutional right. However, it does set out sanctions for any person who puts at risk the production and distribution of primary commodities which, far from limiting a right, protects the people's right to access commodities classified as being of prime necessity.

966. The Government points out that any activity in relation to gas and the process of selling gas constitutes, in the Bolivarian Republic of Venezuela, an essential service of prime necessity for the population, where an essential service is understood to be a service whose interruption could endanger people's lives, safety or health. Similar to many countries in the world, most homes in the country use gas to cook, which means that interrupting the supply and sale of this product is a breach of the right to food and, therefore, the right to health and the right to life of the people.

967. With regard to this point, the Committee once again requested the Government to drop the criminal proceedings and to release the persons who had committed offences punishable under Venezuelan law. This being the case, if the Government were to comply with the Committee's recommendations, it would create a situation of impunity, which would go against the values and principles that are enshrined in the Constitution of the Bolivarian

Republic of Venezuela and are part of a democratic and social State under the rule of law and justice.

968. The Government expects that its reply will be given careful and due consideration.

C. The Committee's conclusions

969. *The Committee recalls that the allegations made by the CTV refer to the following issues: (1) the murder of three union officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, general secretary, Mr Jesús Argenis Guevara, organizational secretary, and Mr Jesús Alberto Hernández, culture and sports secretary) and two union delegates in the Los Anaucos area in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran); (2) the contract killings of more than 200 workers and union officials in the construction sector; (3) the Office of the Attorney-General has brought charges of boycotting against six workers (Mr Larry Antonio Pedroza, union delegate, Mr José Antonio Tovar, Mr Juan Ramón Aparicio, Mr Jafet Enrique Castillo Suárez, Mr Roy Rogelio Chaparro Hernández and Mr José Luis Hernández Alvarado) of the enterprise Petróleos de Venezuela SA (PDVSA) Gas Comunal for staging protests to demand their labour rights; (4) the criminalization of protests, the initiation of legal proceedings at various enterprises and the dismissal of union officials in connection with the protests; and (5) the persistent refusal of the public authorities to collectively bargain in the oil, electricity and national university sector, among others.*

970. *With regard to the allegation concerning the murder of three union officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, general secretary, Mr Jesús Argenis Guevara, organizational secretary, and Mr Jesús Alberto Hernández, culture and sports secretary), and two trade union delegates in the Los Anaucos area in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran), the Committee had noted at its meeting in March 2010 that the Office of the Attorney-General requested on 25 November 2009 the nolle prosequi due to the death of the accused persons, Pedro Guillermo Rondón and Wilfredo Rafael Hernández Avile, in accordance with the provisions of section 318(3) of the Code of Criminal Procedure in line with section 48(1), grounds for discontinuing the criminal proceedings. The Committee had requested the Government to explain why the criminal proceedings had been discontinued and expected that new investigations would be initiated, yield results in the very near future and enable the perpetrators to be identified and punished.*

971. *The Committee notes that in its latest reply the Government declares that regarding the murder of the union officials, Mr Wilfredo Rafael Hernández, Mr Jesús Argenis Guevara and Mr Jesús Alberto Hernández, on 24 June 2009, and in accordance with the law the criminal case remained closed because of the death of Mr Pedro Guillermo Rondón (accused of the aforementioned murders and who died in the act of committing the common crime of which he was the alleged perpetrator) which is why the Office of the Attorney-General requested the discontinuance of the proceedings. The Committee notes that the Government reports that the Office of the Attorney-General has nevertheless continued to carry out the relevant investigations.*

972. *The Committee wishes to recall that in its previous reply the Government referred to the deaths of both persons accused of murder (Pedro Guillermo Rondón and Wilfredo Rafael Hernández Avila) and not only the death of the former, which is the case now. The Committee highlights the importance of stepping up the investigation in order to identify and punish the perpetrators (whether they are alive or dead), but also in order to severely*

punish the instigators and accomplices. The Committee requests the Government to keep it informed in this regard.

