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Reports of the Committee on Freedom of Association

380th 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, from 27 to 29 October and on 4 November 2016, under the chairmanship of Professor Paul van der Heijden.
2. The following members participated in the meeting: Mr Albuquerque (Dominican Republic), Mr Cano (Spain), Ms Onuko (Kenya), Mr Teramoto (Japan), Mr Titiro (Argentina), Mr Tudorie (Romania); Employers' group Vice-Chairperson, Ms Hornung-Draus and members, Mr Frimpong, Ms Horvatić, Mr Mailhos and Mr Matsui; Workers' group Vice-Chairperson, Mr Veyrier (substituting for Mr Cortebeeck), and members, Mr Asamoah, Mr Martinez, Mr Ohrt and Mr Ross. The members of Croatian, Romanian and Spanish nationality were not present during the examination of the cases relating to Croatia (Case No. 3130), to Romania (Case No. 3182) and to Spain (Case No. 3093).

* * *

3. Currently, there are 169 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 33 cases on the merits, reaching definitive conclusions in 20 cases, (ten definitive reports and ten reports in which the Committee requested to be kept informed of developments) and interim conclusions in 13 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

Status of cases

4. In the interests of further bolstering transparency in its working methods, the Committee has continued its efforts to facilitate the understanding of the status of cases and the relative urgency for Governments to transmit their observations. The Committee observes nevertheless that it continues to receive sometimes extensive communications on cases only a few days before its meeting, or even actually during its session. The Committee has made special efforts to try to accommodate its consideration of new information in such cases but finds itself bound to set a deadline for consideration of Government and complainant communications, in line with the general rules for Governing Body papers, in order to be able to efficiently carry out its work. Consequently, any information in relation to urgent appeals (paragraph 8) or where the Committee has already noted the Governments' observations and expressed its intention to examine the substance of the case (paragraph 11) must be received by the Office by 24 February 2017. Communications received after this date will not be able to be taken into account in the Committee's examination.

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

5. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2318 and 3121 (Cambodia), 2508 and 2566 (Islamic Republic of Iran), 2706 (Panama), 2761 and 3074 (Colombia) and 3185 (Philippines) because of the extreme seriousness and urgency of the matters dealt with therein.

Paragraph 69 of the Committee's procedures

6. In light of its continuing failure to respond to complaints, the Committee invites the Government of the Democratic Republic of the Congo, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, to come before the Committee at its next session in March 2017 so that it may obtain detailed information on the steps taken by the Government in relation to the pending cases.

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

7. The Committee deeply regrets that it was obliged to examine the following cases without a response from the Governments: 3076 (Democratic Republic of the Congo) and 3081 (Liberia).

Urgent appeals: Delays in replies

8. As regards Cases Nos 2949 (Swaziland), 3047 (Republic of Korea), 3076 (Republic of Maldives), 3094 (Guatemala), 3127 (Paraguay), 3167 (El Salvador), 3179 (Guatemala), 3180 (Thailand) and 3183 (Burundi), the Committee observes that, despite the time which has elapsed since the submission of the complaints or the issuance of its recommendations on at least two occasions, 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.

Observations requested from governments

9. The Committee is still awaiting observations or information from the Governments concerned in the following cases: 2177 and 2183 (Japan), 2512 (India), 2609 (Guatemala), 2982 (Peru), 3018 (Pakistan), 3095 (Tunisia), 3188 (Guatemala), 3189 (Plurinational State of Bolivia), 3190 (Peru), 3192 (Argentina), 3193 (Peru), 3194 (El Salvador), 3196 (Thailand), 3197 (Peru), 3198 (Chile), 3199 (Peru), 3200 (Peru), 3202 (Liberia) and 3203 (Bangladesh). If these observations are not received by its next meeting, the Committee will be obliged to issue an urgent appeal in these cases.

Partial information received from governments

10. In Cases Nos 2265 (Switzerland), 2445 (Guatemala), 2811 (Guatemala), 2817 (Argentina), 2830 (Colombia), 2854 (Peru), 2869 (Guatemala), 2902 (Pakistan), 2948 (Guatemala), 2967 (Guatemala), 2978 (Guatemala), 2989 (Guatemala), 2997 (Argentina), 3003 (Canada), 3019 (Paraguay), 3027 (Colombia), 3032 (Honduras), 3042 (Guatemala), 3062 (Guatemala), 3078 (Argentina), 3089 (Guatemala), 3091 (Colombia), 3092 (Colombia), 3104 (Algeria), 3115 (Argentina), 3120 (Argentina), 3127 (Paraguay), 3133 (Colombia), 3137 (Colombia), 3139 (Guatemala), 3141 (Argentina), 3143 (Canada), 3148 (Ecuador), 3149 (Colombia), 3150 (Colombia), 3151 (Canada), 3152 (Honduras), 3158 (Paraguay), 3161 (El Salvador), 3170 (Peru), 3191 (Chile), 3192 (Argentina) and 3210 (Algeria), the Governments have sent

partial information on the allegations made. The Committee requests all these Governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

Observations received from governments

11. As regards Cases Nos 2254 (Bolivarian Republic of Venezuela), 2923 (El Salvador) 2927 (Guatemala), 2989 (Guatemala), 3007 (El Salvador), 3016 (Bolivarian Republic of Venezuela), 3023 (Switzerland), 3068 (Dominican Republic), 3069 (Peru), 3082 (Bolivarian Republic of Venezuela), 3090 (Colombia), 3103 (Colombia), 3112 (Colombia), 3116 (Chile), 3117 (El Salvador), 3119 (Philippines), 3124 (Indonesia), 3129 (Romania), 3131 (Colombia), 3135 (Honduras), 3144 (Colombia), 3146 (Paraguay), 3153 (Mauritius), 3156 (Mexico), 3157 (Colombia), 3159 (Philippines), 3160 (Peru), 3162 (Costa Rica), 3163 (Mexico), 3165 (Argentina), 3168 (Peru), 3172 (Bolivarian Republic of Venezuela), 3173 (Peru), 3174 (Peru), 3175 (Uruguay), 3178 (Bolivarian Republic of Venezuela), 3186 (South Africa), 3187 (Bolivarian Republic of Venezuela), 3195 (Peru) and 3201 (Mauritania), the Committee has received the Governments' observations and intends to examine the substance of these cases as swiftly as possible.

New cases

12. The Committee adjourned until its next meeting the examination of the following new cases which it has received since its last meeting: 3204 (Peru), 3205 (Mexico), 3206 (Chile), 3207 (Mexico), 3208 (Colombia), 3209 (Senegal), 3211 (Costa Rica), 3212 (Cameroon), 3213 (Colombia), 3214 (Chile), 3215 (El Salvador), 3216 (Colombia), 3217 (Colombia), 3218 (Colombia), 3219 (Brazil), 3220 (Argentina), 3221 (Guatemala), 3222 (Guatemala), 3223 (Colombia), 3224 (Peru), 3225 (Argentina), 3226 (Mexico), 3227 (Republic of Korea), 3228 (Peru), 3229 (Argentina), 3230 (Colombia), 3231 (Cameroon), 3232 (Argentina), 3233 (Argentina) and 3234 (Colombia), since it is awaiting information and observations from the Governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

Withdrawal of a complaint

13. In its communication received on 11 October 2016, the Trade Federation 4, Trade Federation for Metals, Electronics, Electrical and other Allied Industries-Federation of Free Workers (TF-4FFW) indicated that, by virtue of the agreement concluded on 30 September 2016 between United Cirtex Employees Association (formerly Cirtex Employees Labor Union-FFW) and the management of Cirtex Electronics Corporation, it wished to withdraw the complaint presented against the Government of the Philippines (Case No. 2815). The Committee notes this information with satisfaction and considers the complaint to be effectively withdrawn and Case No. 2815 to be closed.

Transmission of cases to the Committee of Experts

14. The Committee draws the legislative aspects of the following cases, as a result of the ratification of Conventions Nos 87 and 98, to the attention of the Committee of Experts on the Application of Conventions and Recommendations: 3108 (Chile), 3121 (Cambodia) and 3134 (Cameroon)

Cases in follow-up

15. The Committee examined 9 cases concerning the follow-up given to its recommendations and concluded its examination with respect to one case: Case No. 2654 (Canada).

Case No. 2153 (Algeria)

16. The Committee last examined this case at its November 2012 meeting [see 365th Report, paras 14–16]. On that occasion, the Committee asked the Government to provide information on the situation of certain union officials from the National Autonomous Union of Public Administration Personnel (SNAPAP). It was awaiting information from the Government on the outcome of the appeal lodged as part of the case concerning Mr Mourad Tchikou (Vice-President of the UNPC–SNAPAP and civil protection agent), as well as the situation concerning Mr Sadou Saddek (Secretary-General of the trade union section of SNAPAP in Béjaia prefecture), particularly on whether he has taken up his new post following his return from sick leave.
17. In communications dated 16 February and 7 March 2016, the Government indicates that SNAPAP held its seventh meeting from 12 to 14 January 2016 and re-elected Mr Felfoul as Secretary-General. As Mr Felfoul confirmed that no member of his trade union has been arrested or transferred by the public authorities, the Government asks that the Committee consider the present case closed. *The Committee takes note of this information. However, in order to close the present case, the Committee requests the Government to provide without delay the information it has long requested on the current professional situations of Mr Mourad Tchikou and Mr Sadou Saddek, particularly to specify whether they remain in the public service and whether they carry out trade union activities. The Committee also urges the Government to inform it of the outcome of the appeal in the case concerning Mr Tchikou.*

Case No. 2654 (Canada)

18. The Committee last examined this case, in which the complainants alleged that the Public Service (Essential Services) Act, 2008 (PSESA) and the Trade Union Amendment Act, 2008 (TUAA) in Saskatchewan impede workers from exercising their fundamental right to freedom of association by making it more difficult for them to join unions, engage in free collective bargaining and exercise their right to strike, at its March 2014 meeting [see 371st Report, paras 36–43]. On that occasion, the Committee requested the Government to keep it informed of the decision of the Supreme Court of Canada regarding the constitutional validity of the PSESA and TUAA and of any action taken as a result. The Committee also requested the Government to ensure that the provincial government took concrete steps to review the PSESA and TUAA, in full consultation with the social partners concerned, with a view to their amendments in line with its previous recommendations. Finally, it requested the Government to ensure that the provincial government took the appropriate measures, in consultation with the social partners concerned, to create an appropriate appeal mechanism in order to limit the designation of workers as “essential” to the strict minimum necessary to operate the essential services in case of work stoppage and to establish compensatory mechanisms.
19. By a communication dated 2 March 2016, the Saskatchewan Federation of Labour (SFL), one of the complainants in this case, transmitted the decision of the Supreme Court of Canada which dealt with the matters raised in this case.
20. By a communication dated 14 March 2016, the Government of Canada transmitted a reply of the Government of Saskatchewan. The provincial government explains that, on 1 January

2016, it proclaimed into force the Saskatchewan Employment (Essential Services) Amendment Act 2015 (Bill 183). This legislation changed the essential services regime that existed under the PSESA so as to address the concerns of the Supreme Court of Canada and of the Committee on Freedom of Association. The Government explains that the amending legislation:

- Removes the definition of “essential services”. The parties are now required to negotiate what they consider to be essential services; for this purpose, guidance can be sought from the ILO definitions of “essential services” and “minimal services”. If the parties are unable to conclude an essential services agreement, either party may make an application to an essential services tribunal, which is an independent third-party dispute resolution body. The application is made to the Chairperson of the Labour Relations Board as well as the minister responsible.
 - Establishes essential services tribunals that are comprised of the Chairperson or Vice Chairperson of the Labour Relations Board as well as one appointee selected by the employer and one appointee selected by the union. A new tribunal is established for each dispute. The tribunal has the authority to hear an appeal made by either party to the dispute on what services are essential for the particular workplace. The decision of the tribunal is binding on both parties. Once an essential services agreement is negotiated or provided by an essential services tribunal, the parties are free to commence strike or lockout action. At any point, either party can apply to the same essential services tribunal seeking a determination of whether an essential services agreement substantially interferes with the exercise of a strike or lockout.
 - Creates a binding mediation-arbitration process where the essential services tribunal determines that an essential services agreement substantially interferes with the exercise of a strike or a lockout. The parties are required to submit to binding mediation-arbitration the terms and conditions of the collective agreement. The binding process is restricted to a 60-day period unless the parties mutually agree to a longer time period.
21. The Government of Saskatchewan adds that under this new process it is not treated differently by virtue of its ability to make regulations to prescribe the essential services for executive government.
22. The Government believes that the abovementioned amendments are in accordance with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and reiterates its commitment to work with both labour and employer stakeholder groups in an effort to create laws, policies and programmes that position the province to further economic growth and prosperity while ensuring the protection and security of its citizens.
23. *The Committee notes with interest the 30 January 2015 decision of the Supreme Court of Canada declaring the PSESA unconstitutional after concluding that the right to strike was protected under the Canadian Charter of Rights and Freedoms. The Committee notes, in particular, that the Supreme Court declared that the “right to strike [was] protected by virtue of its unique role in the collective bargaining process”, protected under section 2(d) of the Canadian Charter of Rights and Freedoms (paragraph 77). The Court then found that the PSESA was unconstitutional because it impaired “the s. 2(d) rights of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services” (paragraphs 96–97). The Court gave the Government one year to bring the legislation in line with the Constitution (paragraph 103).*

24. *The Committee notes with interest that the PSESA was amended in accordance with its recommendations on 1 January 2016.*
25. *The Committee further notes that as concerns the TUAA, the Supreme Court unanimously maintained the decision of the Court of Appeal that it was constitutional (paragraphs 102 and 175). The Supreme Court concluded that the TUAA did not “substantially interfere with the freedom to freely create or join associations” (paragraph 100) and explained that its conclusion was “reinforced by the trial judge’s findings that when compared to other Canadian labour relations statutory schemes, these requirements are not an excessively difficult threshold such that the workers’ right to associate is substantially interfered with” (paragraph 100).*
26. *In this connection, the Committee understands that no amendments to the TUAA are currently foreseen. The Committee recalls that when it had first examined this case it considered that “in the particular circumstances of the case, the law stipulating that a trade union must receive the support of 45 per cent of employees before the procedure for recognition as a collective bargaining agent may well be excessively difficult to achieve”. The Committee observed that this introduced change actually meant “that the union needs to demonstrate more support in order for a ballot to be conducted then it will need ultimately to be certified” [see para. 379 of its 356th Report].*

Case No. 2962 (India)

27. The Committee last examined this case, in which the complainant alleged refusal by the management of the M/s A M S Fashions Private Limited to negotiate with the Vastra Silai Udhyog Kamgar Union, police interference in an industrial action, anti-union dismissals and the lack of grievance mechanisms in the state of Uttar Pradesh, at its June 2015 meeting [see 375th Report, paras 330–353]. On that occasion, the Committee made the following recommendations [see 375th Report, para. 353]:
- (a) The Committee requests the Government to take all necessary measures without delay to ensure that the functions of Labour Commissioner are not performed by the Development Commissioner in the NSEZ but by an independent person having the confidence of the parties or an impartial body. It requests the Government to keep it informed of the steps taken in this regard.
 - (b) The Committee requests the Government to ensure that the principle that complaints of anti-union discrimination are examined in the framework of national procedures which are prompt, impartial and considered as such by the parties concerned is observed in the cases of the workers laid off or dismissed and, if it is confirmed that the imposition of the lay-offs and dismissals were linked with the legitimate trade union activities of the workers, to take measures to ensure that the workers concerned are appropriately compensated, including through reinstatement if this is still possible.
 - (c) Expressing its deep concern that over three years have lapsed since the lay-offs and retrenchments, the Committee requests the Government to endeavour to bring the parties together without delay, along the lines requested in December 2012, with a view to considering all elements raised and finding a solution in the current context that is satisfactory to all parties concerned.
 - (d) The Committee also requests the Government to take the necessary measures without delay to carry out an investigation into the allegations raised in the complaint of police interference in respect of industrial action and to inform the Committee of the outcome.
28. In its communication dated 6 July 2015, the Government indicates with regard to recommendation (a), that the Development Officer is a public servant and senior Government employee who has been delegated the power of the Labour Enforcement Officer, in line with the Central Government Special Economic Zones (SEZ) Rules, 2006

and the Uttar Pradesh SEZ Policy, 2007, with a view to facilitating implementation and expedition of enforcement activities in SEZs. The Development Officer is assisted by the technical expert from the Labour Department of the concerned State Government. The Government also states that according to the Uttar Pradesh SEZ Policy, 2007 services of the officers of the Labour Department may be at the disposal of the Development Commissioner in order to facilitate a single window service in SEZs. Furthermore, the Government indicates that according to the State Government, the Development Commissioner in the Noida Special Economic Zone (NSEZ) efficiently performed the functions of the Labour Commissioner and 350 cases were settled during conciliation proceedings. However, the present case could not be solved despite several rounds of discussions and hearings and the matter was thus referred to the Tribunal Court, Meerut.

29. As regards recommendation (b), the Government states that the Centre of Indian Trade Unions (CITU) was allowed by the Conciliation Officer, posted in the office of the Development Commissioner in the NSEZ, to present the complaints of anti-union discrimination on behalf of the workers but there were no instances of anti-union discrimination and the issue of lay-offs and compensation are currently being examined by the High Court, Allahabad. The Government also indicates that the Industrial Disputes Act, 1947, contains provisions to resolve disputes speedily, with fewer complications and with little or no cost and that the Central Government Industrial Tribunal and Labour Courts are set up for resolving disputes without cumbersome legal hurdles. Furthermore, a recent amendment of section 2A of the Industrial Disputes Act allows workers to directly approach the Labour Court or Tribunal for adjudication of disputes arising out of discharge, dismissal, retrenchment or termination from service. The amended Act also provides for the establishment of a Grievance Redressal Machinery (GRM) within industrial establishments of 20 or more workers with one stage appeal at the head of the establishment for resolution of disputes arising out of individual grievances. The Government indicates that with this amendment, workers will have one more alternative grievance redress mechanism for the resolution of disputes within the organization itself with minimum necessity for adjudication.
30. Concerning recommendation (c), the Government states that since the dispute is under active consideration of the High Court, Allahabad, where it was listed on 13 October 2014 and 7 July 2015, the jurisdiction of the Labour Commissioner ceased to exist.
31. With regard to recommendation (d), concerning the request to conduct an investigation into the allegations of police interference in respect of industrial action, the Government states that the police action was necessary to maintain law and order and that the police had no role in any conciliation proceedings.
32. *The Committee notes the Government's indication that, in line with the Central Government SEZ Rules and the Uttar Pradesh SEZ Policy, the Development Commissioner is vested with powers of the Labour Commissioner in order to facilitate implementation and expedition of enforcement activities in SEZs and that, according to the Government of Uttar Pradesh, these functions have been efficiently performed by the Development Commissioner in the NSEZ where 350 cases were settled through conciliation. While taking due note of these observations, the Committee recalls its conclusions from an earlier case concerning India [Case No. 2228, Report No. 332, para. 748] regarding the incompatibility that may exist between the functions of Development Commissioner and Labour Commissioner when performed by the same person. The Committee notes, moreover, that the complainant alleges that this mechanism does not have the confidence of all parties concerned, especially when allegations of anti-union discrimination are directed against the NSEZ administration itself, as in this case. The Committee, therefore, requests the Government once again to take all necessary measures without delay to review this matter so as to ensure that the functions of Labour Commissioner are not performed by the Development Commissioner in the NSEZ,*

especially as regards conciliation and mediation efforts, and to ensure that an independent person having the confidence of the parties or an impartial body carries out these functions. It requests the Government to keep it informed of the steps taken in this regard.