- 973.** *The Committee furthermore highlights that in its allegations the CTV also refers to the murder of two trade union delegates in June 2007 in the Los Anaucos area (Mr Felipe Alejandro Matas Iriarte and Mr Reinaldo José Hernández Berroteran). The Committee requests the Government to intensify the Office of the Attorney-General's legal procedures and investigation without delay with the aim of identifying and severely punishing the perpetrators, instigators and accomplices. The Committee notes that the Government refers to the murder of the trade union officials in the Los Anaucos area, Mr Alexander Zambrano and Mr Freddy Antonio Miranda (events which are not however mentioned in the CTV's complaint) stating that Mr Richard David Castillo and Mr Jorge Mizael López are accused of aggravated homicide and bearing firearms and are awaiting the oral and public hearing on 15 June 2010.*
- 974.** *The Committee expresses its serious concern about the murder of the union officials mentioned in this complaint, which it deeply regrets.*
- 975.** *The Committee recalls that freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed [see **Digest of decisions and principles of the Freedom of Association Committee**, sixth edition, 2006, para. 43]. The Committee requests the Government to keep it informed regarding the development of the proceedings and investigations and expects that they will yield results in the near future and enable the perpetrators to be identified and punished.*
- 976.** *Concerning the allegations in relation to the contract killings of more than 200 workers and union officials in the construction sector, the Committee requests the trade union once again to provide the Government without delay with a list of the murders and the circumstances thereof so that the Government can undertake the appropriate investigations without delay.*
- 977.** *As regards the allegations concerning the Office of the Attorney-General's filing of criminal charges for the offence of boycotting and the subsequent detention of six workers of the PDVSA enterprise (Mr Larry Antonio Pedroza, trade union delegate, Mr José Antonio Tovar, Mr Juan Ramón Aparicio, Mr Jafet Enrique Castillo Suárez, Mr Roy Rogelio Chaparro Hernández and Mr José Luis Hernández Alvarado) because, during a protest to demand their labour rights, they paralysed the enterprise's activities (according to the Unitary Federation of Workers in the Petrol, Gas and Similar Industries of Venezuela (FUTPV), the Office of the Attorney-General is being used by the Government), the Committee noted that the Government had stated that, on 12 June 2009, a group of workers, as part of a demonstration, paralysed the plant's gas canister filling activities, affecting the sale of a commodity of prime necessity, for which they were arrested. On 13 June 2009, the Second Court of First Instance of the Criminal Judicial Circuit of the state of Miranda summoned them to appear at a hearing, during which the 16th Prosecutor qualified the events as a boycott under section 139 of the Act for the Defence of Persons in Accessing Goods and Services, which states: "Anyone who, jointly or individually, plans or carries out an action or is responsible for an omission that directly or indirectly impedes the production, manufacture, importation, warehousing, transport, distribution or sales of commodities classified as being of prime necessity shall be liable to a prison term of between six and ten years". The Committee also noted that the Government indicated that section 139 of the aforementioned Act does not apply to the right to peaceful assembly [see 356th report, para. 1649].*

978. *The Committee notes that in its latest reply the Government reiterates these statements and adds that the judicial authority has set the preliminary hearing for 2 June 2010. It states that because gas is used in most homes to cook, the interruption of the supply and sale of this product constitutes a breach of the right to food and therefore the right to health and to life of the population. The Committee notes that in the Government's opinion this issue involves a service that is essential and of prime necessity, whose interruption could endanger people's lives, safety or health. Finally, the Committee notes that the Act does not impose sanctions for holding a strike which does not affect commodities of prime necessity for the population, which the law must protect.*
979. *In this regard, the Committee underlines that the activity of filling and selling gas canisters does not constitute an essential service in the strict sense of the term – i.e. where the interruption of a service could endanger the life, personal safety or health of all or part of the population, for which the exercise of the right to strike or the interruption of activities can be totally prohibited – and even less so when the argument put forward is that this is a product that most homes use to cook. The Committee also considers that the peaceful exercise of those trade union rights should not be the subject of criminal proceedings or result in the detention of trade union officials who have organized these strikes on boycotting charges, as is the present case, by virtue of section 139 of the Act for the Defence of Persons in Accessing Goods and Services. This being the case, the Committee recalls that the detention of trade union officials and members for carrying out legal trade union activities constitutes a violation of freedom of association. The Committee, noting that the Government declares that it cannot discontinue the criminal proceedings, recalls that the public authorities must respect the ratified ILO Conventions. The Committee requests the Government or the competent authority once again to take the necessary measures to discontinue the criminal proceedings brought against the six trade union officials of the PDVSA Gas Comunal and to release them without delay. The Committee requests the Government to keep it informed in this regard. The Committee also requests the Government to take the necessary steps to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services (which includes criminal sanctions for the paralysis of activities) so that it does not apply to services which are not essential in the strict sense of the term, and so that in no event criminal sanctions are imposed in cases of peaceful strike. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations once again to the legal aspect of this case. The Committee requests the Government to keep it informed in this respect.*
980. *With respect to the allegations concerning the criminalization of protests, the initiation of legal proceedings at various enterprises in the oil, gas and steel sectors, and the dismissal of trade union officials as a result of these protests, the Committee had noted in its previous examination of the case that, according to the CTV, judicial proceedings had been brought against 27 workers at the state holding PDVSA, 25 workers at the “Alfredo Maneiro” Orinoco steelworks for staging a protest in defence of their labour rights and that ten trade union delegates at the “El Palito” refinery were dismissed after 600 workers decided to stop work as a result of failure to abide by commitments under the collective agreement. According to the CTV, workers at the enterprises Gas PetroPiar and Gas Comunal have also been affected [see 356th Report, para. 1651]. The Committee also noted in its previous examination of the case the CTV's allegations that around 110 workers have been taken to court for claiming their labour rights. In this regard, the Committee noted that, according to the Government, the Office of the Ombudsman had received no complaints and had not carried out any investigations concerning these allegations; on the contrary, the Ombudsman had intervened in various labour disputes at PDVSA, assisting in resolving them through mediation, without learning of any detentions or criminal proceedings in any of the disputes. Given the contradiction between the allegations and the Government's reply, the Committee requested the complainant to send the text of the accusations allegedly made against the union members in question. The*

Committee observes that it has not received such texts and reiterates its previous recommendation to the complainant.