33. *The Committee notes the Government's indication that: (i) the CITU was allowed to present the complaints of anti-union discrimination on behalf of the workers but no discrimination was found; (ii) the allegations of lay-offs and compensation are currently before the High Court, Allahbad; (iii) the legislation contains provisions to resolve disputes speedily, with little or no cost; and (iv) the Central Government Industrial Tribunal and Labour Courts are set up to solve disputes without cumbersome legal hurdles. The Committee further notes with interest the Government's statement that a recent amendment to the Industrial Disputes Act, 1947, allows workers to directly approach the Labour Court or Tribunal for adjudication of a dispute arising out of discharge, dismissal, retrenchment or termination from service and provides for the establishment of a GRM, as an additional mechanism for resolution of disputes arising from individual grievances within industrial establishments of more than 20 workers. While taking due note of these developments, the Committee notes with concern that more than four years have passed since the lay-offs and retrenchments and the complaints of anti-union discrimination are still pending before the courts. In this regard, the Committee wishes to recall 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. Cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 817 and 826]. The Committee requests the Government to take the necessary measures to ensure that the complaints of anti-union discrimination are examined without further delay in the framework of national procedures which are prompt, impartial and considered as such by the parties concerned and, if it is confirmed that the dismissals and lay-offs were linked to legitimate trade union activities, to take measures to ensure that the workers concerned are appropriately compensated, including though reinstatement, if this is still possible. The Committee requests the Government to provide it with information on any developments in this regard.*
34. *Bearing in mind the context of the case, especially the lengthy proceedings, the ongoing appeal process and the fact that the workers' unit no longer exists, the Committee once again requests the Government to endeavour to bring the parties together without delay with a view to considering all elements raised, and finding a solution in the current context that is satisfactory to all parties concerned.*
35. *Finally, concerning the Committee's request to conduct an investigation into the allegations of police interference in an industrial action, the Committee observes that the Government simply indicates that the police had only aimed at maintaining law and order and was not involved in any conciliation proceedings. The Committee regrets that the Government did not provide any detailed information concerning the conducting of an independent investigation into this allegation or its outcome and requests it to ensure in the future that any such allegations are investigated promptly.*

Case No. 2566 (Islamic Republic of Iran)

36. *The Committee last examined this case, in which the complainant alleged the continued repression of teachers and the obstruction of their exercise of legitimate trade union*

activities, including the arrest and detention of teachers following protest demonstrations, at its November 2008 meeting [see 351st Report, paras 910–989]. On that occasion, the Committee made the following recommendations [see 351st Report, para. 989]:

- (a) The Committee requests the Government to amend the existing legislative framework so as to ensure that employers' and workers' organizations may exercise their freedom of association rights freely and without interference by the public authorities.
- (b) The Committee requests the Government to take the necessary measures to ensure that trade unionists may exercise their freedom of association rights, including the right to peaceful assembly, without fear of intervention by the authorities. It further requests the Government to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations.
- (c) The Committee requests the Government to undertake an independent inquiry into the allegations of ill-treatment endured by trade unionists in the course of their detention and, if they are proven true, to compensate the concerned parties for any damages suffered.
- (d) The Committee urges the Government to ensure that the charges against all the trade unionists relating to their participation in the March-May 2007 protests are immediately dropped, that their sentences are annulled, and that they are fully compensated for any damages suffered as a result of the convictions.
- (e) The Committee urges the Government to immediately stay the execution of Farzad Kamangar's death sentence, annul his conviction and secure his release from detention. It also requests the Government to undertake an independent inquiry into the allegations of torture inflicted upon Mr Kamangar during his detention and, if proven true, to compensate him for any damages suffered as a result of the said treatment. Further noting the allegation that several members of the "Save Farzad Committee" established to demonstrate solidarity with Mr Kamangar have been arrested, detained, and subject to threats and intimidation, the Committee requests the Government to take the necessary steps to ensure that trade unionists may exercise their freedom of association rights, including the right to engage in peaceful expressions of solidarity, without fear of intervention by the authorities.
- (f) The Committee requests the Government to initiate an independent inquiry into the allegations of discriminatory suspension and, if they are proven true, to lift the suspensions and any other prejudicial measures and compensate the parties concerned for any damages, including back pay, incurred as a result of their imposition.
- (g) The Committee requests the Government to take the necessary measures, including the lifting of the bans on the Teachers' Pen and the publication of news concerning protests or other labour-related activities, to ensure the right of trade unions to issue publications and express its opinions to the press. It further requests the Government to ensure the return of Mr Khaksari's passport, as well as the exercise of the right of workers' organizations to join the federation and confederation of their own choosing - including the right to participate in international trade union meetings - free from interference by the authorities. The Committee furthermore requests the Government to initiate an independent inquiry into the confiscation of trade unionists' property during the April and October 2007 raids on trade unionists' residences and, if the confiscations are found to be in violation of freedom of association principles, to fully compensate the parties concerned for any losses incurred.
- (h) The Committee expresses its deep concern with the seriousness of the trade union climate in the Islamic Republic of Iran and calls the Governing Body's special attention to the situation. It once again requests the Government to accept a direct contacts mission in respect of the matters currently pending before the Committee.

37. In their communications dated 28 September and 12 November 2015, Education International (EI) and ITUC provide additional information concerning arbitrary detention of teacher unionists, obstacles to attending international union meetings and the use of violence to disperse a peaceful demonstration. EI indicates that persecution of teachers and

their organizations continues; the recurrent and widespread protests of teachers against their low wages (below the national poverty line) are met by crackdown and criminalization; the authorities increased pressure on teachers and their associations prior to the opening of schools on 23 September 2015 with the intent to create a climate of fear and intimidation and to prevent further protests; teacher unionists face arrest, arbitrary detention and prosecution for exercising their legitimate rights to freedom of expression and association, generally being charged for acting against national security, and do not have any guarantee of due process and fair trial.

38. In particular, the complainants allege that:

- On 1 March 2015, Milad Darvish, a labour activist, filmmaker, and honorary member of the Iranian Teachers' Trade Association (ITTA), was detained when a group of teachers protested over a review of job classifications in front of the National Assembly. He was detained for 12 days in Evin prison. On 22 August 2015, he was arrested again and charged with propaganda against the system and acting against national security. On 27 September 2015, Mr Darvish was released on a bail of 50 million Iranian tomans (500 million Iranian rials (IRR)).
- On 20 April 2015, four days after thousands of teachers protested against low wages in 37 cities in Iran, Alireza Hashemi, head of the ITTA was detained and transferred to Evin prison to serve a five-year sentence originally handed down in 2013.
- On 25 May 2015, Ali Akbar Baghani was summoned by the authorities to serve a suspended six-year sentence issued in 2006 on charges of propaganda against the regime. The authorities provided no information about the reasons for carrying out the sentence at that time.
- On 27 June 2015, Esmail Abdi, the General Secretary of the ITTA-Tehran, was taken into custody after he had been prevented from travelling to Armenia to obtain a travel visa to Canada, where he had been invited to attend EI's 7th World Congress as representative of the Cooperative Council of Iranian Teachers' Trade Associations (CCITTA) and guest speaker. Mr Abdi's passport was confiscated at the border and he was instructed to return to Tehran in order to meet with the prosecutors. After having reported to the prosecutor's office, he was arrested, held in solitary confinement and later transferred to the general ward of Evin prison. In October 2015, there was still no information about the charges brought against him and since his file is considered a "national security" case, his lawyer is not recognized by the judiciary and only lawyers selected by the Government can represent him. Mr Abdi had already been detained several times and had been sentenced to a conditional ten years of imprisonment. During the teachers' protests in April 2015, he was summoned and threatened that the sentence would be executed if he did not resign from his union position but his resignation was rejected by the board of the ITTA-Tehran. The unjustified detention of the union leader had angered the community of teachers and there had been active responses to his arrest throughout the country.
- Rasoul Bodaghi is one of the numerous teacher activists who were arrested following post-election demonstrations of June 2009. Mr Bodaghi was charged for assembly and collusion with the intent to disrupt national security as well as for propaganda against the State. He was sentenced to a six-year sentence and banned for five years from social and cultural activities. Despite having completed his prison term in August 2015, new charges were brought against him and he was condemned to a further three years in custody.
- On 17 August 2015, Mahmoud Bagheri, board member of the ITTA-Tehran was released after having been imprisoned for 44 months.

- On 31 August 2015, following a ruling by the branch 2 of the Evin prison Court, Mohammadreza Niknejad and Mehdi Bohlouli, board member and member of the ITTA-Tehran respectively, were both arrested in raids to their homes in Tehran with intelligence agents seizing their belongings; charges against them included attending teachers' gatherings. On 29 September 2015, they were released on an IRR3 billion bail. Ali-Hossein Panahei, member of the ITTA-Tehran, was arrested in the city of Sanandaj. All three workers will have to face trials.
 - On 5 September 2015, Mahmoud Beheshti Langroodi, leader of the ITTA-Tehran, was part of a meeting between the ITTA and the authorities to discuss the problems teachers in Iran continue to face. The next day, Mr Beheshti Langroodi was arrested by security forces at his home following an order for arrest. Security forces searched his home and confiscated some of his belongings. Mr Beheshti Langroodi is currently detained in Evin prison.
 - Abdolreza Ghanbari, a university lecturer and teacher unionist, has been detained since January 2010. He was first condemned to death for enmity with God but in June 2013, a Revolutionary Court commuted the sentence to 15 years of imprisonment and exiled him in Borazjan in the South of the Islamic Republic of Iran.
 - On 7 October 2015, 14 teachers were arrested and detained for several hours in a detention centre in Tehran for scheduling a peaceful protest. They were told that they would be arrested again if they participated in the protest scheduled on 8 October 2015.
 - On 15 October 2015, Mr Ramin Zandnia, an active member of ITTA-Kurdistan for about 15 years, an environmentalist and a well-known teacher in Kurdistan, was arrested by the Revolutionary Army, along with his wife Ms Parvin Mohammadi, a human rights activist, and their eight-year-old daughter, while they were travelling from Ankara, Turkey where Mr Zandnia went, as representative of the CCITTA, to support the leaders of the Confederation of Public Sector Workers' Unions (KESK) in court. The security forces questioned Mr Zandnia's daughter before leaving her with her aunt at the end of the day. Mr Zandnia and Ms Mohammadi were taken to one of the camps in Saez, Kurdistan where they underwent severe interrogation and were told that they would be transferred to Sanandaj, the capital of the Kurdistan province the next day. Their current whereabouts are unknown. Mr Zandnia was told that he was accused of being a spy for international unions. He had previously been arrested several times and was once sentenced to four months in prison, which had been suspended for two years.
- 39.** EI also alleges that several teacher unionists were prevented from travelling abroad to attend international trade union events. In particular, four representatives of the CCITTA registered to attend EI's 7th World Congress in Ottawa, Canada in July 2015 but none of them could attend the event. While two did not obtain their visas from the Canadian authorities, the other two were held by the Iranian authorities: Esmail Abdi was arrested on 27 June 2015 after his passport was seized to prevent him from travelling to Armenia to obtain a visa for Canada and Peyman Nodinian had his passport seized on 15 June 2015 as he was travelling to Armenia for the same reason. EI alleges that the efforts of the authorities to prevent teacher unionists from attending EI's World Congress constitute an infringement of international human rights Conventions protecting freedom of expression and association, as well as the right to travel.
- 40.** EI further alleges that, on 22 July 2015, the authorities used violence to brutally disperse a protest of over 2,000 teachers who had gathered from many cities to peacefully assemble in front of the Parliament in Tehran at the initiative of the CCITTA. The teachers asked for the release of their colleagues and requested the Government to guarantee the rights of all education workers and unionists as prescribed by international instruments and Conventions

and to promote quality public education for all. Despite the severe crackdown, the protest continued until noon and a large number of teachers were present although they were scattered around. The nearby metro station and adjacent streets were full of security forces and plain-clothes agents, with reports indicating that there were up to five security officers in plain clothes for each teacher. Motorcycle riders from the special anti-riot forces roamed the streets to terrorize people and cell phones were confiscated to prevent protesters from taking pictures. According to EI, security forces arrested over 200 protesters, out of which 92 were taken to temporary detention centre in Vozara Street in Tehran, where they received a speech by the attorney general, were detained for several hours and were subsequently released, with the exception of six teacher activists who were kept in custody.

41. In its communication dated 26 October 2015, the Government states that pursuing labour rights through union protests is one of the fundamental rights recognized by articles 26 and 27 of the Constitution, an implicit reference to it is also made in sections 142 and 143 of the Labour Act and section 73(e) of the Act on the 5th Economic Development Plan provides that strengthening workers' and employers' organizations entails their legal right to union protests. In execution of articles 26 and 27 of the Constitution, the Government also adopted a by-law on managing trade union demands in 2011. Over the last two years, many decisions and measures have been taken to address teachers' unions' demands including improvement of payments and upgrading their status and part of such decisions had already been implemented. The Government also states that it is prepared to receive ILO technical assistance on exchange of experiences and take advantage of training on management of labour gatherings.

42. The Government further indicates that:

- Mehdi Bohluli and Mohammadreza Niknejad were arrested on 1 September 2015 and were released on bail on 29 September 2015.
- Alireza Hashemi had previously been arrested in March 2006, following the assembly of teachers in front of the National Parliament and imprisoned for three years. However, the decision was overturned and he was acquitted on appeal. In 2010, he was charged with assembly and collusion to disturb national security and propagation against the State and was sentenced to a five-year term of imprisonment with the execution of the sentence delayed until 19 April 2015. He is currently serving his sentence in Evin prison, but on 29 June 2015, the Minister of Education hosted Mr Hashemi's family and in his capacity as Minister subsequently requested a commutation of his sentence.
- On 22 August 2015, an indictment was issued against Esmail Abdi on charges of assembly and collusion to commit crimes against national security and propagation against the State, and the case had been sent to the court.
- Ali-Hosseini Panahi is being prosecuted for having insulted the Supreme Leader. His case had been referred to the court of Sanandaj where he was sentenced on 16 September 2015 to two years of discretionary imprisonment after investigation and verification of the alleged offence. The verdict is not yet final but the charges are not linked to union activities.
- Rasoul Bodaghi was charged with assembly and collusion to commit crimes against national security and propagation against the State. On 24 July 2010, he was sentenced to a five-year term of imprisonment and one year in prison taking into account the time previously spent in detention. Mr Bodaghi lodged an appeal against the verdict, which was investigated by Branch 54 of Tehran Province Court of Appeal but on 15 January 2011, it was rejected. Since 1 September 2010, Mr Bodaghi has thus been serving his prison sentence in Rajaei Shahr prison, has enjoyed all health and welfare amenities available and has received medical treatment outside the prison on five occasions.

– Mr Milad Darvish was acquitted of all charges.

43. In its communication dated 16 January 2016, the Government indicates that the Teachers Association of Iran has always demanded for salary increase and the Government has always tried to positively respond to such labour demands despite economic problems facing the country. The Ministry of Education proposed a Teachers' Classification Scheme to motivate teachers to further build their capabilities, improve the quality of their teaching services, enhance educational effectiveness, provide more economic opportunities and improve teachers' living conditions. According to the scheme, teachers, high-school teachers, art teachers, educational trainers, counsellors, health trainers, principals and assistant principals of schools and education and training institutions are classified into five primary, basic, senior, expert and certified professional ranks and those categorized will be entitled to 15, 25, 35 and 50 per cent increments of job allowance respectively. On 24 April 2015, the Council of Ministers approved the proposal and on 31 August 2015, the procedure for application of the scheme was approved by the President Council for Management and Human Capital Development. On 6 September 2015, the necessary directives were issued by the Minister of Education as well as the new employment orders for salary increase. Based on the available data, more than 700,000 teachers are subjected to the scheme. According to the Government, such initiatives will further motivate teachers to improve their ability and quality of teaching services and provide teachers with economic opportunities to upgrade their living conditions.
44. With regard to the issues raised by the Committee in its previous recommendations, the Government indicates that it had performed necessary reviews and discussed with the Ministry of Education, which committed to taking due consideration of claims as well as demands for freedom of association and right to organize and make every effort in this regard. According to the Government, some points raised by the Committee are irrelevant to labour matters and freedom of association, some issues have been addressed legally and others have been settled. The Government states that only a few subject matters still exist and are being dealt with and will be finalized. Following inquiries from the judiciary regarding the persons in question, it was stated that the charges had nothing to do with labour activities, as the workers had been investigated or interrogated for having committed offences against national security or in relation to terrorist or subversive groups.
45. Finally, the Committee notes that the Government provided extensive information relating to this case in a communication dated 26 October 2016 which it will examine when it next considers this case.
46. *The Committee notes that the additional information provided by the complainants denounces the general climate of fear and intimidation in the Islamic Republic of Iran and contains specific allegations of persecution, arrest, interrogation, arbitrary detention and prosecution of teacher trade unionists for legitimate trade union activities. The Committee notes that the alleged acts occurred between March and October 2015, often in the context of demonstrations and protests, which were at times accompanied by raids on houses and confiscation of personal belongings and concern the following trade unionists: Milad Darvish, Alireza Hashemi, Ali Akbar Bahgani, Esmail Abdi, Rasoul Bodaghi, Mahmoud Bagheri, Mohammadreza Niknejad, Mehdi Bohlouli, Ali-Hossein Panahei, Mahmoud Beheshti Langroodi, Abdolreza Ghanbari, Ramin Zandnia and Parvin Mohammadi, as well as 14 other teachers. Observing that many teacher unionists were arrested and convicted for "enmity with God", "assembly and collusion with the intent to disrupt national security" and "propagation against the regime" and that its previous examination of this case revealed the imposition of similar charges on other trade unionists, the Committee notes with concern the allegation that the judicial procedures often lacked guarantees of due process and fair trial, were followed by severe sentences, including imprisonment for several years, and that some of the convicted unionists had had their charges renewed upon*

completion of their prison sentences. The Committee also notes with deep concern the allegation that the whereabouts of Mr Zandnia and Ms Mohammadi have been unknown since their arrest on 15 October 2015.

47. The Committee notes the Government's indication that it has always tried to respond positively to labour demands and many measures had been taken over the last two years to address teachers' unions' demands, such as the adoption of the Teachers' Classification Scheme, which aims at enhancing educational effectiveness and providing teachers with economic opportunities to upgrade their living conditions. Further noting the Government's observations in relation to some of the specific allegations put forward by the complainants concerning Milad Darvish, Alireza Hashemi, Esmail Abdi, Rasoul Bodaghi, Mehdi Bohluli, Mohammadreza Niknejad and Ali-Hossein Panahi, the Committee observes that most of the information provided amounts to general affirmation of the charges and the dates of arrest, judgment and release from custody, if applicable, and provides little detail as to the precise circumstances and reasons for arrest or the judicial guarantees applied to the trials. The Committee also notes that, while the complainants allege that the above measures were motivated by legitimate trade union activities, the Government denies that the charges were connected to trade union activities and affirms that the workers were accused of having committed offences against national security or in relation to terrorist or subversive groups. The Committee regrets that the Government fails to provide information on the specific allegations concerning Ramin Zandnia, Parvin Mohammadi and 14 other union members, as well as the raids of houses, confiscation of personal belongings and renewal of charges after completion of prison sentences.
48. The Committee also understands that in February 2016, Mr Abdi was sentenced to six years of imprisonment, and, that between April and May 2016, Mr Abdi, Mr Beheshti Langroodi and Mr Bodaghi appear to have been temporarily released from prison while awaiting trial and that Mr Bodaghi was charged with "insulting the supreme leader".
49. Taking into account all of the above, as well as the its previous recommendations in this case, the Committee considers that the situation described raises serious concerns as to the climate for freely exercising trade union activity and may be characterized by regular violations of civil liberties and systematic use of the criminal law to punish trade unionists for exercising legitimate trade union activities. In this regard, the Committee recalls that the detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular. In cases where the complainants alleged that trade union leaders or workers had been arrested for trade union activities, and the governments' replies amounted to general denials of the allegation or were simply to the effect that the arrests were made for subversive activities, for reasons of internal security or for common law crimes, the Committee has always followed the rule that the governments concerned should be requested to submit further and as precise information as possible concerning the arrests, particularly in connection with the legal or judicial proceedings instituted as a result thereof and the result of such proceedings in order to be able to make a proper examination of the allegations [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 64 and 111]. In light of these principles and bearing in mind the prosecution of many trade unionists on charges of propaganda against the State and acting against national security, the Committee requests the Government to ensure that the charges against trade unionists relating to their participation in peaceful demonstrations and legitimate trade union activities between March and October 2015, are immediately dropped, that their sentences are annulled and the detained workers released and that they are fully compensated for any damages suffered as a result of the convictions. The Committee further requests the Government to initiate an independent inquiry into the confiscation of trade unionists' property during the raids on their residences and, if confiscations are found to be in violation of freedom of association principles, to fully

compensate the parties concerned for any losses incurred. The Committee urges the Government to take the necessary measures to institute an independent inquiry as to the arrest and detention of Mr Zandnia and Ms Mohammadi in order to identify their current whereabouts, determine the reasons for their detention and fully compensate them for any damage suffered. The Committee requests the Government to inform it of any developments in these matters.

50. *The Committee further notes with concern the allegation of increased persecution, intimidation and pressure on teacher unionists as well as the confiscation of the travel documents of Mr Abdi and Mr Nodinian in order to prevent them from attending international union meetings. Regretting that the Government does not provide any specific observations on this point, the Committee recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected. Participation by trade unionists in international trade union meetings is a fundamental trade union right and governments should therefore abstain from any measure, such as withholding travel documents, that would prevent representatives of workers' organizations from exercising their mandate in full freedom and independence [see **Digest**, op. cit., paras 44 and 153]. The Committee, therefore, requests the Government to take the necessary measures to ensure the return of Mr Abdi's and Mr Nodinian's travel documents and the free exercise of trade union rights, including participation in international trade union meetings, without pressure or threat of any kind and to keep it informed of any developments in this regard.*
51. *The Committee notes that the complainants also allege that the protest of 22 July 2015 was dispersed by security forces, plain-clothes agents and anti-riot forces. Noting with concern the allegation that the violent dispersal of the protest, in which more than 2,000 teachers participated, was coupled with the arrest of 200 workers, 92 of whom were taken into temporary detention and released several hours later, while six were kept in custody, the Committee regrets that the Government does not provide any information on this point. In this regard, it wishes to emphasize that workers should enjoy the right to peaceful demonstration to defend their occupational interests. The authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace. The police authorities should be given precise instructions so that, in cases where public order is not seriously threatened, people are not arrested simply for having organized or participated in a demonstration [see **Digest**, op. cit., paras 133, 140 and 151]. The Committee requests the Government to take the necessary measures to ensure that trade unionists may exercise their freedom of association rights, including the right to peaceful assembly, without fear of intervention by the authorities and trusts that the Government will ensure that the use of police and military force during protests and demonstrations is strictly limited to situations where law and order are seriously threatened, in line with the mentioned principles. It also requests the Government to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations.*
52. *With regard to its previous recommendations in this case, the Committee notes the Government's statement that the Ministry of Education is committed to taking labour claims and demands for freedom of association and the right to organize into due consideration and feels obligated to make every effort in this regard. It further notes the Government's indication that it is prepared to receive ILO technical assistance on exchange of experiences and take advantage of training on management of labour gatherings. In light of the*

seriousness of the matters raised in this case and the trade union climate in the Islamic Republic of Iran, the Committee urges the Government to engage with the ILO in the near future so as to identify the steps necessary to create an environment where trade union rights can be freely exercised.