- 981.** *Relating to the criminal court proceedings against 110 workers for claiming their rights, the Committee again requests the complainant organization to supply additional information concerning these allegations, specifically, the names of those involved and a description of the activities they allegedly undertook so that the Government can send its observations in this regard.*
- 982.** *With regard to the allegations concerning the persistent refusal of public authorities to bargain collectively in the oil, electricity and national university sectors, among others, the Committee noted in its previous examination of the case that the Government reported the conclusion of collective agreements in these sectors and invited the complainant organization to indicate whether in these collective bargaining processes the collective bargaining rights of its affiliates had been respected. The Committee reiterates this recommendation.*

The Committee's recommendations

- 983.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee expresses its grave concern about the serious allegations of murders of workers and union officials, which it deeply regrets, and urges the Government to act diligently and swiftly to resolve these cases fully.*
 - (b) With regard to the allegations concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, general secretary, Mr Jesús Argenis Guevara, organizational secretary, and Mr Jesús Alberto Hernández, culture and sports secretary) and of two trade union delegates in the Los Anaucos area in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran), the Committee requests the Government to intensify the judicial proceedings and investigations of the Office of the Attorney-General in order to identify and severely punish the perpetrators, instigators and accomplices. The Committee requests the Government to keep it informed on the developments of the proceedings and expects that they will yield results in the near future.*
 - (c) Concerning the allegations in relation to the contract killings of more than 200 workers and union officials in the construction sector, the Committee requests the trade union to provide the Government without delay with a list of these murders and the circumstances thereof so that the Government can undertake the appropriate investigations without delay.*
 - (d) As regards the allegations concerning the Office of the Attorney-General's preparation of criminal charges against and detention of six workers at PDVSA because, during a protest in defence of their labour rights, they paralysed the enterprise's activities, the Committee requests the Government or competent authorities to take the necessary measures to have the criminal proceedings brought against the six union officials at PDVSA dropped and to ensure their release without delay. The Committee also requests the*

Government to take the necessary steps to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services so that it does not apply to services which are not essential in the strict sense of the term and so that in no event may criminal sanctions be imposed in cases of peaceful strikes. The Committee requests the Government to keep it informed in this regard. The Committee draws the attention of the Committee of Experts to the legal aspects of this case.

- (e) With respect to the allegations concerning the criminalization of protests, the initiation of judicial proceedings at various enterprises in the oil, gas and steel sectors, and the dismissal of union officials as a result of these protests (according to the CTV, judicial proceedings were started against 27 workers at the state holding PDVSA, 25 workers at the “Alfredo Maneiro” Orinoco steelworks for staging a protest in defence of their labour rights and ten trade union delegates of the “El Palito” refinery were dismissed after 600 workers decided to stop work as a result of failure to abide by commitments under the collective agreement. According to the CTV, workers at the enterprises Gas PetroPiar and Gas Comunal have also been affected), the Committee again requests the complainant to send the text of the accusations allegedly made against the union members in question.*
- (f) With regard to the criminal court proceedings against 110 workers for claiming their rights, the Committee again requests the complainant organization to supply additional information concerning these allegations, specifically, the names of those involved and the activities they are alleged to have undertaken, so that the Government can send its observations in this regard.*
- (g) The Committee again invites the complainant organization to indicate whether the collective bargaining rights of its affiliates have been respected in the bargaining processes mentioned by the Government.*
- (h) The Committee calls the Governing Body’s attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2763

INTERIM REPORT

**Complaint against the Government of the
Bolivarian Republic of Venezuela
presented by the
Single National Union of Public Employees of the
Corporación Venezolana de Guayana (SUNEP-CVG)**

Allegations: Obstacles to exercising the right to bargain collectively and to strike, the arrest and prosecution of trade unionists for carrying out trade union activities, the criminalization of trade union activities