53. Finally, the Committee must express its deepest regret and condemnation over the execution of trade unionist Farzad Kamangar on 9 May 2010, who had been detained in various prisons since July 2006 and, after a trial characterized by procedural irregularities, found guilty in 2008 of endangering national security and being in enmity with God. The Committee deeply deplores this act which is contrary to the most basic principles of the Universal Declaration of Human Rights and the fact that the Government has totally ignored its previous recommendations. The Committee draws the Governing Body's attention to the serious and urgent nature of this case.

Case No. 2752 (Montenegro)

54. The Committee last examined this case at its March 2014 meeting [see 371st Report, paras 79–88]. The present case concerns the alleged refusal of the management of the Radio and Television of Montenegro to recognize the union as the representative organization of workers, as well as the dismissal of its officers and harassment of its members. During the last examination of this case, the Committee: (i) requested the Government and the complainant to provide the court judgments concerning Mr Janjic and Ms Popovic's demotion lawsuits as soon as they were handed down, as well as any additional information relating to this matter; (ii) once again urged the Government to institute an independent investigation into the allegations of repeated acts of anti-union discrimination allegedly committed by the company since 2008, including the dismissal of Mr Pajovic, and to keep it informed on the outcome of such inquiry; (iii) requested the Government, should it be found that Mr Pajovic was dismissed due to his exercise of legitimate trade union activities, to take the necessary measures to ensure that he is fully reinstated without loss of pay; or, in the event that the reinstatement is not possible, for objective and compelling reasons, to ensure that the union member concerned is paid adequate compensation; (iv) requested the Government to respond without delay to the additional allegations made by the complainant; and (v) once again urged the Government to intercede with the parties in order to facilitate their reaching a mutually satisfactory agreement in relation to the facilities to be provided to the representatives of the complainant.
55. In a communication dated 19 May 2014, the complainant indicates that: (i) as regards Mr Janjic, the Supreme Court upheld all the lower courts' decisions declaring the re-engagement of the radio journalist as an administrative clerk for a lower salary as lawful; his 2012 appeal to the Constitutional Court on the issue of workplace has still not been decided; on 3 February 2014, Mr Janjic was declared "redundant" even from his administration-related workplace; following appeal, the labour inspection wrote to him on 28 March 2014 that "an Employer representative stated that there is room for rearranging a greater number of employees to the newly opened workplaces, while for about 30 employees there will not be workplaces and they will be declared redundant in the legal procedure"; however, Mr Janjic is so far the only one declared redundant, which clearly implies discrimination on the grounds of trade union activities; (ii) in the case of Mr Pajovic, who had also been re-engaged in a new lower salary position without filing appeal against the decision, had been suspended in February 2012 and dismissed for the second time following allegedly fabricated disciplinary proceedings, and was deliberately not given back his employment booklet without which he could not apply for benefits, the court found that the employer had mailed the employment booklet which failed to be delivered and that Mr Pajovic must pay the trial expenses; since 2012, the Basic Court in Podgorica allegedly invents various reasons for adjourning the trial in which Mr Pajovic seeks to prove that he was illegally fired; (iii) only in the case of Ms Popovic, who had filed an appeal with the

Supreme Court against the decision of re-engagement in another position with a lower salary, the employer has recently fully met all her requirements in a private and separate manner; (iv) the management continues to charge employees 1 per cent of their monthly income, including some of the members of the complainant organization, and is wiring it to the pro-government trade union; (v) in addition to the allegedly false criminal charges repeatedly brought by management (for instance the ongoing proceedings against Mr Pajovic for secretly recording and eavesdropping, where attempts are being made to discredit the union president as mentally ill), and several allegedly fabricated disciplinary proceedings (for instance against Mr Janjic due to unjustified absence from work conducted during his sick leave and resulting in temporary salary reduction, a measure that has recently been ruled illegal in court), numerous verbal assaults and physical attacks were committed towards Mr Pajovic and other trade union leaders, some of which were considered minor offences in court, while in other cases Mr Pajovic withdrew the complaint after receiving a written apology from the attackers; and (vi) the union continues to be denied office space and equipment, whereas the pro-government union is being granted all facilities without having a single legally subscribed member; the Government failed to intercede with the parties in this regard.

56. In a communication dated 25 September 2014, the Government forwards information from the labour inspectorate and the Basic Court in Podgorica. The labour inspectorate states that the employer temporarily suspended Mr Pajovic on 17 February 2012 pending completion of the disciplinary proceedings and dismissed him on 16 May 2012 as a disciplinary measure; and that during an inspection in July 2012, the labour inspector had access to a document certifying the delivery of employment booklet No. 01-2912, on 15 June 2012, to Mr Pajovic. The Basic Court in Podgorica indicates that the delay in the judicial proceedings concerning the dismissal of Mr Pajovic is due to the need to hear witnesses and examine evidence from both parties, the fact that the complainant constantly introduces new evidence and witnesses, thus deferring proceedings and the general work overload of judges.
57. *As regards the alleged acts of anti-union discrimination, the Committee takes note of the information supplied by the parties concerning the demotion lawsuits and the proceedings related to the employment booklet of Mr Pajovic. However, the Committee regrets that the Government failed to provide information as to the requested institution of an independent investigation into the allegations of repeated acts of anti-union discrimination allegedly committed by the company since 2008, including the second dismissal of Mr Pajovic in 2012. Moreover, the Committee observes with concern the allegation that Mr Janjic, who had previously been dismissed and then re-engaged, was declared redundant on 3 February 2014, and that although, according to the labour inspectorate, 30 redundancies were being envisaged by the employer, Mr Janjic has been the only one made redundant as of the date of the allegation. The Committee again 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. Protection against anti-union discrimination applies equally to trade union members and former trade union officials as to current trade union leaders [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 775 and 799].*
58. *The Committee once again urges the Government to institute an independent investigation into the allegations of repeated acts of anti-union discrimination committed by the company*

since 2008, including the alleged anti-union dismissals of Mr Pajovic in 2012 and of Mr Janjic on 3 February 2014, and to keep it informed on the outcome of such inquiry. Should it be found that a trade union official or member was dismissed due to the exercise of legitimate trade union activities, the Committee requests the Government to take the necessary measures to ensure that he/she is fully reinstated without loss of pay. In the event that the reinstatement is not possible, for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the trade unionist concerned is paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-union dismissals. As regards Mr Pajovic's second dismissal, the Committee trusts that the proceedings will be concluded without delay and requests the Government to transmit the decision as soon as it is handed down.

59. The Committee regrets that the Government has not provided any information in response to the complainant's previous allegations of anti-union harassment as requested by the Committee. The Committee recalls that acts of harassment and intimidation carried out against workers by reason of trade union membership or legitimate trade union activities, while not necessarily prejudicing workers in their employment, may discourage them from joining organizations of their own choosing, thereby violating their right to organize; and that allegations of criminal conduct should not be used to harass trade unionists by reason of their union membership or activities [see *Digest*, op. cit., paras 41 and 786]. The Committee requests the Government to carry out an independent investigation without delay into these remaining allegations, and provide detailed information on its outcome.

Case No. 2706 (Panama)

60. The Committee last examined this case at its March 2013 meeting, when it made the following recommendations [see 367th Report, para. 949]:
- (a) The Committee once again deplores the murders, injuries and other acts of violence between 2007 and 2010 against trade union members and, in certain cases, against police officers. The Committee requests the Government to send the rulings issued and any future rulings in order to ensure that the facts have been clarified and that the guilty parties have been severely punished. The Committee requests the Government to convoke a tripartite dialogue with workers' and employers' organizations in the construction sector in order to examine the problems mentioned and to take all measures necessary to avoid a repeat of the acts of violence. The Committee requests the Government to keep it informed in this regard.
 - (b) The Committee requests the Government to communicate: (1) the rulings issued in relation to the alleged murder of the trade union officials Mr Luiyi Argüelles and Mr Al Iromi Smith; (2) the rulings in relation to the injuries suffered by the trade union officials Mr David Niño and Mr Eustaquio Méndez on 14 August 2007.
 - (c) The Committee requests the Government to indicate whether any judicial proceedings have been initiated against the trade union leader Mr Raymundo Garcés and, if this is the case, to communicate the ruling.
 - (d) The Committee requests the Government to indicate whether the workers Mr Donaldo Pinilla and Mr Félix de León have filed criminal charges.
 - (e) The Committee once again requests the Government to send its observations on the alleged arrest and imposition of fines on more than 500 workers in the context of the demonstration of 12 February 2008.
 - (f) The Committee requests the Government to indicate whether the workers who were arrested and fined for the events that took place during the demonstration of 10 March 2010 (all of whom were released) initiated judicial proceedings and, if this is the case, to communicate the outcome.
 - (g) The Committee invites the Government to submit the law concerning the use of criminal records for labour-related purposes (sentences handed down for crimes) to a tripartite

dialogue, particularly to ensure that criminal records acquired because of peaceful union activities do not have a bearing on obtaining employment.

- (h) The Committee requests the Government to indicate whether judicial proceedings have been initiated by the workers concerned and, if so, to indicate their outcome.
- (i) The Committee calls the Governing Body's special attention to the extreme seriousness and urgency of the issues in this case.

61. In its communication of 17 June 2013, the Government states that the Special Committee for the Rapid Handling of Complaints concerning Freedom of Association and Collective Bargaining (the Complaints Committee), established under the 2012 Panama Tripartite Agreement, is an excellent tool for achieving tripartite dialogue in the construction sector in order to examine the issues raised and avoid a recurrence of violence. Following an ILO technical assistance mission, conducted in February 2016, the Committee was informed of the various agreements reached during meetings of the Complaints Committee and of its timetable of activities for 2016, which includes a monthly meeting to discuss and resolve initial and follow-up complaints presented to the Committee on Freedom of Association. *In this context, the Committee encourages the Government, together with the workers' and employers' organizations in the construction sector, to consider meeting within the framework of the Complaints Committee to examine jointly the issues raised and reach agreements that will avoid recurrence of the violence in that sector. The Committee requests the Government to keep it informed in this respect.*
62. The Committee takes note of the Government's statement that it will consider convening a dialogue on Act No. 14 of 13 April 2010, on the use of criminal records for labour-related purposes, within the framework of the Tripartite Agreement Committee in order to ensure, in particular, that criminal records acquired because of peaceful trade union activities do not have a bearing on obtaining employment. *The Committee requests the Government to report on the discussion of the aforementioned Act at the meetings of the Tripartite Agreement Committee.*
63. The Committee takes note of the Government's report (based on information provided by the Supreme Court) on the murders of Mr Osvaldo Lorenzo, Mr Luiyi Argüelles and Mr Al Iromi Smith. With regard to Mr Osvaldo Lorenzo, the Government states that in Judgment No. 5-PI of 18 March 2010, the Second High Court of Panama City sentenced Mr Jorge Morgan Melchor and Mr Miguel Ángel Ibarra to 25 years' imprisonment and Mr Rogelio Ramos Camargo to 20 years' imprisonment. As regards Mr Luiyi Argüelles, the Government reports that the oral hearing (trial by jury) was held on 29 February 2012; the jury acquitted the defendants and the case was therefore closed. As regards the murder of Mr Al Iromi Smith, the Government reports that the trial was transferred to the Criminal Chamber of the Supreme Court on 3 July 2012 and the oral hearing has yet to be held. *The Committee recalls that in its previous examination of the case, it took note of the sentences handed down in connection with the murder of Mr Osvaldo Lorenzo and requested the Government to confirm whether these sentences were final or whether they could be appealed before the Supreme Court of Justice. Observing that the legal proceedings in connection with the murder of the trade union leader Mr Luiyi Argüelles have concluded and that the case has been closed, the Committee regrets the need to express particular concern at the failure to shed light on the facts and on the circumstances of the murder. The Committee recalls that the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 52]. The Committee requests the Government to send it copies of the sentences handed down in the cases concerning the murder of Mr Argüelles and of Mr Al Iromi Smith, respectively.*

64. With regard to the arrest of some 500 workers who took part in a demonstration on 12 February 2008 to protest the death of the trade union leader, Mr Al Iromi Smith (where the workers were detained at national police stations and released upon payment of a fine), the Committee takes note of the police report of 8 May 2008, submitted by the Government, which states that the police responded with conventional weapons to acts of public disorder and arrested the workers who had committed those acts and acted violently using firearms.
65. As regards the allegations relating to the injuries suffered by the trade union leaders, Mr David Niño and Mr Eustaquio Méndez, on 14 August 2007, the Government reports that neither has initiated legal proceedings for bodily harm and that both are in good health. *Bearing this information in mind, the Committee will not pursue its examination of these allegations.*
66. The Government further adds that, although it has requested information from the Public Prosecution Service, it has yet to receive any information indicating whether: (i) Mr Donaldo Pinilla and Mr Félix De León have filed a criminal complaint in connection with the alleged injuries suffered at the hands of the police during the demonstration held on 12 February 2008; (ii) criminal proceedings have been initiated against the trade union leader, Mr Raymundo Garcés (arrested in connection with a violent demonstration held in 2007); (iii) the workers who were arrested and fined in connection with the demonstration held on 10 March 2010 (who were released) filed appeals; and (iv) the workers dismissed in 2007 have initiated legal proceedings. *The Committee regrets that to date, the Government has been unable to provide information on events that took place almost a decade ago and requests the Government to gather the relevant information as soon as possible and to keep it informed in this regard. The Committee also invites the complainants to provide information on these matters.*
67. *The Committee draws the Governing Body's attention once again to the serious and urgent nature of this case.*

Case No. 2883 (Peru)

68. The Committee last examined this case, which concerns allegations of the promotion of trade union organizations in the construction sector containing persons engaged in violent and criminal activities, at its June 2013 meeting [see 368th Report, paras 799–810]. On that occasion, the Committee invited the Government to provide follow-up to the initiatives to combat violence in the construction sector within the framework of the national tripartite dialogue body.
69. The Federation of Civil Construction Workers of Peru (FTCCP) provided follow-up in a communication dated 6 November 2013, in which it: (i) alluded again to the existence of mafia organizations operating under the guise of trade unions in the construction sector, and reported that the violence and climate of fear they generated were continuing to increase and were restricting freedom of association; (ii) stated that the FTCCP had been excluded from the Multi-Sectoral Commission created in 2012 to implement remedial action for the problem; (iii) alleged that the criminal organizations were planning to murder certain FTCCP leaders and workers who defied them by exercising their freedom of association; and (iv) reported that trade union leader, Mr Jesús Aníbal Ruiz Díaz, had been murdered on 21 October 2013 while leaving the trade union premises alongside Mr Jorge Sánchez Ramírez, a union member, who suffered serious bodily injury. The complainant also provided further details as to the identity of the suspects, who had since been arrested by the police.

70. In its communication of 21 May 2014, the Government reported that the suspected perpetrators of the murder and injury had been handed over to the Public Prosecutor and that a criminal investigation was ongoing.
71. *Expressing its concern over the seriousness of the allegations, the Committee requests the Government to keep it informed of the outcome of the criminal investigation and proceedings relating to the murder of Mr Jesús Aníbal Ruiz Díaz and the injury of Mr Jorge Sánchez Ramírez. Additionally, recalling the importance of implementing measures to ensure that trade union rights can be exercised under normal conditions in a climate free of violence, pressure, fear and threats of any kind, and also of involving the trade unions concerned, such as the FTCCP, in the process of establishing those measures, the Committee requests the Government to inform it of the initiatives adopted in relation to the allegations of violence and threats made against trade union leaders and members in the construction sector.*

Case No. 3022 (Thailand)

72. The Committee last examined this case at its June 2014 meeting [see 372nd Report, paragraphs 575–618], at which time it made the following recommendations:
- (a) The Committee once again urges the Government to take the necessary measures without delay to abrogate section 33 of the SELRA and invites the Government to consider having recourse to the principles concerning minimum services enounced in its conclusions, where the scope or duration of industrial action may result in irreversible damages. The Committee requests to be kept informed of developments in this regard.
 - (b) The Committee trusts that the judgments in the two appeal proceedings before the Supreme Court will be rendered in the near future, and urges the Government to ensure that the Committee's conclusions are brought to the Supreme Court's attention without delay and to provide a copy of the Supreme Court's decision once it is handed down. Pending the final judgment, the Committee requests the Government to make every effort to ensure that the 13 dismissed union officials are swiftly reinstated effectively in their jobs under the same terms and conditions prevailing prior to their dismissal, with compensation for lost wages and benefits. The Committee requests to be kept informed of developments in this regard.
 - (c) The Committee once again urges the Government to take the necessary measures without delay to amend section 77 of the SELRA to bring it fully into conformity with the principles of freedom of association and to keep it informed of any developments in this respect.
 - (d) Considering that the fines against the SRUT leaders have been imposed in response to violations of strike prohibitions, which are themselves contrary to the principles of freedom of association, and that their excessive amount is likely to have an intimidating effect on the SRUT and its leaders and inhibit their legitimate trade union activities, the Committee trusts that the appeal filed by the SRUT has a suspensive effect with regard to the payment of damages, and that the Committee's conclusions on this matter will also be submitted for the Supreme Court's consideration.
73. In a communication dated 18 October 2014, one of the complainants, the International Transport Workers' Federation (ITF), indicates that: (i) the six committee members of the State Railway Workers' Union of Thailand (SRUT), Hat Yai branch, who were dismissed by the State Railway of Thailand (SRT) on 27 October 2009 for their involvement in the Occupational Health and Safety Initiative (the OSH Initiative), namely, Wirun Sagaekhum, Prachaniwat Buasri, Sorawut Porthongkham, Thawatchai Bunwisut, Saroj Rakchan and Nittinai Chaiphum were reinstated on 3 June 2014 to their original roles with full back pay; (ii) similarly, the seven national leaders of the SRUT who were dismissed by the SRT on 28 July 2011 for their contribution to the OSH Initiative, i.e., Sawit Kaewvarn, Pinyo Rueanpetch, Banjong Boonnet, Thara Sawangtham, Liem Morkngan, Supichet

Suwanchatree and Arun Deerkach, were also reinstated on 19 June 2014 under the same terms; (iii) the appeals to the Supreme Labour Court regarding the unfair dismissals of the 13 SRUT officials are being withdrawn by the union; (iv) negotiations are still ongoing between the SRT and the SRUT over a possible request by the SRT to the Supreme Labour Court to set aside the order for damages of 15 million Thai baht (THB) against the seven national union leaders (process delayed due to the dismissal of the SRT Governor on 10 July 2014); and (v) the Government has so far made no efforts to revise the 2000 State Enterprise Labour Relations Act (SELRA) B.E. 2543 in accordance with the Committee's recommendations.

74. *The Committee notes with interest the information provided by the complainant concerning the reinstatement of the 13 SRUT trade union leaders, to their original roles and with full back pay.*
75. *The Committee regrets however that the Government has provided no information on steps taken to revise the SELRA in line with its previous recommendations and once again urges it to take the necessary measures without delay to abrogate section 33 and amend section 77 of the SELRA so as to bring it fully into conformity with the principles of freedom of association, and to keep it informed of any progress made in this regard.*
76. *As regards the fines imposed on the SRUT leaders in response to violations of strike prohibitions, which were themselves contrary to the principles of freedom of association, the Committee observes that the SRT and the SRUT have been negotiating a possible request from the former to set aside the order for damages of THB15 million. The Committee trusts that the appeal filed by the SRUT continues to have a suspensive effect with regard to the payment of damages, and expects that the conclusions reached by the Committee in the framework of the examination of this case at its meeting in June 2014 [see 372nd Report, para. 617] will be submitted for the Supreme Court's consideration, should this not already have been the case. The Committee requests the Government to keep it informed of the progress made on this matter.*

Case No. 2763 (Bolivarian Republic of Venezuela)

77. The Committee last examined this case at its March 2013 meeting, when it made the following recommendations [see 367th Report, para. 1294]:
 - (a) Bearing in mind the considerable delay in the negotiation process, the Committee expects the collective agreement between SUNEPCVG and the Corporación Venezolana de Guayana to be signed as soon as possible and once again requests the Government to keep it informed of developments without delay.
 - (b) Regarding the alleged (provisional) arrest and criminal prosecution of SUTRA-CVG union officials Ronald González and Carlos Quijada and of trade unionists Adonis Rangel Centeno, Elvis Lorán Azocar and Darwin López, the Committee urges the Government once again to draw the judicial authority's attention without delay to the need for it to take duly into account the fact that the trade unionists concerned were engaged in a peaceful demonstration to demand compliance with the collective agreement, and requests the Government to communicate to it without delay the sentence that is handed down.
 - (c) Regarding the alleged criminal prosecution of SUTISS-Bolívar union leaders (Juan Antonio Valor, Leonel Grisett and Jhoel José Ruiz Hernández) and the criminal prosecution of employees of Camila CA in 2006 (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 communicate to it without delay the sentence handed down on the said union leaders and employees and, bearing in mind that the incidents date back to 2006 and that the trade unionists involved are required periodically to present themselves before the judicial authority, trusts that the sentence will be handed down very

soon. The Committee recalls that a delay in the administration of justice is tantamount to a denial of justice.