- 984.** The complaint is contained in communications dated 8 November 2009 and 22 February 2010 presented by the Single National Union of Public Employees of the Corporación Venezolana de Guayana (SUNEP-CVG).
- 985.** The Government sent its observations in a communication dated 24 May 2010.
- 986.** The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 987.** In its communication dated 8 November 2009, SUNEP-CVG states that it is presenting a formal complaint against the Government of the Bolivarian Republic of Venezuela for serious violations of freedom of association, as reflected in the disregard for the procedures for handling collective labour disputes and the criminal prosecution of workers and trade union leaders of Guayana's core enterprises, which are overseen by the Corporación Venezolana de Guayana (CVG).
- 988.** SUNEP-CVG indicates that three years and five months ago it presented a list of demands to the Alfredo Maneiro labour inspectorate in Puerto Ordaz, calling for the enforcement of the collective labour agreement and for other rights for its members in compliance with all the requirements under Venezuelan law concerning the handling of collective labour disputes. To date, however, it has not been possible to lawfully exercise the right to strike because nothing has been done to address the list of demands, showing the open and flagrant bias of the officials in the labour administration. Neither the Office of the Attorney-General of the Republic nor the President of the Republic has responded to the union's complaints in this regard.
- 989.** SUNEP-CVG adds that, most seriously, as the legal channels are closed, staging any type of protest carries the risk of arrest and criminal prosecution, as has been the case for unionized CVG workers. In view of the fact that the benefits under the collective agreement were being withheld, these workers staged a peaceful protest and several of them were taken into custody on 6 October 2009 and criminal proceedings were initiated against them (as is the case for Ronald González, general secretary of SUTRA-CVG, Carlos Quijada, treasurer of SUTRA-CVG and the workers Adonis Rangel Centeno, Elvis Lorán Azocar and Darwin López, who were charged with the offences of illegal assembly, violation of freedom of movement and incitement to commit an offence). On 7 October 2009, the Criminal Court decided to release them on probation, but prohibited them from organizing any industrial action that is not authorized by the Ministry of Labour. This in itself is contrary to freedom of association.
- 990.** According to SUNEP-CVG, the criminalization of protests has become the systematic response of the State to any public demonstration that is not to its liking. There is a long list of workers and trade union leaders who have fallen victim to this attitude of the Government, which is unprecedented in the country. For example, in the Guayana region, on 5 September 2006, criminal charges were laid against Juan Antonio Valor, a leader of the Single Union of Steel Industry and Allied Workers of the State of Bolívar (Sutiss-Bolívar), Leonel Grisett, member of the Joint Committee on Industrial Health and Safety, and Jhoel José Ruíz Hernández, also a Sutiss leader, all of whom are employed by Siderúrgica del Orinoco (CA Sidor), an enterprise that is now once again under CVG control. Furthermore, Richard Alonso Díaz, Osmel José Ramírez Malavé, Julio César Soler, Agdatamir Antonio Rivas, Luis Arturo Alzota Bermúdez, Argenis Godofredo Gómez and Bruno Epifanio López, employees of the contracting enterprise Camila CA, were charged with the offences of misappropriation, restricting freedom to work, taking

the law into their own hands and breaching the special security zone arrangements, under sections 191, 192, 270 and 468 of the Criminal Code and under section 56 (in conjunction with sections 47 and 48) of the Organic National Security Act. Section 56 of the Organic National Security Act states:

Section 56: Anyone who organizes, supports or incites activities within the security zones that are intended to disrupt or adversely affect the organization and operation of military facilities, public services, industries and core enterprises, or the social and economic life of the country, shall be subject to a penalty of five to ten years' imprisonment.

- 991.** However, all that the abovementioned workers did was to protest against the poor working conditions that the contracting enterprise Camila imposes on its workers. The defendants were not taking any industrial action and yet the Organic National Security Act was applied to them in order to give them harsher penalties and in order to proceed in that way with their prosecution. These workers are required to report once a month to the Criminal Judicial Circuit of the State of Bolívar, territory of Puerto Ordaz. At their last court appearance, their trial was postponed until 10 February 2010.
- 992.** SUNEPCVG also alleges that, on 14 March 2008, the national guard and the Bolívar State Police brutally repressed a gathering of steelworkers on Avenida Fuerzas Armadas in the Matanzas industrial zone of Puerto Ordaz. These workers were calling for improvements to the proposed collective agreement that at the time was under discussion with the multinational Ternium-Sidor. Several workers were injured, some of them seriously, and criminal charges were laid against several dozens of workers. Thirty-two vehicles belonging to the workers were destroyed by the authorities. It is important to note that the judge at the preliminary criminal hearing ordered the unconditional release of 52 Sidor workers on 15 March. However, the Office of the Public Prosecutor lodged an appeal against this decision to the Court of Appeals and that court overturned the ruling of the judge at the preliminary criminal hearing and consequently the group of workers is now awaiting the initiation of further court proceedings against them.
- 993.** Furthermore, SUNEPCVG alleges that, on 24 September 2009, Rubén González, general secretary of Sintraferrominera (the union representing the workers of CVG Ferrominera Orinoco, CA) was arrested and brought before a court of preliminary criminal proceedings in Puerto Ordaz. This was simply for having led a protest demanding the fulfilment of the commitments under the collective agreement, which the enterprise has stopped honouring. The case caused public controversy and disputes between judges, because it concerned the general secretary of a union, a leader with a long career, who was simply fulfilling his union responsibilities. After Mr González had been held in custody for four days and after the court decisions had been challenged twice and passed over three times, the judge of the First Court of Preliminary Proceedings, Arsenio López, handed down a sentence of house arrest and at the same time declared himself incompetent, passing the case on to a criminal court in the city of Bolívar. That criminal court subsequently passed the case onto another court of the city of Puerto Ordaz. It should be noted that the trade union leader, Rubén González, was placed under house arrest at his home in Ciudad Piar in the autonomous municipality of Raúl Leoni in the state of Bolívar.
- 994.** SUNEPCGV concludes by noting that the disregard for collective agreements, the disregard for legal procedures for handling disputes as a policy of the Ministry of Labour and the criminalization of labour protests have been ongoing in recent years throughout the Bolivarian Republic of Venezuela, in particular in the state of Bolívar.
- 995.** In its communication dated 22 February 2010, SUNEPCVG states that the situation has deteriorated in the case of trade union leader, Rubén González, general secretary of Sintraferrominera (the union representing the workers of CVG Ferrominera Orinoco, CA), who has been in custody since 24 September 2009, despite having filed successive appeals

to the courts. SUNEP-CVG adds that the illegal and arbitrary detention of Rubén González, who is now being held in a police cell, led his wife, Ms Yurid de González, and a group of his co-workers to go on a hunger strike in front of the Palace of Justice in Puerto Ordaz, a strike which they continued for as long as their health allowed.

B. The Government's reply

- 996.** In its communication dated 24 May 2010, the Government categorically rejects the claims that the criminalization of protests is the Venezuelan Government's response to public demonstrations. The Venezuelan legal system and the Government of the Bolivarian Republic of Venezuela guarantee and safeguard in practice and in accordance with the law the right to stage protests, to hold public demonstrations and to strike in accordance with the provisions of the national Constitution and the law, provided that such events do not cause irreparable damage to the population or to institutions.
- 997.** The Government then refers to the information provided by the Office of the Attorney-General of the Republic on the status of the cases in question.
- 998.** On 6 October 2009, national guard officers arrested Ronald González, Carlos Quijada, Adonis Rangel Centeno, Elvis Lorán Azocar and Darwin López for allegedly taking over the premises of the CVG's nursery, padlocking and chaining the doors to prevent the nursery staff from entering freely and leaving out on the street the workers' children who attend that institution on a daily basis. In accordance with the procedure stipulated by law, the Office of the Public Prosecutor thus proceeded to bring the individuals in question before the appropriate court, ordering the court to examine the case in accordance with the regular procedure without holding the individuals concerned in custody.
- 999.** In this regard, the Office of the Attorney-General of the Republic, exercising the powers conferred on it by the Constitution of the Bolivarian Republic of Venezuela and the Organic Code of Criminal Procedure, ordered that steps be taken to conduct interviews and technical investigations and to log telephone connections and calls, these, among other things, serving as grounds for the issuance of a final ruling. Consequently, on 2 December 2009, an indictment was filed against the individuals in question and the court arranged a preliminary hearing, which took place, and the claims were upheld with regard to the offences of illegal assembly, violation of freedom of movement and incitement to commit an offence, as provided for in the Venezuelan Criminal Code. An order was issued for the case to proceed to the oral and public hearing stage, in accordance with the principles governing criminal procedure in the Bolivarian Republic of Venezuela. On the basis of information provided by the Office of the Public Prosecutor, the abovementioned individuals are allegedly engaged in offences against the security and rights of the Venezuelan people (including workers and their children), which are considered to be punishable acts under Venezuelan law.
- 1000.** With regard to Juan Antonio Valor, Leonel Grisett, Jhoel José Ruiz Hernández, Richard Alonso Díaz, Osmel José Ramírez Malavé, Julio César Soler, Agdamatir Antonio Rivas, Luis Arturo Alzota Bermúdez, Argenis Godofredo Gómez and Bruno Epifanio López, the Government states that, on 29 September 2006, the Office of the Public Prosecutor received a complaint from the representatives of the enterprise Camila CA alleging that, on 26 August 2006, the individuals in question violently and without the authorization or consent of any representative of the enterprise Camila CA forcefully took possession of six payloader machines, moving them from one plant (Planta de Cal) to another (Planta de Peñas), refused to return them, and caused the cessation of the industrial activities being conducted in various areas of the enterprise. Under the circumstances and on the basis of investigations and inquiries conducted by the respective bodies, the Office of the Public Prosecutor asked the corresponding court of preliminary proceedings to issue an arrest

warrant against the individuals in question, which was approved and executed. Subsequently, on 5 and 7 September 2006, the hearings took place before the court in question, which ordered the precautionary measure of regular court appearances in accordance with the provisions of the Organic Code of Criminal Procedure. On 21 July 2007, the Office of the Public Prosecutor filed formal charges against the individuals in question for committing the offences of qualified misappropriation, restricting freedom to work and taking the law into their own hands, as provided for in the Venezuelan Criminal Code, and the offence of breaching the special security zone arrangements, as provided for in the Organic National Security Act, setting the preliminary hearing for 25 September 2009, at which the charges were upheld, a precautionary measure of release on probation was applied, and an order was issued for the case to go to trial. The oral and public hearing has been set and delayed on several occasions because the accused parties have failed to appear, and the oral hearing has now been postponed until 16 September 2010.