- (d) Regarding the alleged brutal repression by the national guard and police of the State of Bolívar of a gathering of steelworkers from Ternium-Sidor who were demanding improvements to the collective agreement under negotiation, which resulted in injuries to several people, dozens of criminal prosecutions and the destruction by the authorities of 32 vehicles belonging to the workers (according to the Government, a group of some 80 workers was blocking the traffic with private vehicles, burning tyres and throwing heavy objects at members of the national guard unit, injuring several officers), the Committee takes note that the judicial authority ordered the unconditional release of the workers who had been charged and again requests the Government to conduct an inquiry without delay into the allegations that the police used excessive force and caused serious injuries and damage to property.
- (e) The Committee regrets once again the delay in the criminal proceedings brought against the trade union leader Mr Rubén González (which have resulted in repeated restrictions of his free movement) and requests the Government to provide it with a copy of the judgment that is handed down after the initial sentence was declared null and void by the Supreme Court of Justice because it lacked sufficient grounds. Finally, the Committee reiterates the recommendation it made when it first examined the case, considering that the charges against Ruben González do not justify his preventive detention or house arrest for years prior to the present interim measures, and requests the Government that he be compensated for the damages suffered.

78. The Committee notes a communication dated 18 May 2013 signed by many organizations expressing their support for the complaint presented by the Venezuelan Corporation of Guyana (SUNEP–CVG).

79. In its communication dated 8 October 2013, the Government informs the Committee that the criminal prosecution of SUTRA–CVG trade union leaders, Ronald González and Carlos Quijada, and trade unionists, Adonis Rangel Centeno, Elvis Lorán Azocar and Darwin López, is at the preparatory stage, where the necessary and relevant steps are being carried out in order for the final report to be issued (the Committee recalls that the said defendants, who are not incarcerated, were charged with unlawful association and restricting freedom of work). *The Committee regrets that to date the Government has not been able to provide information that a judgment has been handed down in relation to those trade unionists despite the time that has elapsed. Further, the Committee recalls that in its previous examination of the case, it urged the Government to draw the judicial authority's attention without delay to the need for it to take duly into account the fact that the trade unionists concerned were engaged in a peaceful demonstration to demand compliance with the collective agreement. The Committee reiterates the conclusions it reached when it previously examined the case and requests the Government to communicate without delay the judgment handed down in relation to those trade unionists.*

80. Regarding the criminal prosecution of trade union leaders and trade unionists from SUTISS– Bolívar, Juan Antonio Valor, Leonel Grisett and Jhoel José Ruiz Hernández, and of workers of the Camila CA enterprise, Richard Alonso Díaz, Osmel José Ramírez Malavé, Julio César Soler, Agdatamir Antonio Rivas, Luis Arturo Alzota Bermúdez, Argenis Godofredo Gómez and Bruno Epitafio López in 2006, the Government reports that the Second Attorney-General's Office of the Second Judicial Circuit of Bolívar State and the 59th Attorney-General's Office at the national level with full competence submitted charges and that the public oral hearing was scheduled for 13 October 2013 (the Committee recalls that the defendants, who are not incarcerated, were charged with second-degree misappropriation of funds, restricting freedom of work and taking the law into their own hands). *The Committee regrets that to date the Government has not sent any up-to-date information on the proceedings concerning the facts dating from 2006. The Committee once*

again requests the Government to provide without delay information on the decision handed down in relation to the said trade unionists.

- 81.** The Committee recalls that, in its previous examinations of the case, it had requested that the Government carry out an investigation into the allegation that the police used excessive force on 14 March 2008 against a gathering of steelworkers from Ternium–Sidor who were calling for improvements to the collective bargaining, which allegedly resulted in serious injuries and property damage (according to the allegations, the authorities destroyed 32 vehicles). The Committee notes that the Government states that no criminal investigation was ever launched because the Public Prosecutor’s Office was never informed of those facts. *The Committee invites the complainant to provide information to allow the Government to carry out an impartial investigation into the facts and to specify, in particular, whether the instances of serious injury and property damage were reported to the police.*
- 82.** In its communication dated 15 May 2014, the Government reports that, on 23 April 2014, the 24th Court of Justice of the Metropolitan Area of Caracas handed down a final judgment which acquitted trade union leader Rubén González. The Government also reports that while the legal proceedings were in progress, González enjoyed full trade union rights, freely participated in the General Workers Union of Ferrominera Orinoco (SINTRAFERROMINERA) trade union elections, in which he was elected as the general secretary, and represented his trade union in discussions regarding the collective labour agreement. *The Committee requests the Government to supply a copy of the said judgment and to provide information on whether the trade union leader Rubén González has been compensated for the damages he suffered during the preventive detention and house arrest to which he had been subject since September 2009.*
- 83.** Finally, the Committee regrets that the Government has not provided information on the negotiation process between the trade union SUNET–CVG and la Corporación Venezolana de Guayana, *and requests the Government once again to keep it informed on the matter.*

* * *

- 84.** Finally, the Committee requests the Governments and/or complainants concerned to keep it informed of any developments relating to the following cases.

Case	Last examination on the merits	Last follow-up examination
2096 (Pakistan)	March 2004	June 2016
2512 (India)	November 2007	November 2015
2528 (Philippines)	June 2012	November 2015
2637 (Malaysia)	March 2009	November 2015
2684 (Ecuador)	June 2014	–
2715 (Democratic Republic of the Congo)	June 2014	–
2750 (France)	November 2011	March 2016
2755 (Ecuador)	June 2010	March 2011
2758 (Russian Federation)	November 2012	June 2015
2780 (Ireland)	March 2012	–
2797 (Democratic Republic of the Congo)	March 2014	–
2807 (Islamic Republic of Iran)	March 2014	June 2016
2850 (Malaysia)	March 2012	June 2015
2872 (Guatemala)	November 2011	–

Case	Last examination on the merits	Last follow-up examination
2896 (El Salvador)	June 2015	–
2925 (Democratic Republic of the Congo)	March 2014	–
2934 (Peru)	November 2012	–
2952 (Lebanon)	March 2013	June 2016
2976 (Turkey)	June 2013	March 2016
2987 (Argentina)	March 2016	–
2988 (Qatar)	March 2014	November 2015
2998 (Peru)	March 2015	–
3024 (Morocco)	March 2015	March 2016
3039 (Denmark)	November 2014	June 2016
3041 (Cameroon)	November 2014	–
3046 (Argentina)	November 2015	–
3051 (Japan)	November 2015	–
3055 (Panama)	November 2015	–
3058 (Djibouti)	March 2015	–
3072 (Portugal)	November 2015	–
3075 (Argentina)	November 2015	–
3083 (Argentina)	November 2015	–
3101 (Paraguay)	November 2015	–
3102 (Chile)	November 2015	–
3105 (Togo)	June 2015	–
3140 (Montenegro)	March 2016	–

85. The Committee hopes that these Governments will quickly provide the information requested.

86. In addition, the Committee has received information concerning the follow-up of Cases Nos 1787 (Colombia), 1865 (Republic of Korea), 1962 (Colombia), 2086 (Paraguay), 2341 (Guatemala), 2362 (Colombia), 2400 (Peru), 2434 (Colombia), 2488 (Philippines), 2540 (Guatemala), 2583 (Colombia), 2595 (Colombia), 2603 (Argentina), 2652 (Philippines), 2656 (Brazil), 2667 (Peru), 2673 (Guatemala), 2679 (Mexico), 2699 (Uruguay), 2708 (Guatemala), 2710 (Colombia), 2716 (Philippines), 2719 (Colombia), 2723 (Fiji), 2725 (Argentina), 2745 (Philippines), 2746 (Costa Rica), 2751 (Panama), 2756 (Mali), 2768 (Guatemala), 2786 (Dominican Republic), 2788 (Argentina), 2789 (Turkey), 2793 (Colombia), 2816 (Peru), 2827 (Bolivarian Republic of Venezuela), 2833 (Peru), 2837 (Argentina), 2840 (Guatemala), 2852 (Colombia), 2854 (Peru), 2856 (Peru), 2860 (Sri Lanka), 2871 (El Salvador), 2895 (Colombia), 2900 (Peru), 2915 (Peru), 2916 (Nicaragua), 2917 (Bolivarian Republic of Venezuela), 2924 (Colombia), 2929 (Costa Rica), 2937 (Paraguay), 2944 (Algeria), 2946 (Colombia), 2953 (Italy), 2954 (Colombia), 2960 (Colombia), 2973 (Mexico), 2979 (Argentina), 2980 (El Salvador), 2985 (El Salvador), 2991 (India), 2992 (Costa Rica), 2994 (Tunisia), 2995 (Colombia), 2998 (Peru), 2999 (Peru), 3002 (Plurinational State of Bolivia), 3006 (Bolivarian Republic of Venezuela), 3013 (El Salvador), 3020 (Colombia), 3021 (Turkey), 3026 (Peru), 3030 (Mali), 3033 (Peru), 3036 (Bolivarian Republic of Venezuela), 3040 (Guatemala), 3043 (Peru), 3052 (Mauritius), 3054 (El Salvador), 3057 (Canada), 3063 (Colombia), 3064 (Cambodia), 3065 (Peru), 3066 (Peru), 3070 (Benin), 3077 (Honduras), 3085 (Algeria), 3087 (Colombia), 3096 (Peru), 3098 (Turkey), 3110 (Paraguay), 3114 (Colombia), 3123 (Paraguay), 3142 (Cameroon), 3169

(Guinea), 3171 (Myanmar) and 3177 (Nicaragua), which it will examine as swiftly as possible.

CASE NO. 2882

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

Complaints against the Government of Bahrain presented by

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

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

- 87.** The Committee last examined this case at its March 2016 meeting, when it presented an interim report to the Governing Body [see 377th Report, paras 186–199, approved by the Governing Body at its 326th Session].
- 88.** The Government sent its observations in communications dated 8 March and 18 April 2016.
- 89.** Bahrain has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 90.** At its March 2016 meeting, the Committee made the following recommendations [see 377th Report, para. 199]:
- (a) Noting with deep concern the allegations of Abu Dheeb's deteriorating health and the prison officers' prevention of his receipt of necessary medication, the Committee requests the Government to reply to these allegations without delay and to take the necessary measures to ensure that Abu Dheeb immediately receives all necessary medical attention. The Committee further once again urges the Government to provide copies of the judgments condemning Abu Dheeb and Jalila Al-Salman and to provide any information relating to their appeals and requests the Government to ensure that Abu Dheeb is immediately released should it be found that he has been detained since 2011 for the exercise of legitimate trade union activity, as this would then mean that he would have been wrongfully detained for four years. The Committee urgently requests to be kept informed of any developments in this respect. The Committee further urges the Government to remove any obstacles to the re-establishment of the BTA and to ensure

that Jalila Al Salman can exercise her legitimate right to freedom of expression and that she is not blacklisted due to her trade union activity. The Committee draws the Governing Body's attention to the serious and urgent nature of this aspect of the case.

- (b) Bearing in mind the Government's commitment in the 2012 tripartite agreement to work on the possibility of ratifying Conventions Nos 87 and 98, the Committee expects consultations to be held by the Government without delay on this and on the Trade Union Act, taking into account the Committee's previous comments. The Committee once again reminds the Government that it can avail itself of ILO technical assistance and requests the Government to keep it informed of any developments in this regard.
- (c) The Committee requests the Government to provide detailed information on the outcome of its investigations into, and to solicit information from the employers' organization concerned, on the precise allegations of anti-union discrimination and interference by the employer in trade union affairs in the following companies: ALBA, BAS, ASRY, GARMCO, BATELCO, BAPCO, BAFCO, Gulf Air, Yokogawa Middle East, KANOO cars and Sphynx cleaning. The Committee further invites the complainant to provide any additional information at its disposal in relation to its complaints of anti-union discrimination in these companies.

B. The Government's reply

91. In its communication dated 18 April 2016, the Government indicates that Abu Dheeb, President of the Bahraini Teachers Association (BTA), was released on 4 April 2016, having served his sentence, and that complaints concerning his health in prison are not pertinent at present. It further states that the BTA was a civil society organization, established in 2001 in accordance with the Association, Social and Cultural Clubs, Special Committees Working in the Field of Youth and Sports and Private Institutions Act (Act No. 21 of 1989, as amended), which prohibits associations from engaging in politics or conducting business outside the scope of the goals for which they were established. Since the BTA contravened national laws regulating the activity of such institutions, it was dissolved in 2011, but according to the Government there is nothing to prevent individuals from forming professional associations within the framework of adherence to the current procedures and laws. However, the Government indicates that no new application to establish an association of this type had been filed.

92. With regard to a series of allegations of anti-union discrimination and interference by the employer in trade union affairs of several private sector companies (ALBA, BAS, ASRY, GARMCO, BATELCO, BAPCO, BAFCO, Gulf Air, Yokogawa Middle East, KANOO cars and Sphynx cleaning), the Government states that the relevant agencies in the Ministry of Labour and Social Affairs had been in contact with the trade unions in the aforementioned companies and had investigated their situation. The Ministry found that the trade unions continued to conduct their activities normally and their activists enjoyed all of the rights established under the Trade Union Act. The Government further indicates that a number of unions had reformed their governing bodies in accordance with the laws and regulations governing the matter and reaffirms that the Ministry of Labour and Social Affairs will investigate any complaint received from the mentioned unions and take the necessary measures, in accordance with the established laws and regulations of Bahrain.

The Committee's conclusions

93. *The Committee recalls that this case concerns grave allegations of widespread arrest, torture, dismissals, intimidation and harassment of trade union members and leaders following a general strike action in March 2011 in defence of workers' socio-economic interests.*

94. *As regards recommendation (a), the Committee welcomes the Government's indication that Abu Dheeb was released from prison on 4 April 2016 but notes that Abu Dheeb was only released after having served his sentence. The reasons for his detention thus remain unclear, especially considering that the Government has still not provided copies of the judgments condemning Abu Dheeb and Jalila Al-Salman, which could, in the Committee's view, clarify whether they had been wrongfully sentenced and detained for the exercise of legitimate trade union activity. The Committee deplores the nature of the Government's reply which simply states that the complaints concerning Abu Dheeb's health and safety prior to his release are no longer relevant and which does not provide any information on the issue or indicate the measures taken to investigate these allegations, especially in view of their serious nature. The Committee urges the Government to carry out an independent inquiry without delay into these allegations and to provide copies of the judgments condemning Abu Dheeb and Jalila Al-Salman as well as any information relating to their appeals.*
95. *The Committee further notes the Government's statement that the BTA had been registered under Act No. 21 but had been dissolved in 2011 for having contravened national laws, including for having engaged in politics, and that although there is nothing to prevent individuals from forming professional associations within the framework of the current procedures and laws, no new application to establish an association had been filed. Recalling that workers should have the right to form organizations of their own choosing regardless of their political opinions, the Committee requests the Government to inform the workers concerned that, should the BTA wish to re-establish, it will be able to do so without encountering any legislative or administrative obstacles.*
96. *With regard to recommendation (b), the Committee notes that the Government does not provide any new information. Bearing in mind the Government's commitment in the 2012 tripartite agreement to work on the possibility of ratifying Conventions Nos 87 and 98, the Committee expects consultations to be held with relevant parties without delay on this and on bringing the Trade Union Act into conformity with freedom of association principles, taking into account the Committee's previous comments. The Committee draws the Government's attention to the importance of respecting its previous commitments and once again reminds the Government that it can avail itself of ILO technical assistance. The Committee requests the Government to keep it informed of any developments in this regard.*
97. *As regards recommendation (c), concerning allegations of anti-union discrimination and interference by the employer in trade union affairs in a number of private sector companies (ALBA, BAS, ASRY, GARMCO, BATELCO, BAPCO, BAFCO, Gulf Air, Yokogawa Middle East, KANOO cars and Sphynx cleaning), the Committee regrets that the Government neither provides detailed information on the outcome of its investigations into the precise allegations that had been made concerning these companies nor submits observations from the employers' organization concerned. The Committee further notes that the Government repeats what it had previously stated, in particular that investigations were conducted, the trade unions continue to function, their activists enjoy the rights under the Trade Union Act, a number of unions reformed their governing bodies and that the Ministry will investigate any complaint it receives. Bearing in mind the repetitive nature of the Government's reply, the Committee is obliged to request the Government once again to provide detailed information on the outcome of the investigations into, and to solicit information from the employers' organization concerned on the precise allegations of anti-union discrimination and interference by the employer in trade union affairs in the abovementioned companies. The Committee further invites the complainant to provide any additional information at its disposal in relation to its complaints of anti-union discrimination in these companies.*

The Committee's recommendations

98. *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 carry out an independent inquiry without delay into the allegations concerning Abu Dheeb's health and safety prior to his release and to provide copies of the judgments condemning Abu Dheeb and Jalila Al-Salman as well as any information relating to their appeals.*
- (b) *Recalling that workers should have the right to form organizations of their own choosing regardless of their political opinions, the Committee requests the Government to inform the BTA that, should it wish to re-establish, it will be able to do so without encountering any legislative or administrative obstacles.*
- (c) *Bearing in mind the Government's commitment in the 2012 tripartite agreement to work on the possibility of ratifying Conventions Nos 87 and 98, the Committee expects consultations to be held with relevant parties without delay on this and on bringing the Trade Union Act into conformity with freedom of association principles, taking into account the Committee's previous comments. The Committee draws the Government's attention to the importance of respecting its previous commitments and once again reminds the Government that it can avail itself of ILO technical assistance. The Committee requests the Government to keep it informed of any developments in this regard.*
- (d) *The Committee requests the Government to provide detailed information on the outcome of the investigations into, and to solicit information from the employers' organization concerned on the precise allegations of anti-union discrimination and interference by the employer in trade union affairs in the following companies: ALBA, BAS, ASRY, GARMCO, BATELCO, BAPCO, BAFCO, Gulf Air, Yokogawa Middle East, KANOO cars and Sphynx cleaning. The Committee further invites the complainant to provide any additional information at its disposal in relation to its complaints of anti-union discrimination in these companies.*

CASE NO. 2318

INTERIM REPORT

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

<p><i>Allegations: The murder of three trade union leaders and the continuing repression of trade unionists in the country</i></p>

99. The Committee has already examined the substance of this case on numerous occasions, most recently at its October–November 2015 meeting where it issued an interim report, approved by the Governing Body at its 325th Session [see 376th Report, paras 204–224].
100. The Government sent partial observations in communications dated 30 October 2015, 30 May and 25 October 2016.
101. 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

102. In its previous examination of the case, the Committee made the following recommendations [see 376th Report, para. 224]:
- (a) While regretting that it had to decide to apply a measure of special nature to obtain information from the Government on the present case, the Committee welcomes the constructive engagement of the Cambodian Government which provided a written communication and made an oral presentation. The Committee recalls the importance for all Governments of providing within a reasonable time frame complete replies concerning allegations made against them or in follow-up to the Committee’s recommendations.
 - (b) The Committee once again urges the Government to keep it duly informed of any development with regard to the investigation into the murder of Mr Chea Vichea and to ensure that the perpetrators and the instigators of this heinous crime are brought to justice.
 - (c) The Committee once again urges the Government to investigate into the allegations of torture and other ill-treatment by police, intimidation of witnesses and political interference with the judicial process during the prosecution of Mr Born Samnang and Mr Sok Sam Oeun and to keep it informed of the outcome and any measure of redress provided for their wrongful imprisonment.
 - (d) While recalling that it had previously deplored the fact that Mr Thach Saveth had been sentenced to prison in a trial characterized by the absence of full guarantees of due process and had urged the Government to ensure that he may exercise his right to a full appeal before an impartial and independent judicial authority, the Committee requests the Government to investigate and indicate whether Mr Thach Saveth was effectively given the opportunity to appeal against the Court ruling and, if so, whether he had exercised his right to appeal.
 - (e) With regard to the investigation into the murder of Mr Hy Vuthy, the Committee once again urges the Government to keep it duly informed of any progress made in this regard.
 - (f) While noting that Mr Chhouk Bandith handed himself over to police on 8 August 2015, the Committee urges the Government to indicate whether the latter had paid the

compensation awarded to the victims and is serving his jail term as ruled by the Svay Rieng Provincial Court.

- (g) The Committee strongly encourages the Government to take steps to investigate into the assault of trade unionists of the FTUWKC and of the Free Trade Union of the Suntex Garment Factory reported by the complainant in October 2006. The Committee also urges the Government to investigate into the current employment status of three activists of the FTUWGGF who were allegedly dismissed in 2006 following their convictions for acts undertaken in connection with a strike at the Genuine Garment Factory. The Committee trusts that the present engagement of the Cambodian Government to tackle all pending issues before the ILO will also materialize in concrete steps to resolve these long outstanding matters raised by the Committee since 2007.
- (h) The Committee urges the Government to ensure that the Special Inter-ministerial Committee keep the national employers' and workers' organizations, including the complainants in this case, informed on a regular basis of the progress of its investigations with a view to promoting social dialogue and putting an end to the climate of impunity that exists surrounding the acts of violence against trade unionists.
- (i) While welcoming recent steps taken to investigate the violent acts against trade unionists alleged in this case, some of which date back to 2005, the Committee emphasizes the importance of taking concrete and meaningful steps to fully uncover the underlying facts and circumstances, identify those responsible and punish the guilty parties, and expresses the firm expectation that a full report on the reopened investigations will be transmitted to it in the very near future and will have a significant impact on the impunity prevailing in the country with respect to the matters raised in this case.

B. The Government's reply

- 103.** In its communications dated 30 October 2015, 30 May and 25 October 2016, the Government confirmed the setting up of an Inter-Ministerial Commission for Special Investigation of all outstanding cases examined by the ILO. Under decision No. 73 SSR dated 15 September 2015, this Commission comprises: the Secretary of State of the Ministry of Interior (Chairman), the Secretary of State of the Ministry of Labour and Vocational Training (Vice-Chairman), the Secretary of State of the Ministry of Justice (Vice-Chairman), the Secretary of State of the Office of the Council of Ministers (member), the High Commissioner of the National Police (member), the Supreme Commander of the National Military Police (member), the Governor of Phnom Penh Municipal City (member), the Governor of Svay Rieng Province (member), the Commissioner of Phnom Penh Municipal Police Commissariat (member), the Royal Government Attorney and Member of Jurist Councils (member), a member of Jurist Councils (member), the Commissioner of Svay Rieng Provincial Police Commissariat (member), the Deputy Director of the Department of International Organizations of the Ministry of Foreign Affairs and International Cooperation (member), and the Chief of the Office of Legal and Consular Affairs of the Ministry of Foreign Affairs (member). The Government indicated that the Commission held its first meeting on 9 August 2016 and adopted measures with regard to its functioning. These include the use of electronic communication for reporting on progress made by each member of the Commission, regular meeting every three months to review progress made for each case. The next meeting of the Commission is scheduled for November 2016. Furthermore, the establishment of a tripartite working group attached to the Secretariat of the Commission is under process in order for the employers' and workers' organizations to provide information in relation to the investigation and to provide their feedback on the findings of the Commission.
- 104.** With regard to the investigation concerning the murder of Chea Vichea, Hy Vuthy and Ros Sovannareth, the Government indicates that the Commission is thoroughly working on the documentation of the cases.

- 105.** Concerning the incident in which three female workers were shot and injured at a protest outside a garment factory in Svay Rieng SEZ by the former governor of Bavet City, the Government confirms that Mr Chhouk Bandith, who handed himself over to police on 8 August 2015, is serving an 18-month jail term as ruled by the Svay Rieng Provincial Court.
- 106.** Finally, with regard to issues concerning the assault of trade unionists of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) and of the Free Trade Union of the Suntex Garment Factory reported by the ITUC in October 2006 (Lay Sophead, Pul Sophead, 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), as well as the current employment status of three activists of the Free Trade Union of Workers of the Genuine Garment Factory (FTUWGFF) (Lach Sambo, Yeom Khun and Sal Koem San) who were allegedly dismissed in 2006 following their convictions for acts undertaken in connection with a strike at the Genuine Garment Factory, the Government indicates that the Ministry of Labour and Vocational Training is processing a request for a site visit to investigate the case.
- 107.** The Government concludes by reiterating its commitment to solve the pending cases with fairness and to duly report back to the Committee on the result of the investigations.

The Committee's conclusions

- 108.** *The Committee recalls that it has considered this serious case on numerous occasions which relates, inter alia, to the murder of trade union leaders, Chea Vichea, Ros Sovannareth and Hy Vuthy, and to the climate of impunity that exists surrounding acts of violence directed towards trade unionists. The Committee appreciates the renewed engagement of the Government to provide regular updates on the handling of the present case.*
- 109.** *The Committee takes note of the information according to which the Inter-Ministerial Commission for Special Investigations held its first meeting on 9 August 2016 and adopted measures with regard to its functioning. These include the use of electronic communication for reporting on progress made by each member of the Commission, regular meeting every three months to review progress made for each case, as well as the establishment of a tripartite working group attached to the Secretariat of the Commission in order for the employers' and workers' organizations to provide information in relation to the investigation and to provide their feedback on the findings of the Commission.*
- 110.** *With regard to the murder of Chea Vichea, the Committee takes due note of the information provided by the Government to the effect that the Inter-Ministerial Commission for Special Investigations is still investigating the case. The Committee once again urges the Government to keep it duly informed of any development with regard to the investigation into the murder of Chea Vichea and to ensure that the perpetrators and the instigators of this heinous crime are brought to justice.*
- 111.** *Recalling that it had previously called for an independent and impartial investigation into the prosecution of Born Samnang and Sok Sam Oeun, including allegations of torture and other ill-treatment by police, intimidation of witnesses and political interference with the judicial process, the Committee expects that the Inter-Ministerial Commission for Special Investigations will also thoroughly review this matter and ensure an investigation into all the above mentioned allegations, and requests the Government to keep it informed of the outcome and any measure of redress provided for the wrongful imprisonment of Born Samnang and Sok Sam Oeun.*
- 112.** *Furthermore, recalling that it had previously deplored the fact that Mr Thach Saveth was arrested and sentenced for the premeditated murder of trade unionist Ros Sovannareth in a*

trial characterized by the absence of full guarantees of due process necessary to effectively combat impunity for violence against trade unionists, the Committee expects that the Inter-Ministerial Commission for Special Investigations will thoroughly review the circumstances surrounding his trial so as to ensure that justice has been carried out and that he has been able to exercise his right to a full appeal before an impartial and independent judicial authority, and requests the Government to keep it informed of developments in this regard.

- 113.** *With regard to the murder of Mr Hy Vuthy in February 2007, the Committee takes note of the statement from the Government that the Inter-Ministerial Commission for Special Investigations is still investigating the case and once again urges the Government to keep it duly informed of any progress made in this regard.*
- 114.** *In relation to the shooting of three workers engaged in a strike by former governor Mr Chhouk Bandith and the circumstances related to his subsequent trial, the Committee takes note of the Government's confirmation that Mr Chhouk Bandith, who handed himself over to police on 8 August 2015, is serving an 18-month jail term as ruled by the Svay Rieng Provincial Court. The Committee urges the Government to indicate whether Mr Chhouk Bandith had also paid the compensation awarded to the three victims as ruled by the court (38 million Riel (KHR) (US\$9,500)).*
- 115.** *Finally, concerning its previous recommendations requesting the Government's urgent investigation into the assault of trade unionists of the FTUWKC and of the Free Trade Union of the Suntex Garment Factory (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) alleged by the ITUC in 2007, as well as into the current employment status of three activists of the FTUWGGF (Lach Sambo, Yeom Khun and Sal Koem San) who were allegedly dismissed in 2006 following their convictions for acts undertaken in connection with a strike at the Genuine Garment Factory, the Committee notes the indication that the Government is processing a request for a site visit to investigate the matters. The Committee requests the Government to inform it of any development in this regard.*
- 116.** *As a concluding remark, while the Committee appreciates the renewed commitment of the Government and its efforts to solve the pending issues still under examination, it must however express its concern with continued delays and with the lack of concrete results in this case despite the time that has passed since its last examination. The Committee is bound to once again express the firm expectation that the Government will take swift action and will be able to report fully on the progress made by the Inter-Ministerial Commission concerning the reopened investigations into the murders of trade union leaders, as this shall have a significant impact on the impunity prevailing in the country and on the exercise of trade union rights of all workers. Lastly, the Committee once again draws the Governing Body's attention to the extremely serious and urgent nature of this case.*

The Committee's recommendations

- 117.** *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 keep it duly informed of any development with regard to the investigation into the murder of Chea Vichea and to ensure that the perpetrators and the instigators of this heinous crime are brought to justice.*

- (b) *The Committee expects that the Inter-Ministerial Commission for Special Investigations will thoroughly review the allegations of torture and other ill-treatment by police, intimidation of witnesses and political interference with the judicial process during the prosecution of Born Samnang and Sok Sam Oeun, and ensure an investigation into all the abovementioned allegations, and requests the Government to keep it informed of the outcome and any measure of redress provided for the wrongful imprisonment of Born Samnang and Sok Sam Oeun.*
- (c) *Recalling that it had previously deplored the fact that Mr Thach Saveth was arrested and sentenced for the premeditated murder of trade unionist Ros Sovannareth in a trial characterized by the absence of full guarantees of due process necessary to effectively combat impunity for violence against trade unionists, the Committee expects that the Inter-Ministerial Commission for Special Investigations will thoroughly review the circumstances surrounding his trial so as to ensure that justice has been carried out and that he has been able to exercise his right to a full appeal before an impartial and independent judicial authority and requests the Government to keep it informed of developments in this regard.*
- (d) *With regard to the murder of Mr Hy Vuthy, the Committee takes note of the statement that the Inter-Ministerial Commission for Special Investigations is still investigating the case and once again urges the Government to keep it duly informed of any progress made in this regard.*
- (e) *The Committee urges the Government to indicate whether Mr Chhouk Bandith, who is serving his jail term, has paid the compensation awarded to the three victims as ruled by the Svay Rieng Provincial Court.*
- (f) *The Committee request the Government to inform it of any development with regard to its investigation into the assault of trade unionists of the FTUWKC and of the Free Trade Union of the Suntex Garment Factory reported in 2006, as well as into the current employment status of three activists of the FTUWGGF who were allegedly dismissed in 2006 following their convictions for acts undertaken in connection with a strike at the Genuine Garment Factory.*
- (g) *While the Committee appreciates the renewed commitment of the Government and its efforts to solve the pending issues still under examination, it must however express its concern with continued delays and with the lack of concrete results in this case despite the time that has passed since its last examination. The Committee is bound to once again express the firm expectation that the Government will take swift action and will be able to report fully on the progress made by the Inter-Ministerial Commission concerning the reopened investigations into the murders of trade union leaders, as this shall have a significant impact on the impunity prevailing in the country and on the exercise of trade union rights of all workers.*
- (h) *The Committee once again draws the Governing Body's attention to the extremely serious and urgent nature of this case.*

CASE NO. 3121

INTERIM REPORT

**Complaint against the Government of Cambodia
presented by
the Cambodian Alliance of Trade Unions (CATU)**

Allegations: The complainant organization denounces the refusal to register a trade union at the Bowker Garment Factory (Cambodia) Co. Ltd.; acts of anti-union discrimination following a strike, including dismissals, forced transfers, suppression of benefits and false criminal charges; the use of military force on striking workers; and alleges that section 269 of the Labour Act imposes excessive requirements for the determination and election of union leadership

- 118.** The complaint is contained in a communication from the Cambodian Alliance of Trade Unions (CATU) dated 27 February 2015.
- 119.** The Government sent its partial observations in a communication dated 25 October 2016.
- 120.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 121.** In its communication dated 27 February 2015, the CATU denounces the refusal to register a trade union at the Bowker Garment Factory (Cambodia), Co. Ltd.; acts of anti-union discrimination following a strike, including dismissals, forced transfers, suppression of benefits and false criminal charges; the use of military force on striking workers; and alleges that section 269 of the Labour Act imposes excessive requirements for the determination and election of union leadership.
- 122.** In particular, the complainant indicates that in late 2013, in accordance with the Labour Act, 1997 and the Prakas No. 305, 2001, it began forming a trade union at the factory which employed around 2,000 workers and was a disclosed supplier of a brand. On 10 December 2013, a union election was held and on 12 and 16 December 2013, a notification for registration was communicated to the management of the factory (copies of notifications were provided by the complainant), informing them about the elected union leaders, but the notification was rejected on both occasions. An application for registration was then submitted on 23 January 2014 to the Ministry of Labour and Vocational Training (MLVT) but the complainant was informed by administrative officials from the Dispute Resolution Department that the process for registration of trade unions had been suspended, as the Ministry needed to prepare for new requirements and procedures.
- 123.** The complainant further states that on 26 December 2013, a nationwide strike broke out in the garment industry with more than 200,000 workers, including all workers from the factory, calling for an increase in the minimum wage to US\$160 per month. According to

the complainant, on 2 and 3 January 2014, the Government deployed the army on the striking workers in the capital's major garment districts, shooting and killing five workers, wounding more than 40 and arresting 23 union leaders and striking workers, thus breaking the strike throughout the country. The complainant adds that violence against striking workers is a widespread occurrence in Cambodia and provides statistical information from the Community Legal Education Center (CLEC), according to which at least 102 trade union leaders and members were subjected to violence or serious injury in the last two years.

124. The complainant further specifies that on 13 and 15 January 2014, four elected union leaders from the factory were informed by the administrative manager that they were terminated due to their role in the strike, although the right to strike is guaranteed under section 319 of the Labour Act, and were told to challenge the decision in court if they did not accept the termination of their employment. The dismissal concerned the following leaders:

- Mr Leok Sopheak, the elected President of the factory trade union, employed in the ironing department, was terminated on 15 January 2014; he had been employed under a three-month employment contract which expired on 30 December 2013 but the employer had not informed or required him to sign a new contract.
- Mr Dem Sokleang, the elected Vice-President of the factory trade union was terminated on 13 January 2014; he had been employed under a three-month employment contract which was due to expire on 28 February 2014.
- Mr Sam Kimsong, the elected Secretary of the factory trade union, employed in the ironing department, was terminated on 13 January 2014; he had been employed under a three-month employment contract which expired on 30 December 2013 but the employer had not informed or required him to sign a new contract.
- Mr Chhorn Chan, a prominent union activist of the factory trade union, employed in the packing department, was terminated on 15 January 2014; he had been employed under a three-month employment contract which was due to expire on 28 February 2014.

125. On this subject, the complainant further indicates that: (i) following their termination, all four workers received a summons from the police, based on a complaint lodged by the factory, to attend questioning at the Ang Snoul police station on 17 January 2014; (ii) the complaint by the factory was erroneous and the four workers were never charged but, as is common practice in the judicial system, the complaint had not been dropped despite the lack of evidence; (iii) through legal assistance from the CLEC, the complainant requested the brand to intervene and ask for the reinstatement of the union leadership on the basis of sections 3 and 4 of the Prakas No. 305 and sections 12 and 279 of the Labour Act; (iv) the brand conducted an investigation into the allegations, after which the complainant received a message from the factory stating that the human resources manager was trying to reach out to the four workers to reinstate them; however, the workers were not reinstated; (v) an unsuccessful conciliation took place between the union and the factory on 11 February 2014, following which the factory attempted to pay off the workers; (vi) after more than a month of negotiations, the four trade union leaders and activists were reinstated on 24 February 2014 in an extrajudicial process with no binding agreement made between the parties; (vii) although reinstated, the workers were given very little work and no possibility to work overtime, leaving them with severely insufficient wages, while such overtime was widely available to other workers; (viii) the workers were given new positions in a secluded warehouse where they no longer had access to their members and since they were offered new contracts, they were concerned about losing seniority, not receiving back pay for the period during which they had been terminated and about being laid off since they did not have much work; and (ix) although this continued for several months it was recently remedied. Furthermore, the complainant indicates that the practice of dismissing trade union

leaders and members following strikes and the practice of lodging erroneous criminal charges against them are widespread in Cambodia, as demonstrated by the statistical information from the CLEC: at least 1,554 trade union leaders and members were terminated illegally and at least 54 trade union leaders and members were arrested, summoned or criminally charged in the last two years.

126. As to the registration question, the complainant indicates that despite the reinstatement of the trade union representatives, the employer refused to recognize the factory union claiming that no notification of registration had been issued to the management and that even if that had been the case, the union leaders had criminal records based on their summons for questioning, making them ineligible for union membership as per section 269 of the Labour Act, which provides that: “the members responsible for the administration and management of a professional organization shall meet the following requirements: ... (3) not have been convicted of any crime”. The complainant specifies that even though the workers had not been convicted, the employer considered that the pending criminal case made the candidates ineligible for union election. After having contacted the MLVT on several occasions seeking further clarification on the union’s registration, the complainant was informed by Ministry officials in March 2014 that it needed to submit a comprehensive video clip of the election as well as individual photos of each and every member submitting their election ballot. In the complainant’s view there is no legal provision requiring to submit such documentation but it became widespread practice indicative of the Government’s intention to thwart independent union activity. The complainant indicates that the MLVT has not yet issued a certificate of registration.
127. With regard to registration, the complainant further alleges that section 3 of the Prakas No. 305, which requires that the employer be duly informed of the candidacy to a leadership position by any reliable means, is manipulated by the employer and condoned by the Government to the extent that notification amounts to authorization. It also indicates that section 269 of the Labour Act imposes excessive external controls over the unions’ ability to determine and elect its own leadership as it requires that anyone with a leadership or management position in a union cannot have been convicted of any criminal offence, regardless of the type or severity of the offence. According to the complainant, such a requirement is disconcerting particularly in light of the recent politically motivated conviction of 25 workers and human rights activists, demonstrating the Government’s control over the judicial system.
128. The complainant claims that the case illustrates the violation of Article 2 of Convention No. 87 and Articles 1(1) and 2(1) of Convention No. 98. and, therefore, urges the Committee to direct the Government to inquire into the matter of non-registration of the factory trade union and the wider consequences of the misapplication of the aforementioned policies, specifically to: put an end to onerous requirements of photo and video evidence of union elections being used as a barrier to union registration; ease trade union registration of all independent trade unions; put an end to the manipulation of the judiciary and anti-union practices, including false criminal charges; and respect the right to strike and put an end to violence against trade union leaders, members and striking workers.

B. The Government’s reply

129. The Government’s states that Cambodia fully recognizes the right to freedom of association which is highly guaranteed, protected and promoted. In particular, the Government indicates that: (i) under section 266 of the Labour Act workers and employers have, without distinction whatsoever and prior authorization, the right to form professional organizations of their own choice; (ii) in order for a professional organization to enjoy the rights and benefits recognized by the Act, its founders must file their statutes and a list of persons responsible for the management and administration to the MLVT for registration, in line with section 268

of the Labour Act; (iii) in line with section 268(2) of the Labour Act, a trade union is automatically registered two months after the completion of the application, whereas section 12 of the new Act on Trade Unions provides that if an application is complete it will be automatically registered within 30 days of the date of application; and (iv) while according to section 269 of the Labour Act and Prakas No. 021 KKBV/BrK on the Registration of professional organizations, members in charge of administration and management must not have been convicted of any crime, section 10 of the new Act on Trade Unions no longer requires the criminal record of union leaders for registration.

- 130.** The Government strongly objects to the allegation that it refused to register the factory trade union in question, stating that its registration was not rejected but simply delayed due to an incomplete application, which does not mean that the Ministry restricted registration or created any obstacles for the exercise of the freedom of association. The Government further states that it has never had any policy to stop or postpone registration of new trade unions and registered 224 trade unions at the enterprise level, 11 federations, two confederations and one employers' association in 2015. As of September 2016, the Ministry had registered 3,497 trade unions at the enterprise level, 103 confederations, 18 federations and 8 employers' associations. According to the Government, the number of registered trade unions will further increase under the newly adopted Act on Trade Unions, as the law provides better conditions for establishment and registration.

The Committee's conclusions

- 131.** *The Committee notes that in the present case the complainant denounces the refusal to register a trade union at the Bowker Garment Factory (Cambodia) Co. Ltd.; acts of anti-union discrimination following a strike, including dismissals, forced transfers, suppression of benefits and false criminal charges; the use of military force on striking workers; and excessive requirements for the determination and election of union leadership in section 269 of the Labour Act.*
- 132.** *With regard to the alleged refusal to register a trade union at the factory level, the Committee notes the complainant's indication that even though it formed a union and held a union election at the factory on 10 December 2013, two notifications for registration communicated to the management and informing them about the elected union leaders in line with section 3 of the Prakas No. 305 were rejected. The Committee also notes the complainant's assertion that even after the trade union leaders had been reinstated following their dismissal for leading a strike, the factory management refused to recognize the union claiming that no notification of registration had been issued to the factory and that even if that had been the case, the union leaders had criminal records based on their summons for questioning by the police and a pending criminal case and that, therefore, they were ineligible for union membership as per section 269 of the Labour Act. According to the complainant, section 3 of the Prakas No. 305, which requires that the employer be duly informed of the candidacy to a leadership position by any reliable means, is thus manipulated by the employer and condoned by the Government to the extent that notification amounts to authorization. Furthermore, the Committee notes the complainant's indication that an application for registration was submitted to the Ministry of Labour and Vocational Training but that administrative officials from the Dispute Resolution Department informed the complainant that the process for registration of trade unions had been suspended as the Ministry needed to prepare for new requirements and procedures. The Committee notes the complainant's statement that after having sought further clarification at the Ministry concerning the delay in registration, in March 2014, Ministry officials explained that the complainant needed to submit a comprehensive video clip of the election as well as individual photos of each member submitting the election ballot. The complainant considers that the Ministry's request is indicative of the Government's intention to thwart independent*

union activity as there is no legal provision requiring submission of such documentation and the MLVT has not yet issued a certificate of registration.