- 1001.** With regard to the allegation that on 14 March 2008 “the national guard and the Bolívar State Police brutally repressed a gathering of steelworkers”, the Government states that on the date indicated by the complainants, a unit of the national guard was heading towards the warehouses of the Matanzas industrial zone, located on the Simón Bolívar highway, when it came across a group of approximately 80 people preventing the free flow of traffic with cars and burning tyres. Furthermore, these individuals threw heavy objects at the members of the national guard, causing several injuries to several officers (Raúl Mora, Alexander Marín Bucarelo and Pastran Comentes). The demonstrators threw stones, bottles and iron pellets, which resulted in the arrest of 49 people who, the next day, within the legal time limit, were brought before the appropriate preliminary hearings court, which conducted the hearing of the charges laid by the national guard unit, which concerned the jointly perpetrated offences of obstruction and severance of communication channels. The court ruled that the regular procedure should be followed and the Office of the Public Prosecutor is currently carrying out all the necessary inquiries and investigations to resolve the matter. The Government asserts that, in safeguarding the rights of the workers of the steel enterprise against the major irregularities and the exploitation and outsourcing practices committed against them, it proceeded to nationalize the enterprise to guarantee the workers’ social and labour rights and entitlements, which were being violated by the private enterprise.
- 1002.** With regard to Rubén González, the Office of the Public Prosecutor reports that it received a complaint claiming that the individual in question entered the railway yard of the enterprise Ferrominera’s main workshop, taking over the premises and obstructing the exit of trains, thereby halting production at the enterprise for several days. This claim is supported by various pieces of evidence such as witness interviews and videos. Therefore, the Office of the Public Prosecutor called for an arrest warrant to be issued against the individual in question, which was granted by the court and executed by the relevant security forces. On 26 September 2009, in accordance with the procedures in place, the Office of the Public Prosecutor charged the said individual with public order offences such as incitement to commit an offence, illegal assembly, restriction of freedom to work, and breach of the special security zone arrangements. The court upheld these charges and ordered the house arrest of the accused. In accordance with the law, the charges were formally set out in writing and on 26 January 2010 an oral hearing was held before the Court of Appeal, on the basis of an application for *amparo* (protection of constitutional rights) by the defence of the accused, which was rejected by the court, as the defence had been informed of the submission of the final ruling within the appropriate legal timeframe.
- 1003.** With regard to the precautionary measure imposed on Rubén González on 19 January 2010, the Government states that the competent court, in exercising its powers, issued a finding of non-compliance, which is why it agreed to overturn the measure and scheduled a preliminary hearing for 15 March 2010, which the defence lawyers of the accused failed to

attend. Subsequently, the hearing was held at the Court of Preliminary Proceedings, which admitted the allegation made by the Office of the Public Prosecutor against Rubén González, and consequently this case is currently under trial. The outcome of this trial will be communicated to the Committee on Freedom of Association.

C. The Committee's conclusions

- 1004.** *The Committee notes that in the present case the complainant organization's allegations concern obstacles to exercising the right to strike and the arrest and/or prosecution of trade union leaders and members, who are often required to report to the authorities on a monthly basis, for exercising trade union activities.*
- 1005.** *Regarding the alleged obstacles to the exercise of the right to strike, the complainant organization alleges that, as the administrative authority (Puerto Ordaz labour inspectorate) has not followed the legal procedures with regard to the list of demands presented by SUNEP-CVG more than three years ago calling for the enforcement of the collective agreement and for other rights, it has not been possible to lawfully exercise the right to strike in the Corporación Venezolana de Guayana (CVG).*
- 1006.** *The Committee notes that the Government has not sent observations with regard to this allegation and therefore the Committee requests it to address without delay the list of demands by SUNEP-CVG so that the union can bargain collectively with the enterprise and perhaps lawfully exercise the right to strike.*
- 1007.** *With regard to the allegations concerning the arrest and criminal prosecution of the SUTRA-CVG union leaders Ronald González and Carlos Quijada and unionists Adonis Rangel Centeno, Elvis Lorán Azocar and Darwin López for staging a peaceful protest against the withholding of the benefits under the collective agreement, the Committee takes note of the statements by the Government, according to which: (1) these individuals were arrested in October 2009 for padlocking and chaining closed the doors of the premises of the CVG's nursery, preventing the staff from entering freely and leaving the workers' children out on the street; (2) they were released; (3) they were charged with the offences of illegal assembly, violation of freedom of movement and incitement to commit an offence and of engaging in crimes against the security and rights of the population.*
- 1008.** *The Committee expresses its surprise at the fact that trade unionists have been charged with various offences for closing – as stated by the Government – the premises of a preschool establishment. The Committee urges the Government to urge the judicial authority to give due consideration to the fact that the trade unionists in question were staging a peaceful protest calling for the enforcement of the collective agreement and requests the Government to inform it of the judgement handed down in relation to these trade unionists.*
- 1009.** *With regard to the allegation concerning the criminal prosecution of the Sutiss-Bolívar trade union leaders Juan Antonio Valor, Leonel Grisett and Jhoel José Ruiz Hernández, the Committee notes that the Government has not supplied observations in this respect and requests it to send them without delay.*
- 1010.** *With regard to the allegation concerning the criminal prosecution in 2006 of the employees of the enterprise Camila CA, Richard Alonso Díaz, Osmel José Ramírez Malavé, Julio César Soler, Agdatamir Antonio Rivas, Luis Arturo Alzota Bermúdez, Argenis Godofredo Gómez and Bruno Epitafio López, for protesting against the poor working conditions imposed on workers, the Committee takes note of the statements by the Government, according to which these workers: (1) forcefully took six payloader machines from one plant (Planta de Cal) to another (Planta de Peñas), refusing to return them, and*