133. *In this regard, the Committee notes the Government's strong objection to the allegation that it had refused to register the factory trade union in question and its indication that the registration was not rejected but delayed due to an incomplete application, which does not mean that the Government created obstacles to registration and freedom of association. The Committee also notes the Government's indication that it has never had a policy to obstruct or postpone trade union registration and had in fact registered a large number of trade unions at different levels in 2015, a number which should further increase with the adoption of the new Act on Trade Unions which provides better conditions for establishment and registration. The Committee also notes that the Government states that section 10 of the new Act on Trade Unions no longer requires the criminal record of union leaders for registration.*
134. *In light of the information provided by the complainant and the Government, the Committee notes with concern that although more than two years have passed since the creation of the trade union and the election of its leaders, the trade union has not yet been registered and has encountered significant hurdles from both the employer and the MLVT in this regard. The Committee observes on the basis of the information provided by the complainant that in order to enable registration of the trade union, two notifications about the election of trade union leaders had been sent to the employer in line with section 3 of the Prakas No. 305 but both were rejected by the management. Recalling that section 3 of the Prakas No. 305 provides that: "Any workers belonging to a union who run for a leadership position in that union shall enjoy the same protection from dismissal as a shop steward. This protection begins 45 days prior to the election and ending, if she/he is not elected, 45 days after the election. To this end, the employer must be duly informed of the candidacy by any reliable means. However, the employer shall only be required to comply with this provision once per each election of union leaders", the Committee observes that the notification required by section 3 of the Prakas No. 305 is aimed at ensuring effective protection of candidates for trade union office rather than an authorization by the employer and regrets that the Government did not take the necessary protective action in this regard. The Committee urges the Government to take all necessary measures to ensure in the future that the notification requirement does not amount to a requirement for authorization by the employer to create a trade union or is not otherwise misused to halt trade union formation or restrict workers' rights to elect their officers freely.*
135. *The Committee also notes, as indicated by the complainant, that the factory management subsequently claimed that the trade union leaders had criminal records based on a pending criminal case as well as their summons for questioning by the police – occurring after their notification of the trade union election – which would prevent them from being eligible as union representatives under section 269 of the Labour Act. On this point, the Committee understands that despite the summons for questioning the concerned workers were never charged and there is, therefore, no pending criminal case against them; and moreover, the workers have not been criminally convicted. Furthermore, the Committee wishes to emphasize that conviction on account of offences the nature of which is not such as to call into question the integrity of the person concerned and is not such as to be prejudicial to the exercise of trade union functions should not constitute grounds for disqualification from holding trade union office, and any legislation providing for disqualification on the basis of any offence is incompatible with the principles of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 422]. In this regard, and further bearing in mind the complainant's concern that section 269 of the Labour Act imposes excessive external controls over the unions' ability to determine and elect their own leadership as it prohibits anyone convicted of any criminal offence, regardless of the type or severity of the offence, from holding a leadership or management position in a union (a requirement that the complainant notes is particularly*

disconcerting in view of the recent allegedly politically motivated conviction of 25 workers and human rights activists), the Committee observes that the Committee of Experts on the Application of Conventions and Recommendations has repeatedly requested the Government to amend this provision so as to narrow its scope to convictions which would be prejudicial to the aptitude and integrity required for trade union office. While noting the Government's indication that the criminal record is no longer a required document for trade union registration in the new Act on Trade Unions adopted on 4 April 2016, the Committee observes with concern that section 20 of the new Act provides that "leaders, managers and those responsible for the administration of unions at the enterprise or establishment shall meet the following requirements: [... m]ake their own declaration that they have never been convicted of any criminal offence". The Committee urges the Government, in consultation with all social partners concerned, to review these provisions and take all necessary steps to ensure that the law does not infringe the above principle, and to report back on any measures taken in this regard.

- 136.** *Observing on the basis of the information provided by the Government that the new Act on Trade Unions and the Labour Act have different approaches to certain issues regarding freedom of association, the Committee requests the Government to provide information in this respect, including on the relationship between these laws, to the Committee of Experts on the Application of Conventions and Recommendations, to which it refers the legislative aspects of this case.*
- 137.** *The Committee further notes that while it can be observed from the documentation provided by the complainant that the MLVT had suspended the issuance of registration certificates at the time pending the adoption of the new Act on Trade Unions stating that it had to prepare for new requirements and procedures, which resulted in considerable delays in registration, the Government indicates that there was no policy to obstruct trade union registration as demonstrated by the high numbers of registered unions in 2015 and adds that the registration of the factory trade union in question was delayed due to its incomplete application, without, however, indicating what registration requirements were not satisfied. The Committee also observes that in March 2014, the Ministry requested the union to provide additional documentation in order to be registered, including video footage of the election and photos of each worker submitting the election ballot, which are not prescribed by the applicable legal provisions and regrets that the Government does not address this allegation. In these circumstances, the Committee wishes to recall that the right to official recognition through legal registration is an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately. The formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations. Any delay caused by authorities in registering a trade union constitute an infringement of Article 2 of Convention No. 87 [see **Digest**, op. cit., paras 279 and 295]. In light of these principles, the Committee is of the view that the requirement to provide video footage and photos of each worker participating in the election is an infringement on trade union rights and that this requirement together with the delay in registration hindered the free establishment of the factory union. Therefore, the Committee requests the Government to take the necessary measures to ensure the swift registration of the factory trade union in line with the mentioned principles and to keep it informed of any developments in this regard. The Committee trusts that the Government will avoid creating additional administrative obstacles to registration and will ensure that legislative reform or the issuance of implementing regulations does not have the effect of suspending or considerably delaying registration of trade unions in the future.*
- 138.** *With regard to the alleged use of military force on striking workers, the Committee notes the complainant's allegation that on 26 December 2013, a nationwide strike broke out in the garment industry with more than 200,000 workers, including all workers from the factory,*

calling for an increase in the minimum wage and that on 2 and 3 January 2014, the Government deployed the army on the striking workers in the capital's major garment districts, as a result of which five workers were shot and killed, more than 40 wounded and 23 arrested, and the strike was disrupted throughout the country. The Committee also notes the complainant's indication that violence against striking workers is a widespread occurrence and that, according to the statistical information provided by the CLEC, at least 102 trade union leaders or members were subjected to violence or serious injury in the past two years. The Committee further observes that the allegations of violence against the striking workers in January 2014 have been examined by both the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards. In particular, in its latest observation, the Committee of Experts noted the Government's indication that the strike action had turned violent and that the security forces had had to intervene in order to protect private and public properties, and to restore peace. It also took note of the fact that the Government had established three committees following the incidents: the damages evaluation committee, the Veng Sreng road violence fact-finding committee and the minimum wages for workers in apparel and footwear sector study committee. Recalling the conclusions from the 2016 Committee on the Application of Standards calling upon the Government to ensure that freedom of association can be exercised in a climate free of intimidation and without violence against workers, trade unions or employers, the Committee expresses its concern at the acts of violence on both sides and regrets that the Government did not take preventive measures to promote a resolution to the dispute through dialogue and collective bargaining before it could become violent. In this regard, the Committee recalls that the intervention of the army in relation to labour disputes is not conducive to the climate free from violence, pressure or threats that is essential to the exercise of freedom of association [see **Digest**, op. cit., para. 641]. The Committee further wishes to emphasize that while the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike [see **Digest**, op. cit., para. 667], the authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order [see **Digest**, op. cit., para. 647]. The Committee urges the Government to inform it without delay of any outcome of the investigations into the allegations of killings, physical injury and arrest of striking workers and of any measures taken as a result, particularly with regard to the three mentioned committees. The Committee requests the Government to promote in the future social dialogue and collective bargaining as preventive measures aimed at restoring confidence and peaceful industrial relations and trusts that the Government will ensure that the use of police and military force during strikes is strictly limited to situations where law and order are seriously threatened, in line with the mentioned principles.

139. Regarding the allegations of anti-union practices, the Committee notes the complainants' indication that on 13 and 15 January 2014, the administrative manager at the factory informed four elected union leaders from the factory that they were terminated due to their role in the strike of 26 December 2013, although the right to strike is guaranteed under section 319 of the Labour Act, and told the concerned workers to challenge the decision in court if they did not accept the termination of their employment. These dismissals concerned the following four trade union leaders who were all apparently employed on renewable three-month contracts: Mr Leok Sopheak, Mr Dem Sokleang, Mr Sam Kimsong and Mr Chhorn Chan. The Committee further notes the allegations that these four leaders suffered a series of measures of harassment and intimidation including a summons from the police based on an erroneous complaint lodged by the factory and, despite their reinstatement following an intervention from a brand which was sourcing from the factory, the workers were given very little work and no possibility to work overtime, leaving them

with severely insufficient wages and were given new positions in a secluded warehouse where they no longer had access to their members. The complainants specify that, in these circumstances, they were concerned about losing seniority, not receiving back pay for the period during which they had been terminated and about being laid off since they did not have much work. The Committee further notes that while these precarious circumstances continued for several months, they are apparently now resolved. The complainant further alleges that the practice of dismissing trade union leaders and members following strikes and the practice of lodging erroneous criminal charges against them are widespread in Cambodia as demonstrated by the statistical information from the CLEC: in the last two years, at least 1,554 trade union leaders and members were terminated illegally and at least 54 trade union leaders and members were arrested, summoned or criminally charged.

140. *While welcoming the reinstatement of the union leaders and activists, as well as the rectification of their unfavourable circumstances for several months following their reinstatement, the Committee nevertheless considers that the situation described by the complainant raises serious concerns as to the climate for forming trade unions and freely exercising trade union activity. In this regard, the Committee recalls that when trade unionists or union leaders are dismissed for having exercised in a legitimate manner the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against. In a case in which a trade union leader was dismissed and then reinstated a few days later, the Committee pointed out that the dismissal of trade union leaders by reason of union membership or activities is contrary to Article 1 of Convention No. 98, and could amount to intimidation aimed at preventing the free exercise of their trade union functions [see **Digest**, op. cit., para. 810]. Concerning the summons for questioning, the Committee wishes to emphasize 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]. With regard to allegations of anti-union practices following reinstatement, the Committee points out that protection against acts of anti-union discrimination should cover not only hiring and dismissals, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker [see **Digest**, op. cit., para. 781]. 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 and impartial. In light of the circumstances of the case, as well as the alarming statistical information provided by the complainant, the Committee requests the Government to take the necessary measures to ensure that trade union members and leaders are not subjected to anti-union discrimination, including dismissal, transfers and other acts prejudicial to the workers, or to false criminal charges based on their trade union membership or activities, and that any complaints of anti-union discrimination are examined by prompt and impartial procedures.*

141. *The Committee regrets that it had to examine this case without being able to take account of the observations of the enterprise concerned and requests the Government to obtain information from the enterprise on the questions under examination through the relevant employers' organization. Finally, the Committee draws the Governing Body's attention to the serious and urgent nature of this case.*

The Committee's recommendations

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

- (a) The Committee requests the Government to take the necessary measures to ensure the swift registration of the factory trade union in line with the*

mentioned principles and to keep it informed of any developments in this regard. The Committee trusts that the Government will avoid creating additional administrative obstacles to registration and will ensure that legislative reform or the issuance of implementing regulations does not have the effect of suspending or considerably delaying registration of trade unions in the future.

- (b) The Committee urges the Government, in consultation with all social partners concerned, to review section 269 of the Labour Act and section 20 of the new Act on Trade Unions and take all necessary steps to ensure that the law does not infringe workers' right to elect their officers freely, and to report back on any measures taken in this regard. The Committee urges the Government to take all necessary measures to ensure in the future that the notification requirement in section 3 of the Prakas No. 305 does not amount to a requirement for authorization by the employer to create a trade union or is not otherwise misused to halt trade union formation.*
- (c) Observing on the basis of the information provided by the Government that the new Act on Trade Unions and the Labour Act have different approaches to certain issues regarding freedom of association, the Committee requests the Government to provide information in this respect, including on the relationship between these laws, to the Committee of Experts on the Application of Conventions and Recommendations, to which it refers the legislative aspects of this case.*
- (d) The Committee urges the Government to inform it without delay of any outcome of the investigations into the allegations of killings, physical injury and arrest of striking workers and of any measures taken as a result, particularly with regard to the three mentioned committees. The Committee requests the Government to promote in the future social dialogue and collective bargaining as preventive measures aimed at restoring confidence and peaceful industrial relations and trusts that the Government will ensure that the use of police and military force during strikes is strictly limited to situations where law and order are seriously threatened.*
- (e) In light of the circumstances of the case, as well as the alarming statistical information provided by the complainant, the Committee requests the Government to take the necessary measures to ensure that trade union members and leaders are not subjected to anti-union discrimination, including dismissal, transfers and other acts prejudicial to the workers, or to false criminal charges based on their trade union membership or activities, and that any complaints of anti-union discrimination are examined by prompt and impartial procedures.*
- (f) The Committee regrets that it had to examine this case without being able to take account of the observations of the enterprise concerned and requests the Government to obtain information from the enterprise on the questions under examination through the relevant employers' organization.*
- (g) The Committee draws the Governing Body's attention to the serious and urgent nature of this case.*

CASE NO. 3134

DEFINITIVE REPORT

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

- **the National Union of Land Transport Sector Employees (SYNESTER) and**
- **the National Union of Professional Drivers and Public Transport Workers (SYNACPROTCAM)**

Allegations: The complainants allege the intimidation, arrest and detention of trade union leaders by the authorities

- 143.** The complaint is contained in a communication dated 1 June 2015 from the National Union of Land Transport Sector Employees (SYNESTER) and the National Union of Professional Drivers and Public Transport Workers (SYNACPROTCAM).
- 144.** The Government sent partial observations in communications dated 14 August and 8 September 2015.
- 145.** Cameroon has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainants' allegations

- 146.** In communications dated 1 June 2015 and 16 March 2016, SYNESTER and SYNACPROTCAM allege that, after jointly calling a nationwide strike for 5 January 2015, the national President of SYNESTER (Mr Jean Collins Ndefossokeng) and the national President of SYNACPROTCAM (Mr Joseph Deudie) were arrested and detained and the Operations Officer of SYNESTER (Mr Patrice Fioko) was sentenced to six months of pre-trial detention.
- 147.** The strike was called in response to the decision of a tripartite committee comprising representatives of the Ministry of Finance, the Association of Cameroonian Insurance Companies (ASAC) and public transport trade unions, which met on 11 November 2014 (without the participation of SYNESTER and SYNACPROTCAM), to increase the period covered by the insurance premium from two months to three months as from 1 January 2015. The objections raised by SYNESTER and SYNACPROTCAM in the media and the call for a strike led the Government to engage in dialogue with the two trade union federations. According to the two complainants, as a result of the government authorities' assurance that they would attempt to reason with the insurance companies, the two trade union federations suspended their original call to strike.
- 148.** However, on 1 January 2015, the insurers decided to implement the decisions of the tripartite committee. SYNACPROTCAM and SYNESTER then called a nationwide strike by their members as from Monday, 19 January 2015. The complainants maintain that, in response, the Government decided to imprison the leaders of the two trade union federations. On 15 January 2015, the Operations Officer of SYNESTER, Mr Patrice Fioko, was arrested while distributing leaflets in the city of Bafoussam. On 16 January 2015, after the Presidents of SYNESTER (Mr Jean Collins Ndefossokeng) and SYNACPROTCAM (Mr Joseph Deudie) had renewed their call to strike during a radio broadcast, they were arrested and held

in administrative detention for 15 days by the police Mobile Intervention Unit (GMI) on accusations of advocacy of a crime, sedition and terrorist activities.

149. Upon his release, the President of SYNESTER immediately went to Bafoussam, where the Operations Officer of SYNESTER was serving six months of pre-trial detention for sedition. When the President of SYNESTER arrived, he spoke with various authorities and explained that Mr Patrice Fioko had simply been carrying out trade union activities. The investigating judge was receptive to these explanations and gave his authorization for the pre-trial detention order to be lifted on 20 February 2015. Mr Patrice Fioko was released on 27 February 2015.
150. Lastly, the complainants report that, during their detention, the leaders of SYNESTER and SYNACPROTCAM were interrogated in connection with acts of terrorism under the new Act on the Suppression of Terrorism. They recall that article 2, paragraph 2, of the Act establishes that “the death penalty shall be imposed on anyone who, acting alone or as an accomplice or accessory, commits or threatens to commit any act that may cause death, endanger physical safety, result in bodily injury or property damage or harm natural resources, the environment or the cultural heritage with the intention of: (a) intimidating the public, causing a situation of terror or forcing a victim, the Government and/or a national or international organization to carry out or refrain from carrying out a given act, adopt or renounce a particular position or act according to certain principles; (b) disrupting the normal operation of public services or the delivery of essential public services, or creating a public crisis; or (c) creating widespread insurrection in the country. The complainants consider that implementation of the Act on the Suppression of Terrorism makes it impossible to carry out any trade union activities in accordance with the principles enshrined in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

B. The Government’s reply

151. In a communication dated 8 September 2015, the Government provided the following partial explanations regarding the alleged events.
152. The increase in the period covered by the insurance premium was decided by the insurance companies. Prior to this increase, a tripartite committee comprising representatives of workers, insurance companies and the Government was established in the Ministry of Finance with the Government represented by the Ministry. SYNESTER and SYNACPROTCAM requested to participate in the committee’s work, which was not possible. When the work was completed, the committee published the conclusions of its meetings, the most important of which was an increase in the period covered by the insurance premium that was immediately challenged by the complainants. When it learned of this situation, the Government, through the Ministry of Labour and Social Security, met with the leaders and members of the trade union federations. The Director of Industrial Relations, on behalf of the Minister of Labour, invited the various trade unions to reach agreement through a formal consensus, which, owing to differences in the parties’ interests, they had been unable to do in the past. The Government indicates that the payment of insurance premiums is the responsibility of employers and does not fall within the scope of workers’ trade union activities.
153. With regard to the arrest of the Presidents of the two trade union federations and of the Operations Officer of SYNESTER, the Government indicates that the federations decided to demonstrate without completing all the procedures required for a strike. It also reports that, after a radio broadcast during which the two trade union leaders made statements that bordered on terrorism, the Governor of the Central Region ordered them to be arrested and detained for a period of 15 days, renewable once, in accordance with the legislation in force.

After the first 15 days of detention, the Government sought and obtained their release by the competent administrative authority.

- 154.** The Government concludes that freedom of association is enjoyed in Cameroon, as seen from the number of employers' and workers' organizations that operate freely in the country without interference from the authorities, and that collective bargaining is a constant and ongoing practice in Cameroon.

The Committee's conclusions

- 155.** *The Committee notes that this case concerns allegations of the arrest and detention of leaders of the National Union of Land Transport Employees SYNESTER and the National Union of Professional Drivers and Public Transport Workers SYNACPROTCAM in retaliation for calling a national strike in January 2015.*
- 156.** *The Committee observes from the information supplied that in November 2014, the Government established a tripartite committee on the public transport sector, in which the two complainants were unable to participate, at the conclusion of which it was decided, among other things, to increase the period covered by the insurance premium from two months to three months as from January 2015. In light of the objections raised by SYNESTER and SYNACPROTCAM, the Government held meetings with these trade unions but, according to the Government, no progress was made owing to differences in the parties' interests. In January 2015, the insurance companies' implementation of the planned increase prompted SYNESTER and SYNACPROTCAM to call a nationwide strike for 19 January 2015.*
- 157.** *The Committee notes the complainants' allegations that on 15 January 2015, the Operations Officer of SYNESTER was arrested in the city of Bafoussam while distributing leaflets on the forthcoming strike and was immediately placed in pre-trial detention, initially for a period of six months, for sedition. On 16 January 2015, the Presidents of SYNESTER and SYNACPROTCAM were arrested after a radio broadcast in which they reiterated their call for a general strike. They were detained at the police Mobile Intervention Unit for 15 days on accusations of advocacy of a crime, sedition and terrorist activities. The Government indicates, with regard to their arrest, that their statements during the radio broadcast led the Governor of the Central Region to order their arrest and detention, in accordance with the law, on accusations of advocacy of a crime, sedition and terrorist activities. Recalling, without further elaboration, that the two trade union federations did not follow the legal procedures required for a strike, the Government indicates that it sought and obtained the release of the two Presidents at the end of the 15-day period of administrative detention.*
- 158.** *The Committee further notes that the Operations Officer of SYNESTER was released on 27 February 2015, when the pre-trial detention order was lifted following intervention by SYNESTER, which confirmed that at the time of his arrest, Mr Patrice Fioko had been carrying out trade union activities.*
- 159.** *The Committee regrets that the Government did not provide more specific information concerning the nature of the statements made by the Presidents of SYNESTER and SYNACPROTCAM during the radio broadcast on 16 January 2015 and expresses its deep concern that these statements led to their arrest and detention for 15 days on accusations of advocacy of a crime, sedition and terrorist activities on the order of the Governor of the Central Region and not pursuant to a judicial proceeding. In this regard, the Committee would like to recall that the full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, trade*

union organizations should respect the limits of propriety and refrain from the use of insulting language [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 154].