causing the cessation of the industrial activities being conducted in various areas of the enterprise; (2) were charged with the offences of misappropriation, restricting freedom to work, taking the law into their own hands and breaching the special security zone arrangements under the Organic National Security Act; (3) the oral hearing is scheduled for 16 September 2010. The Committee notes the discrepancies between the version given by the complainant organization and that given by the Government and requests the Government to supply a copy of the judgement that is handed down. The Committee notes that the complaint dates back to 2006 and it can only regret the delay in the court proceedings. Lastly, the Committee considers that section 56 of the Organic National Security Act, which provides that activities to disrupt or adversely affect the organization and operation of public services, industries and core enterprises, or the social and economic life of the country, carry a penalty of five to ten years' imprisonment, may apply to the lawful exercise of the right to strike in activities that are not essential in the strict sense of the term and therefore it should be amended. The Committee draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

- 1011.** *With regard to the allegation that, on 14 March 2008, the national guard and the Bolívar State Police brutally repressed a gathering of steelworkers from Ternium-Sidor who were calling for improvements to the collective agreement that was being negotiated, resulting in several wounded, dozens of criminal prosecutions and the destruction by the authorities of 32 vehicles belonging to the workers, the Committee notes that, according to the Government: (1) a group of some 80 workers was blocking the traffic with cars and burning tyres and throwing heavy objects at the members of the national guard unit, injuring several officers; (2) 49 workers were arrested and the next day these individuals were brought before the judicial authority charged with the obstruction and severance of channels of communication; and (3) the Office of the Public Prosecutor is conducting inquiries and investigations. The Committee notes the delay in the criminal proceedings, as the allegations date back to March 2008 and requests the Government to supply a copy of the judgement that is handed down. It also requests the Government to carry out an investigation into the allegations concerning the excessive use of public force which resulted in serious injuries and property damage.*
- 1012.** *With regard to the allegation concerning the detention and criminal prosecution of union leader Rubén González, who works for the enterprise CGV Ferrominera Orinoco CA (Puerto Ordaz), for protesting against the failure to honour the commitments set out in the collective agreement, the Committee takes note that, according to the Government: (1) Rubén González took over the premises of the railway yard at the enterprise's main workshop, obstructing the exit of trains and impeding production at the enterprise for several days; (2) the judicial authority issued a warrant for his arrest and later for his house arrest and the prosecutor charged him with the offences of incitement to commit an offence, illegal assembly, restricting freedom to work and breaching the special security zone arrangements. Taking into account the discrepancies between the version provided by the complainant and that provided by the Government, the Committee considers that the events as alleged by the Government do not justify his preliminary detention or house arrest since September 2009 and requests that he be released without delay pending judgement and appropriately compensated for his inappropriate detention. The Committee requests the Government to supply a copy of the judgement that is handed down. The Committee asks the Government whether Rubén González was the only employee who took over the premises in question.*
- 1013.** *More generally, with regard to the allegation concerning the criminalization of trade union protests and public demonstrations, the Committee notes that the Government rejects this allegation and asserts that the rights to demonstrate and to strike are guaranteed provided that no irreparable damage is caused to the population or to*

institutions. The Committee notes that this case concerns the arrest and criminal prosecution of a considerable number of trade unionists, who, for example, for stopping production or undermining freedom to work have had three or more criminal charges laid against them and sometimes precautionary measures requiring them to report to the authorities on a monthly basis; the aim of these measures is not understood and they may have a detrimental effect and be a deterring factor in the exercise of trade union rights.

1014. *The Committee expresses its concern regarding the multiple charges laid against these unionists for activities connected with the exercise of trade union rights. The Committee notes that although there may have been – if the statements by the Government are corroborated – some excesses, all penalties should be proportionate to the fault committed.*

1015. *Lastly, the Committee notes that the Government has not denied the allegations concerning the breach of collective agreements in several enterprises (which, according to the Government, have been nationalized) and the difficulties faced with regard to bargaining collectively and exercising the right to strike in the steel sector and requests the Government to take measures to ensure that these rights are respected in practice and that effective dispute settlement mechanisms are put in place.*

The Committee's recommendations

1016. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

(a) Regarding the alleged obstacles to the exercise of the right to strike (the complainant organization alleges that as the Puerto Ordaz labour inspectorate has not followed the legal procedure with regard to the list of demands presented by SUNEP-CVG more than three years ago calling for the enforcement of the collective agreement and for other rights, it has not been possible to lawfully exercise the right to strike in the Corporación Venezolana de Guayana (CVG)), the Committee notes that the Government has not supplied observations with regard to this allegation and therefore the Committee requests it to address, without delay, the list of demands by SUNEP-CVG so that the union can bargain collectively with the enterprise and perhaps lawfully exercise the right to strike.

(b) With regard to the allegations concerning the (temporary) detention and criminal prosecution of the SUTRA-CVG union leaders, Ronald González and Carlos Quijada and the unionists Adonis Rangel Centeno, Elvis Lorán Azocar and Darwin López, the Committee urges the Government to urge the judicial authority to give due consideration to the fact that the trade unionists in question were staging a peaceful protest calling for the enforcement of the collective agreement and requests the Government to inform it of the judgement handed down in relation to these trade unionists.

(c) With regard to the allegation concerning the criminal prosecution of the Sutiss-Bolívar trade union leaders, Juan Antonio Valor, Leonel Grisett and Jhoel José Ruiz Hernández, the Committee notes that the Government has not supplied observations in this respect and requests it to send them without delay.

- (d) *With regard to the allegation concerning the criminal prosecution in 2006 of the employees of the enterprise Camila CA, Richard Alonso Díaz, Osmel José Ramírez Malavé, Julio César Soler, Agdatamir Antonio Rivas, Luis Arturo Alzota Bermúdez, Argenis Godofredo Gómez and Bruno Epitafio López, the Committee requests the Government to supply a copy of the judgement that is handed down and notes that as the complaint dates back to 2006 it can only regret the delay in the court proceedings.*
- (e) *The Committee considers that section 56 of the Organic National Security Act, which provides that activities to disrupt or adversely affect the organization and operation of public services, industries and core enterprises, or the social and economic life of the country, carry a penalty of five to ten years' imprisonment, may apply to the lawful exercise of the right to strike in activities that are not essential in the strict sense of the term and therefore it should be amended. The Committee draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*
- (f) *With regard to the allegation that, on 14 March 2008, the national guard and the Bolívar State Police brutally repressed a gathering of steelworkers from Ternium-Sidor who were calling for improvements to the collective agreement that was being negotiated, resulting in several wounded, dozens of criminal prosecutions and the destruction by the authorities of 32 vehicles belonging to the workers, the Committee, while noting that, according to the Government, a group of some 80 workers was blocking the traffic with cars and burning tyres and throwing heavy objects at the members of the national guard unit, injuring several officers, and requests the Government to supply a copy of the judgement that is handed down, notes the delay in the legal proceedings and requests the Government to carry out an investigation into the allegations concerning the excessive use of public force which resulted in serious injuries and property damage.*
- (g) *With regard to the alleged detention since September 2009 and criminal prosecution of trade union leader Rubén González for protesting against the failure by CGV Ferrominera Orinoco CA (Puerto Ordaz) to honour the commitments set out in the collective agreement, the Committee considers that the events as alleged by the Government against the union leader do not justify his preliminary detention or house arrest since September 2009 and requests that he be released without delay pending judgement and appropriately compensated for his inappropriate detention. The Committee requests the Government to supply a copy of the judgement that is handed down.*
- (h) *More generally, with regard to the allegation concerning the criminalization of trade union protests and public demonstrations, the Committee notes that although the Government rejects this allegation it must be noted that this case concerns the arrest and criminal prosecution of a considerable number of trade unionists, who, for example, for stopping production or undermining freedom to work have had three or more criminal charges laid against them and sometimes precautionary measures requiring them to report to the authorities on a monthly basis; the aim of these measures is not*

understood and they may have a detrimental effect and be a deterring factor in the exercise of trade union rights. The Committee expresses its concern regarding the multiple charges laid against these unionists for activities connected with the exercise of trade union rights. The Committee notes that although there may have been – if the statements by the Government are corroborated – some excesses, all penalties should be proportionate to the fault committed.

- (i) *Lastly, the Committee notes that the Government has not denied the allegations concerning the breach of collective agreements in several enterprises (which, according to the Government, have been nationalized) and the difficulties faced with regard to bargaining collectively and exercising the right to strike in the steel sector and requests the Government to take measures to ensure that these rights are respected in practice and that effective dispute settlement mechanisms are put in place.*

Geneva, 12 November 2010

(Signed) Professor Paul van der Heijden
Chairperson

<i>Points for decision:</i>	Paragraph 157	Paragraph 643
	Paragraph 171	Paragraph 660
	Paragraph 219	Paragraph 700
	Paragraph 241	Paragraph 723
	Paragraph 280	Paragraph 764
	Paragraph 288	Paragraph 771
	Paragraph 320	Paragraph 780
	Paragraph 334	Paragraph 797
	Paragraph 361	Paragraph 826
	Paragraph 381	Paragraph 867
	Paragraph 422	Paragraph 892
	Paragraph 446	Paragraph 910
	Paragraph 461	Paragraph 933
	Paragraph 490	Paragraph 953
	Paragraph 522	Paragraph 983
	Paragraph 558	Paragraph 1016
	Paragraph 612	