- 160.** *The Committee notes, however, that as a direct result of the aforementioned arrests, the strike that the two trade union federations had called for 19 January 2015 could not be held. The Committee would like to recall that the right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests and that the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations [see **Digest**, op. cit., paras 522 and 547]. Regarding the arrest and detention of the trade unionists, the Committee once again emphasizes the following principles: (i) the arrest, even if only briefly, of trade union leaders and trade unionists, and of the leaders of employers' organizations, for exercising legitimate activities in relation with their right of association constitutes a violation of the principles of freedom of association; (ii) the arrest of trade unionists and leaders of employers' organizations may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities; and (iii) while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists [see **Digest**, op. cit., paras 62, 67 and 72]. The Committee expects the Government to ensure full respect for these principles.*
- 161.** *The Committee notes with concern that, according to the complainants, the arrests made in this case pursuant to the Act on the Suppression of Terrorism (Act No. 2014/028 of 23 December 2014) are examples of the current situation of trade unions in Cameroon, where it has become impossible to carry out trade union activities in accordance with Convention No. 87. The Committee urges the Government to ensure not only that implementation of the Act does not lead to retaliation against trade union leaders and members who express their views within their mandates and carry out legitimate trade union activities in accordance with the principles of freedom of association, but also that it is not perceived as a threat to or intimidation of trade unionists or the trade union movement as a whole. In addition, the Committee refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations with respect to the conformity of the Act on the Suppression of Terrorism with the principles of freedom of association.*

The Committee's recommendations

- 162.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee expects the Government to ensure full respect for the principles of freedom of association recalled by the Committee with respect to the right to strike, freedom of expression and the arrest and detention of trade unionists.*
 - (b) The Committee urges the Government to ensure not only that implementation of the Act does not lead to retaliation against trade union leaders and members who express their views within their mandates and carry out legitimate trade union activities in accordance with the principles of freedom of association, but also that it is not perceived as a threat to or intimidation of trade unionists or the trade union movement as a whole.*

- (c) *The Committee refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations with respect to the conformity of the Act on the Suppression of Terrorism with the principles of freedom of association.*

CASE NO. 3108

DEFINITIVE REPORT

Complaint against the Government of Chile

presented by

the National Federation of the Public Prosecutor's Office of Chile (FENAMIP)

supported by

the National Association of Prosecutor Employees (ANEF)

Allegations: The complainant alleges anti-union practices, including the dismissal of an official, obstacles to visits by officials to members, anti-union interpretation of the rules on union leave, constraints on the representation of members in cases brought and interference in freedom of union membership, as well as the absence of negotiating procedures and impartial mechanisms for hearing labour disputes, including anti-union discrimination

- 163.** The complaint is contained in the communications received on 18 December 2014 and 9 March 2015 from the National Federation of the Public Prosecutor's Office of Chile (FENAMIP), supported by the National Association of Prosecutor Employees (ANEF).
- 164.** The Government sent its observations in a communication dated 10 December 2015.
- 165.** Chile 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. Allegations by the complainant

- 166.** In its communications of 18 December 2014 and 9 March 2015, FENAMIP alleges anti-union practices including the dismissal of an official, obstacles to visits by officials to members, anti-union interpretation of the rules on union leave, constraints on the representation of members in cases brought and interference in freedom of union membership, as well as the absence of negotiating procedures and impartial mechanisms for hearing labour disputes, including anti-union discrimination.
- 167.** The complainant alleges obstacles to the work of trade union officials on the part of the Public Prosecutor's Office, through constraints on their visits to members, as well as undue restrictions on the capacity to organize meetings and assemblies during the working day. The complainant alleges that: (i) on 19 March 2013, the Administrator of the San Bernardo Local Prosecutor's Office informed two officials who were hoping to visit their members

that the meetings could only take place on Tuesdays and Thursdays, and that information should be provided on the subjects that would be raised at the meetings; and (ii) in response to the formal complaint raised by the complainant against this action by the authority in Instruction FR (4) No. 175-2013, the Regional Prosecutor of the Western Metropolitan Regional Prosecutor's Office stated that as per article 37 of Law 19.296 on associations of state administration officials, prior agreement is required with the employing institution to hold assemblies and meetings during working hours. The Instruction requires a formal request to the Regional Executive Director, with at least one week's notice of the date of the meeting or assembly. The complainant considers the interpretation of the rule to be incorrect, given that the rule refers to assemblies and not to simple meetings to discuss matters of union concern, nor to simple visits and conversations between officials and members in workplaces. In FENAMIP's opinion, the Instruction is authoritarian in nature and does not leave the door open to negotiation nor to the most minimal agreement, besides establishing an unreasonable timeframe that does not allow urgent meetings to be held and seeks to control union activity. Similarly, it considers that placing an obligation to request authorization from the authority whenever an official wishes to meet a member constitutes an abnormal breach of freedom of association.

- 168.** The complainant alleges anti-union actions by the authorities of the Public Prosecutor's Office in June 2014 in response to the submission of an appeal for protection by FENAMIP against a general instruction by the Prosecutor-Attorney of the Talagante Local Prosecutor's Office (according to the complainant, the instruction placed a block on extended vacation or leave and cancelled that which had already been granted). The complainant alleges that: (i) even though the appeal had not been officially received, it was communicated to the Prosecutor concerned through informal channels; (ii) the Prosecutor summoned the officials to a meeting on 13 June 2014 to express his discontent and disappointment with the lodging of the appeal; (iii) from his head office email address, the Prosecutor sent a copy of the appeal to officials and prosecutors with the intention of making clear his unhappiness and the seriousness of the pressure he was placing on the members; (iv) the replacement Administrator of the Public Prosecutor's Office, Ms Carmen Gloria Ríos, urged and encouraged workers to sign a letter rejecting the appeal; and (v) as a result, in order to denounce these facts the complainant lodged an appeal before the San Miguel Court of Appeal.
- 169.** The complainant alleges constraints placed by the authorities on the capacity to represent its members in complaints, in particular through the requirement to produce a signed authorization and, consequently, the non-recognition of the representation exercised by officials' associations. The complainant denounces the fact that, in response to the harassment at work experienced by the official, Ms Lugarda Andrade, the authorities called into question the complainant's capacity to bring an action in court for labour protection. The complainant alleges that in response to its request to reinstate the official dismissed, the Public Prosecutor stated that the complainant lacked the necessary representation. Likewise, the complainant mentions that in February 2015 at the Libertado Bernardo O'Higgins Regional Prosecutor's Office, in relation to a complaint concerning irregularities on the part of a female official, the Regional Prosecutor made his assistance dependent on whether the official was in contact with the union leaders of her officials' association; and that in the same month at the Los Vilos Local Prosecutor's Office an officials' association was refused the possibility to represent a member official who was the victim of harassment at work, and a request was made for signed authorization to be produced for these purposes.
- 170.** The complainant denounces the anti-union dismissal of the union leader, Mr Mario Gutiérrez Ollarzú. The complainant alleges that Mr Gutiérrez Ollarzú led its actions to demonstrate the rejection of the project to strengthen the Public Prosecutor's Office, whereby he had to carry out acts and issue statements that were not to the liking of the Public Prosecutor, generating tensions between the two parties. At that time, Mr Gutiérrez Ollarzú was involved

in a criminal case, as a result of which he was tried and obliged to fulfil a series of conditions, aimed at finding an alternative solution to the criminal proceedings (so-called “conditional suspension of proceedings”, through which, if the indicted person satisfies the conditions within a period specified in the respective decision, the criminal proceedings are definitively dismissed). The complainant alleges that the Public Prosecutor took advantage of this situation to terminate Mr Gutiérrez Ollarzú’s employment, invoking sudden incapacity, in accordance with the provisions of articles 60 and 65 of the Basic Law on the Public Prosecutor’s Office, in relation to article 265 of the Basic Courts Code and article 35 of the Staff Regulations for Officials of the Public Prosecutor’s Office. The complainant alleges that sudden incapacity does not exist in legislation, that the reason did not apply to the official, since he was a staff member, and that it only appeared to have been applied once in the history of the Public Prosecutor’s Office, despite the fact that other similar cases had existed. FENAMIP alleges that only on this occasion was the decision taken to terminate the employment, when the situation concerned a union official who led a movement of great relevance and with the aim of weakening that movement. Similarly, the complainant alleges that the rules stipulated by the law regarding trade union immunity were not observed.

171. The complainant denounces the anti-union interpretation of the rules and instructions applicable to the hours of union leave. FENAMIP indicates that in 2009 the Public Prosecutor had stated in Instruction No. 369/2009 that the respective head offices were obliged to grant to the directors of associations the leave necessary to absent themselves from their work to carry out their functions, which could not be less than 22 hours per week for national associations or 11 hours per week for regional associations. The complainant alleges that, in contrast with this provision, through Instruction No. 152/2014 the new National Executive Director requested union officials to provide advance information on the use of their leave time for the purposes of coordinating the sound operation of the institution and the due registration of the union hours established by the law. The complainant considers that the law had been interpreted correctly by the Public Prosecutor’s Office, whereby the hours cannot be less than the values described (in other words, the law establishes minimum values with no limit); and that the National Executive Director made a fresh interpretation which considers these to be maximum values – illegally contradicting the Public Prosecutor and with the aim of hindering the work of the workers’ representatives. The complainant considers that the instruction issued by the Public Prosecutor recognizes that leave is a right of union officials of which they may avail themselves in the manner and conditions they deem relevant, provided they simply inform the authority of the use in question, whereby such information should be coordinated with the officials and not imposed in line with specific interpretations as claimed by the National Executive Director.
172. The complainant denounces institutional interventions designed to generate disputes between workers’ organizations and not to recognize the right of regional associations to make officials from other regions members. The complainant alleges that, pursuant to a request submitted by another union association of the Public Prosecutor’s Office (which considered it inappropriate for a regional association to be able to make officials from other regions members), the Public Prosecutor’s Office requested the Labour Department to state whether activities carried out by directors of regional officials’ associations, in jurisdictions of regions separate from those in which they were set up, should be considered to be union activities, and also whether it was appropriate to make membership deductions from the remuneration of officials who have decided to join an association with its headquarters in a region other than that in which the official provides his or her services. The complainant states that subject to the principle of self-regulation, the charters of its member associations allow officials from other regions to become members, and recalls that when these charters were submitted to the corresponding labour inspectorate, that body did not make any observations on them. It considers that as a result, and since it is not prohibited by law, the membership of officials who perform duties in other regions is legally acceptable, and that

a public entity cannot seek to characterize as union-related or otherwise the actions or tasks performed by union officials in the exercise of their duties in other regions.

- 173.** The complainant denounces the fact that both the administrative authorities (Labour Department and National Auditor General's Office) and judicial authorities have stated that they are not competent to deal with matters concerning labour relations within the Public Prosecutor's Office, and that there is only one recognized means of representation regarding labour disputes on employment conditions within that Office: the sole internal authority is the National Executive Directorate, which establishes the service regulations, and acts as judge and party. Consequently, the complainant alleges that there is no competent impartial organization such as the judiciary to hear labour disputes between officials or prosecutors and the Public Prosecutor's Office (as an example, the complainant refers to the case of the labour dispute involving Ms Miriam Cruz who, in November 2013, requested the unilateral amendment of her contract, and in relation to which the Court of Appeal confirmed that the labour courts were not competent, as alleged by the State Defence Council). In this connection, the complainant denounces the fact that, in response to different requests submitted by the complainant alleging unfair or anti-union practices and infringement of union rights, the State Defence Council confirmed the lack of competence of the labour courts to hear work-related cases brought by officials and stated that the complainant "is not specifically a union association" – but an association of officials regulated by bodies of rules separate from the Labour Code – "for which 'reason' 'no anti-union practices can exist' in relation thereto". The complainant alleges that the responses of the State Defence Council to these requests, the texts of which are attached to the complaint, imply that associations of officials lack any trade union rights and protection by the ordinary courts of law in respect of anti-union practices. Similarly, the complainant alleges that working conditions in the Public Prosecutor's Office are not the subject of negotiation but the result of an imposition and that there are no internal dispute settlement procedures or internal negotiating tools. As an example of constraints placed on the exercise of freedom of association by the Public Prosecutor's Office, the complainant refers to the fact that in 2012 it was forced to seek recourse to the Santiago Court of Appeal since the Public Prosecutor's Office had refused to hand over the information necessary to defend the rights of its members. In conclusion, the complainant considers that the requirements of Articles 7 and 8 of Convention No. 151, ratified by Chile, which require the adoption of negotiating procedures or other methods allowing representatives of public employees to participate in the determination of conditions of employment, as well as mechanisms to settle disputes arising in connection with the determination of such conditions so as to ensure the confidence of the parties involved, are not satisfied.

B. The Government's reply

- 174.** In its communication of 10 December 2015, the Government forwards its observations, based mainly on the response of the Public Prosecutor's Office to the allegations. The Public Prosecutor's Office states that 76.75 per cent of its officials are members of an officials' association and that, out of the total number of members, 56.65 per cent are members of the National Association of Officials of the Public Prosecutor's Office (ANFUMIP) and 43.35 per cent belong to the complainant organization.
- 175.** As regards the allegation of obstacles to the work of union officials and undue restrictions on the capacity to organize meetings during the working day, the Public Prosecutor's Office considers that the events that occurred do not constitute an obstacle to officials' activity, nor may they be considered to be intervention in trade union activity. It recalls that the officials concerned entered the premises of the San Bernardo Local Prosecutor's Office on 19 March 2013, without giving prior notice to the heads of that unit, on the assumption that they were able to interrupt, without authorization or notice, the performance of its members' work during the working day. The Public Prosecutor's Office states that Law 19.296 on

associations of officials establishes what its rights are and, in relation to meetings, its states that meetings may be held during the working day provided they have been agreed in advance with the employing institution (the same treatment is accorded to private sector workers by the Labour Code). The Public Prosecutor's Office adds that arrangements have been made for meetings to be held during working hours and that the authorities of the Regional Prosecutor's Office concerned have periodic meetings with the officials of the Association of Officials of the Western Metropolitan Regional Prosecutor's Office (ASFFRO), an association affiliated to the complainant, which deal with matters of interest to the associations and seek to reach agreement on the most appropriate measures for officials. According to the Public Prosecutor's Office, within the framework of these meetings an agreement was reached with ASFFRO representatives for the institution to make arrangements to hold meetings with its members on institutional premises and also during the working day, with a requirement to request the relevant authorization. The Public Prosecutor's Office adds that ASFFRO has requested authorizations to hold meetings during the working day and that those authorizations have been granted. The Public Prosecutor's Office considers that the unplanned intervention of officials of the complainant organization in March 2013 without prior warning or notice did not respect the agreement that the authorities had reached with its member organization, ASFFRO. Similarly, the Public Prosecutor's Office denies that officials of associations have the right to meet their members during working hours without requesting the authority's authorization. It recalls that in accordance with Article 6 of Convention No. 151, the granting of facilities to representatives of organizations shall not impair the efficient operation of the administration or service concerned. In conclusion, the Public Prosecutor's Office recalls that the institution affords greater facilities than those required by law (such as technological resources, materials and physical spaces to hold meetings inside the institution), that it does not make the holding of meetings subject to prior authorization and that only the meetings which it wishes to hold during working hours are subject to a feasibility analysis regarding the timeliness and maintenance of institutional functions, while emphasizing that in no case is an analysis conducted of the matters to be discussed at those meetings.

- 176.** As regards the allegation of anti-union actions on the part of the authorities of the Public Prosecutor's Office in June 2014 in the Talagante Local Prosecutor's Office in response to an appeal for protection, the Government calls into question the account and description of the facts and, while it considers that there was no anti-union action of any kind, states that: (i) the general instruction in question was a general mailing sent on 13 May 2014 by the Chief Prosecutor, in which authorizations for time off or leave were made dependent on the processing of a number of cases that were being registered with no action taken; (ii) the meeting of 13 June was intended to discuss other subjects but, in the end, in view of the discontent that appeared to have been generated by the mailing concerning days off and leave which gave rise to the appeal, the Chief Prosecutor expressed his regret since it had not been his intention to cause such a reaction but merely to settle a work-related procedure; he also regretted that such discontent had not been expressed to him directly (the Government specifies that this was not a reproach as regards anyone's conduct or actions); (iii) the Chief Prosecutor had become aware of the appeal through the permanent monitoring by the Public Prosecutor's Office of the appeals lodged in the courts (the Government also specifies that this information is public and that from the time appeals are lodged the Court publishes the details on its website, which is accessible to all); (iv) the Chief Prosecutor simply forwarded the email which he received to all the officials, containing details of the lodging of the appeal but did not include any phrase or commentary and did not mention the subject again either orally or in writing; (v) the lodging of the appeal surprised many officials, some of whom expressed in emails their disagreement with the management of the association concerning the lodging of the appeal; (vi) Ms Carmen Torres Ríos, who together with other officials (including one prominent union leader) signed a letter expressing her opinion and rejecting the appeal, was not serving at the time as Administrator of the Public Prosecutor's Office (contrary to the complainant's claim) and signed the letter as a member

of the officials' association; (vii) in response to a denunciation of the facts the Regional Prosecutor ordered by Decision of 27 June 2014 the launching of an administrative investigation, which ended in the case being dismissed owing to the fact that there was no proof of sanctionable conduct (in the investigation many officials expressed an opinion and none of them coincided with the complainant's version); (viii) FENAMIP brought a legal case based on the same facts but did not present any witnesses to support its statements; (ix) the court of first instance suggested to FENAMIP that it withdraw its appeal but, as FENAMIP did not withdraw the case, the court rejected the appeal since it considered that it was not competent to take a decision on the facts that FENAMIP, in its capacity as an association of officials, denounced as an anti-union practice; and (x) the Court of Appeal overturned the decision and ordered the case to continue; a hearing was held on 27 June 2015 at which the Court proposed reconciliation, consisting of a statement by the Public Prosecutor's Office to the effect that it intended to offer respect and consideration for workers' individual and union rights (and making it completely clear that the complainant was in agreement with this solution, pending the decision to be adopted in this regard by the Public Prosecutor and the State Defence Council).

177. As regards the allegations of constraints on the representation of members in work-related cases, the Government indicates, in relation to the cases mentioned concerning the Libertado Bernardo O'Higgins Regional Prosecutor's Office and the Los Vilos Local Prosecutor's Office, that the authorities worked jointly with the complainant in the search for solutions, that an administrative investigation was launched and that the prosecutors concerned by the facts denounced (not linked to anti-union discrimination) were sanctioned. As regards the case of harassment at work against Ms Andrade, the Government states that Ms Andrade brought legal action on three occasions and only on one of those occasions did the Supreme Court state that the court was not competent to deal with such matters. On the other two occasions, its protection actions were examined by the courts but, since there was no legal or factual basis, the cases were set aside on their merits, for which reason the claimed lack of protection for the officials alleged by the complainant does not appear to have been proven. The Government emphasizes that Ms Andrade's situation does not relate to any allegation of discrimination or anti-union practice. Similarly, the Government specifies that Ms Andrade only became a member of a FENAMIP-based association following her dismissal. As regards the alleged denial of the complainant's capacity to represent Ms Andrade as its member, the Government indicates that, in accordance with the law, associations of officials do not have the right to represent their members by asking for or requesting such personal rights as may accrue to them, unless a legally approved mandate therefor is granted. The Government adds that the complainant did not attach any documents proving that it had received such a mandate from Ms Andrade, that its submission had been presented "on behalf of the Federation", and that the affected person had denounced the alleged unjustified dismissal individually to request compensation (but not the reinstatement requested by FENAMIP) – this would appear to demonstrate the lack of consistency between the claims made by the complainant organization and those expressed by the person it supposedly represented.
178. As to the allegation of anti-union dismissal of the union official, Mr Mario Gutiérrez Ollarzú, the Government specifies firstly that the draft law criticized by the complainant was also rejected by the Public Prosecutor – Mr Gutiérrez Ollarzú and the Public Prosecutor retained similar opinions and the Public Prosecutor called a working meeting with the participation of all the organizations of officials and prosecutors, at which an agreement was reached on an alternative draft to be put forward to the Government. As a result, the Government refutes the alleged ill-will and states that there cannot have been any reason to weaken the trade-union action, since the union's aims coincided with the position of the Public Prosecutor. As regards the criminal proceedings, the Government states that, on 18 March 2014, Mr Gutiérrez Ollarzú overturned the vehicle he was driving and following two breathalyser tests, it was proven that he was driving in a state of intoxication, which is a crime under

Chilean law. The Government states that in the criminal case Mr Gutiérrez Ollarzú benefited from a conditional suspension of the proceedings. In so doing – since there was no intervention from the authorities – the official invoked the reason of sudden incapacity established by law. In that regard, the Government specifies that the Staff Regulations for Officials of the Public Prosecutor's Office do not establish the reason but the Regulations include the legal provisions. The Government provides detailed explanations as to how, under articles 60 and 65 of the Basic Law on the Public Prosecutor's Office and articles 265 and 332 of the Basic Code of Courts, the conditional suspension of criminal proceedings constitutes a reason for incapacity to be appointed a prosecutor or official of the Public Prosecutor's Office and, consequently, termination of duties or of an employment contract, where a cause of incapacity suddenly arises while employed. The Government states that, as a result, in strict compliance with the law, the Public Prosecutor was obliged to order the termination of Mr Gutiérrez Ollarzú's employment contract. Claiming the alleged unlawful nature of the Public Prosecutor's decision, Mr Gutiérrez Ollarzú lodged an appeal before the First Labour Court of Santiago. The Government stated that, within the framework of that ruling, on 4 August 2015 Mr Gutiérrez Ollarzú undertook a transaction, and renounced all his allegations on the supposed illegality of the dismissal in exchange for receiving compensation of around 7,500,000 Chilean pesos (CLP) (approximating to US\$11,300).

179. In relation to the allegation of anti-union interpretation of the rules and instructions relating to union leave, the Government recalls firstly the applicable rules, contained in Law 19.296, which state that: (i) directors have the right to leave of at least 11 or 22 hours per week, according to the type of organization (regional or national) – hours which are considered worked and are remunerated by the institution; and (ii) there is also additional leave – some of which must be remunerated by the institutions and other leave by the associations. The Government denies that there is any contradiction between the communications of the Public Prosecutor – who recalls the rules on the minimum number of hours granted per week to be paid by the institution, established to protect the associations of officials – and that of the National Executive Director – which simply recalls the obligation to communicate the use of leave (an obligation which the complainant acknowledges in its communication). In this regard, the Government indicates that the complainant continues to fail to satisfy this obligation, and simply sends an email once a week in which it states that its directors will make use of the leave, without allowing the institutional authority to know when the official will be available to perform his or her duties (the Public Prosecutor's Office specifies that such abusive conduct is tolerated by the institutional authority, as it wishes to strengthen the organizations of officials). The Government recalls that the officials of the complainant organization enjoy a minimum of 33 hours per week (11 for a regional organization and 22 for a national organization) out of the 44-hour working week. The Government considers that what the complainant is seeking is to enjoy unlimited union leave at the expense of the institution – which is incompatible with the aforementioned legal rules on leave.

180. As concerns the allegation of institutional interventions so as to cause disputes between workers' organizations in relation to the possibility that regional associations may make workers from other regions members, the Public Prosecutor's Office denies having interfered so as to instigate or further the dispute that has arisen. The Public Prosecutor's Office states that the dispute is between organizations of officials, in which the only intervention by the institutional authority was that of requesting a decision from the Labour Department, merely as a result of a denunciation made by another officials' association – ANFUMIP. The Public Prosecutor's Office states that, in response to the practice of associations brought together in the complainant organization, whereby such associations sought to make officials from regions separate from those in which they were set up as members, officials who were members of ANFUMIP cancelled their membership in order to join these other associations. Consequently, in 2012, ANFUMIP denounced the complainant for anti-union practices and alleged that these new memberships were illegal. On 3 May 2012, the Labour Department responded to this complaint, stating that it did not

have jurisdiction to take a decision on anti-union practices of officials' associations and added, in its conclusions, that "in legal terms it is unacceptable for an official of the Public Prosecutor's Office to participate in the establishment of, or to join, a regional association linked to a jurisdiction separate from that in which he or she provides services". The Government states that, despite this ruling the complainant did not adopt any measures to rectify what it was accused of, for which reason in July 2014 ANFUMIP requested a decision from the Public Prosecutor. In response to this request, the Public Prosecutor requested a decision from the Labour Department, so as not to become involved in a dispute between organizations of officials. In November 2014 the Labour Department said in response that it did not have the jurisdiction to intervene in a situation such as that which had arisen in relation to memberships contracted in contravention of the law; the Department added that this was without prejudice to the right of those affected to challenge the validity of those memberships. On the basis of this decision, the Public Prosecutor's Office resolved not to order a disciplinary investigation into the denunciation made by ANFUMIP. The Public Prosecutor's Office adds that despite the clear interpretation made by the Labour Department of this matter, the complainant has not taken any action to correct the faults identified.

- 181.** As regards the allegations that impartial supervisory authorities to monitor work-related abuses, including anti-union discrimination, are absent, and internal negotiating tools, including dispute settlement processes, do not exist, the Public Prosecutor's Office states that the courts' lack of jurisdiction to hear the cases brought by the association of officials or its directors are the result of an error in the chosen procedural strategy. In relation to one of the cases mentioned by the complainant to illustrate the lack of jurisdiction alleged by the State Defence Council (the case of the labour dispute involving Ms Miriam Cruz), the Government indicates that the Supreme Court revoked the lack of jurisdiction that had been accepted by the Court of Appeal and declared that the Labour Court was competent, stating that the alleged lack of protection did not in fact exist. As regards the allegations of complaints for failure to hand over information, the Public Prosecutor's Office confirms that the complainant was obliged to seek recourse to the Court of Appeal to request that certain background materials be handed over, but states that this was a result of the obligation imposed by the Transparency Act, which requires the institution to consult the affected parties – since those parties objected, the Public Prosecutor's Office was forced to refuse the handover, and so recourse to the Court to settle the matter was the result of the opposition of an affected third party. The Government specifies also that the complainant receives all the information it requests on subjects of interest to it. As to the general conclusions regarding lack of protection put forward by the complainant, the Public Prosecutor's Office emphasizes that the disputes may be settled by the courts and that the rejection of some of the cases brought does not mean that there is a lack of protection mechanisms, but only faults in the way in which its requests or complaints are made, or the lack of grounds therefor.
- 182.** In relation to the allusions to imposition and lack of negotiation and dialogue contained in different allegations made by the complainant, the Public Prosecutor's Office refers to various actions in which the authorities have had relations with the associations of officials during the past few years, as evidence of the collaboration with these associations since they were set up – showing respect for their rights and in search of agreed proposals or solutions to problems or matters of interest for officials. The actions referred to include: (i) a working meeting in 2014 with the participation of all the associations to prepare a proposal for strengthening the Public Prosecutor's Office, with the participation of FENAMIP and which culminated in an agreed draft law; (ii) a working meeting for the implementation of the Law to Strengthen the Public Prosecutor's Office – a meeting which is fully operational; (iii) a working meeting for the regulation of labour relations, called in August 2014, on the initiative of ANFUMIP to prepare a regulation proposal to solve the labour disputes originating within the Public Prosecutor's Office (the complainant initially refused to participate, joined in the process later and stated finally that it did not subscribe to the proposed documents (documents on labour relations, monitoring and reporting of work-

related and sexual harassment, and code of good labour treatment)), since if it subscribed to those documents its aim of obtaining legal amendments allowing labour disputes in the Public Prosecutor's Office to be monitored by external bodies may be affected; (iv) a working meeting on prosecutor's office administrators (with participation of all the officials' organizations); (v) various meetings in 2014 and 2015 with the different associations of officials and others exclusively with the complainant to deal with subjects of interest to it, proving that associations are hosted whenever they so request; (vi) responses to various requests and consultations by the complainant, proving that a response is given to all the requests received and that where there are differences the questions are settled by the courts; and (vii) arrangements made for the associations of officials above and beyond legal requirements (for example, use of institutional mail servers, use of Public Prosecutor's Office premises for assemblies and other types of meetings during the working day or payment of expenses to directors of associations where they have to participate in meetings with the authorities).

The Committee's conclusions

183. *The Committee observes that the complaint concerns allegations of anti-union practices, including the dismissal of an official, obstacles to visits by officials to members, anti-union interpretation of the rules on union leave, constraints on the representation of members in their requests and interference in freedom of membership, as well as the absence of negotiating procedures and impartial mechanisms for hearing labour disputes, including anti-union discrimination.*
184. *As regards the allegation of obstacles to the work of trade union officials and of undue restrictions on the capacity to undertake visits and organize meetings during the working day, the Committee observes that, on the one hand, the complainant alleges the unilateral imposition of restrictions on the capacity of officials to gain access to its members, subject to the requirement of prior agreement with one week's notice for any meeting, including simple visits. On the other hand, the Committee observes that the Government considers that the complainant is defending a non-existent right to be able to disrupt without notice or prior agreement the work of its members during working hours. In this regard, the Committee must recall both the principle through which workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation functions, and also the principle via which the right of access to the workplace should not be exercised to the detriment of the efficient functioning of the administration or public institutions concerned. Therefore, in such cases the Committee has often stated that the workers' organizations concerned and the employer should strive to reach agreements so that access to workplaces, during and outside working hours, should be granted to workers' organizations without impairing the efficient functioning of the administration of the public institution concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 1104 and 1109]. In relation to this complaint, the Committee notes that the Government: states that prior to the facts denounced the authorities had already reached agreements on holding meetings and facilities granted with the regional prosecutor's organization, which was a member of the complainant organization; specifies that the authorities should simply carry out a feasibility analysis for the meetings to be held during the working day; and indicates that the requested authorizations have been granted and facilities and measures for meetings to be held that go beyond those provided for by law are granted too.*
185. *As regards the allegation of anti-union actions in the Talagante Local Prosecutor's Office as a reprisal for the lodging of a protest appeal against a general instruction issued by the Public Prosecutor (public expression of disappointment, circulation of the appeal and instigation of workers to sign a rejection letter are alleged), the Committee notes the*

information and documentation provided by the Government, denying that the authorities intervened or carried out anti-union actions, including: the measures adopted by the administration to investigate the allegation; and the fact that a conciliation agreement appeared to have been reached at the judicial headquarters (consisting of a statement by the Public Prosecutor's Office indicating its intention to respect and consider workers' individual and union rights).

186. As regards two allegations of anti-union actions and constraints on the representation of members in work-related cases before the authorities of the Public Prosecutor's Office (Libertado Bernardo O'Higgins Regional Prosecutor's Office and Los Vilos Local Prosecutor's Office), the Committee notes that according to the Government the authorities worked jointly with the complainant in search of solutions, an administrative investigation was launched and the prosecutors concerned were sanctioned for the facts denounced (unrelated to anti-union discrimination). As to the allegation of the refusal of the capacity to represent a female member (Ms Andrade) in court, the Committee observes that the Government indicates that the officials' associations are not entitled to act to represent their members by requesting or claiming possible personal rights that they may have, without obtaining a legally approved mandate. Similarly, the Committee notes that, according to the Government, in the case in question the complainant does not appear to have demonstrated that it acted with a mandate from its member and the members seems to have simultaneously put forward a complaint with different claims (the affected party requests compensation and the trade union her reinstatement).
187. As to the allegation of the dismissal of the union official, Mr Gutiérrez Ollarzú, the Committee observes firstly that the complainant organization alleges the anti-union motivation of the dismissal by the Public Prosecutor's Office in order to weaken the union movement which was questioning a draft law by the Government relating to the Public Prosecutor's Office. Similarly, it observes that the complainant alleges that the reason put forward for the termination of employment (sudden incapacity where recourse to the conditional suspension of criminal proceedings has been sought) is not covered by law and that the proceedings did not respect the immunity of the trade union official. Secondly, the Committee observes that the Government indicates that the contract was terminated for legal reasons, as a result of the decision to seek recourse to the conditional suspension of criminal proceedings relating to driving in a state of intoxication. In this connection, the Committee notes the detailed information provided by the Government on the legal basis of this case of sudden incapacity. Likewise, the Committee observes that the Government questions that there might have been any kind of anti-union motivation, since the position of the Public Prosecutor coincided with that of the complainant in rejecting the draft law. Finally, the Committee observes that, according to the information and documentation supplied by the Government, within the judicial appeal lodged against the dismissal, an agreement was reached through which Mr Gutiérrez Ollarzú renounced all the allegations of supposed illegality in return for compensation. In these circumstances, the Committee will not pursue its examination of this allegation.
188. As regards the alleged anti-union interpretation of the rules and instructions applicable to the hours of union leave, the Committee notes that according to the Government there is no contradiction or anti-union interpretation in the communications of the competent authorities and that a minimum of 33 hours per week out of the 44-hour working week is granted to officials of the complainant organization. The Committee observes without detecting any contradiction that whereas on the one hand, the Instruction issued by the Public Prosecutor in 2009 had recalled the minimum number of hours of weekly leave that union officials should enjoy under the law, on the other hand the Instruction issued by the National Executive Director in 2014 reiterates the obligation to communicate the use of such leave. In this respect, the Committee must recall the principle whereby the affording of facilities to representatives of public employees, including the granting of time off, has as its

corollary ensuring the “efficient operation of the administration or service concerned”. This corollary means that there can be checks on requests for time off for absences during hours of work by the competent authorities solely responsible for the “efficient operation” of their services [see **Digest**, op. cit., para. 1111]. Consequently, the Committee considers that the communication by the National Executive Director, which recalls the need to satisfy the obligation to communicate the use of hours of union leave, does not infringe the principles of freedom of association.

- 189.** As regards the allegation of institutional interventions in order to generate disputes between workers’ organizations concerning the possibility that regional associations may make workers from other regions members, the Committee notes that the Public Prosecutor’s Office indicates that this is a dispute between organizations of officials, in which the only intervention by the institutional authority was to request a ruling from the Labour Department as a result of a denunciation made by another officials’ association (which was questioning the practice of regional associations making officials from other regions members). The Committee observes that the Labour Department had considered it legally unacceptable for an official from the Public Prosecutor’s Office to participate in the establishment, or to become a member, of a regional association linked to a jurisdiction separate from that where he or she provides services. While it recalls that the Committee is not competent to make recommendations on internal dissensions within a trade union organization, the Committee emphasizes that the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions [see **Digest**, op. cit., paras 333 and 1114]. The Committee requests the Government to take the measures necessary to ensure that the associations of officials of the Public Prosecutor’s Office established in one region may have officials of that Office from other regions as members, if their charters so allow.
- 190.** As to the alleged absence of impartial bodies to settle cases of work-related abuses, including anti-union discrimination, and the non-existence of internal negotiating tools, the Committee notes firstly that the Government states: that there are internal dialogue forums (and provides relevant examples), that the disputes raised can be settled by the courts, that in one of the alleged cases the Supreme Court declared that the labour courts were competent and that, in its opinion, errors had occurred in the complainant’s judicial strategy. Secondly, the Committee observes that the State Defence Council has alleged that the labour courts do not have jurisdiction and has stated that the complainant is not specifically a union association but an association of officials governed by rules and laws separate from the Labour Code “for which reason, no ‘anti-union practices’ can exist in relation thereto”. The Committee recalls that it has pointed out that Article 8 of Convention No. 151 allows a certain flexibility in the choice of procedures for the settlement of disputes concerning public servants on condition that the confidence of the parties involved is ensured. The Committee itself has stated in relation to grievances concerning anti-union practices in both the public and private sectors that such complaints should normally be examined by national machinery which, in addition to being speedy, should not only be impartial but should also be seen to be such by the parties concerned [see **Digest**, op. cit., para. 778]. In the absence of further clarifications received from the Government on the applicable mechanisms for settling disputes and, in particular, the protection of officials of the Public Prosecutor’s Office against anti-union discrimination, the Committee requests the Government, in the light of the aforementioned principle and within the framework of the application of Convention No. 151 ratified by Chile, to inform the Committee of Experts on the Application of Conventions and Recommendations, to which the legislative aspects of the case are referred, of the dispute settlement mechanisms relating to the determination of employment conditions and of the applicable machinery, remedies and sanctions to ensure that officials of the Public Prosecutor’s Office enjoy adequate protection against any act of anti-union discrimination.

- 191.** *Finally, in the light of the foregoing conclusions and taking note with interest of the fact that, according to the Government, there are various bodies for dialogue which deal with issues concerning associations of officials (working meetings, including a meeting to deal with labour relations), the Committee encourages the competent authorities to continue deepening social dialogue with the associations of officials of the Public Prosecutor's Office in order to promote harmonious collective relations and, in line with the aforementioned principles of freedom of association, to reach shared agreements on the issues that may remain pending in relation to the access of union officials to their members during the working day; the union leave of officials and communication of its use; and the development and use of negotiating procedures between the authorities and associations of officials, and other methods allowing their participation in the determination of employment conditions.*

The Committee's recommendations

- 192.** *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 the measures necessary to ensure that the associations of officials of the Public Prosecutor's Office established in one region may have officials of that Office from other regions as members, if their charters so allow.*
 - (b) The Committee requests the Government, within the framework of the application of Convention No. 151 ratified by Chile, to inform the Committee of Experts on the Application of Conventions and Recommendations, to which the legislative aspects of the case are referred, of the dispute settlement mechanisms relating to the determination of employment conditions and of the applicable machinery, remedies and sanctions to ensure that officials of the Public Prosecutor's Office enjoy adequate protection against any act of anti-union discrimination.*
 - (c) The Committee encourages the competent authorities to continue deepening social dialogue with the associations of officials of the Public Prosecutor's Office in order to guarantee the efficient operation of the administration or service concerned, and to promote harmonious collective relations and, in line with the aforementioned principles of freedom of association, to reach shared agreements on the issues that may remain pending in relation to the access of union officials to their members during the working day; the union leave of officials and communication of its use; and the development and use of negotiating procedures between the authorities and associations of officials, and other methods allowing their participation in the determination of employment conditions.*

CASE NO. 3184

INTERIM REPORT

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

Allegations: arrest and detention of eight advisers and paralegals who have provided support services to workers and their organizations in handling individual and/or collective labour disputes, as well as police interference in industrial labour disputes

- 193.** The complaint is contained in a communication dated 15 February 2016 from the International Trade Union Confederation (ITUC). The ITUC provided additional information in a communication dated 10 October 2016.
- 194.** The Government sent its observations in communications dated 24 May and 23 October 2016.
- 195.** China has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 196.** In its communications dated 15 February and 10 October 2016, the ITUC alleges that on 3 and 4 December 2015, seven advisers/paralegals from four labour support organizations in Guangzhou City, Guangdong Province, namely Mr He Xiaobo, Mr Zeng Feiyang, Mr Meng Han, Ms Zhu Xiaomei, Mr Deng Xiaoming, Mr Peng Jiayong and Mr Tang Huanxing (also known as Tang Jian) were arrested and detained in a coordinated sweep. In addition, the ITUC believes that Mr Chen Huihai, director of the Haige Labour Services Centre, was placed under surveillance by the public security authorities for several days and was forced into hiding. According to the ITUC, on 8 June 2016, four activists, Mr Zeng Feiyang, Ms Zhu Xiaomei, Mr Tang Huanxing and Mr Meng Han were officially charged for assembling a crowd to disturb public order. Three were sentenced on 26 September 2016. Mr Meng Han remains the only one still in prison (see table below).

Name	Date of the arrest	Charge	Organization
1. Mr He Xiaobo	4.12.2015 Released on bail on 7.04.2016 pending further investigation of up to 12 months	Embezzlement	Director, Nan Fei Yan Social Service Centre
2. Mr Zeng Feiyang	4.12.2015 On 8.06.2016 formally charged with assembling a crowd to disturb public order. Sentenced to 3 years on 26.09.2016; sentence suspended for 4 years	Gathering a crowd to disturb social order	Director, Panyu Workers' Centre
3. Mr Meng Han	4.12.2015	Gathering a crowd to disturb social order	Staff, Panyu Workers' Centre

	On 8.06.2016 formally charged with assembling a crowd to disturb public order; remains in prison		
4. Ms Zhu Xiaomei	4.12.2015 On 8.06.2016 formally charged with assembling a crowd to disturb public order. Sentenced to 1 year 6 months on 26.09.2016; sentence suspended for 2 years	Gathering a crowd to disturb social order	Coordinator, Panyu Workers' Centre
5. Mr Deng Xiaoming	4.12.2015 Released on bail on 1.02.2016 pending further investigation of up to 12 months	Gathering a crowd to disturb social order	Staff, Haige Labour Services Centre
6. Mr Chen Huihai	3.12.2015 Under surveillance until 7.12.2015.	Gathering a crowd to disturb social order	Director, Haige Labour Services Centre
7. Mr Peng Jiayong	4.12.2015 Released on bail on 1.02.2016 pending further investigation of up to 12 months	Gathering a crowd to disturb social order	Coordinator, Guangzhou Labour Solidarity Network
8. Mr Tang Huanxing (also known as Tang Jian)	3.12.2015 On 8.06.2016 formally charged with assembling a crowd to disturb public order. Sentenced to 1 year 6 months on 26.09.2016, sentence suspended for 2 years	Unspecified	Former staff, Panyu Workers' Centre

197. The ITUC indicates that these advisers and paralegals, through their respective organizations, have been working for the respect of domestic and international labour rights in China. As a result, they have been subject to repressive measures by the Government including arrest, detention, interrogation, seizure of documents and computers, surveillance at home and office and verbal and physical harassment. The ITUC believes that the charges levelled against them are not genuine but are intended to intimidate them and, by extension, the workers and worker organizations they have supported.

198. The complainant provides the following details on the eight labour advisers.

199. Mr He Xiaobo came to Guangzhou as a migrant worker from Henan province over 15 years ago. He lost three fingers in an occupational accident and received paralegal assistance from the Panyu Workers' Centre, which he joined as a volunteer and then as staff. In 2007, he founded the Nan Fei Yan Social Work Service Centre in Foshan District, which was officially registered in 2012, to offer paralegal services to migrant workers in industrial injuries and occupational disease disputes. Mr He was arrested by the public security authority near his home on 4 December 2015. He was not allowed to see his wife and was denied access to his lawyer. On 8 January 2016, his wife and lawyer filed a complaint. On the same day, his wife received an arrest warrant issued by the municipal public security authority, which indicated that he was arrested on suspicion of "embezzlement". The ITUC explains that "embezzlement" is not a criminal charge under the Criminal Code and the arrest warrant did not specify the provision of the law allegedly violated. The ITUC believes that the charge refers to section 271 of the Criminal Code. Mr He's wife was also informed that her husband had signed an agreement to forego his right of legal representation at the detention centre. The ITUC questions this claim. However, if truly signed, the ITUC believes it was done under duress.

200. Mr Zeng Feiyang is a graduate of South China Normal University Law School and is the founder and current director of the Panyu Workers' Centre in Panyu District of Guangzhou City – the first labour NGO in southern China. There he provided legal services to migrant workers and training on labour law and social security. In 2012, Mr Zeng was awarded by

Nanfang Metropolitan Daily for his charitable services. Mr Zeng faced increasing pressure including assaults and office raids by unknown thugs after his organization's active intervention in a number of strikes and unfair dismissal cases of elected workers' representatives. The Centre's business registration was cancelled by the authorities in 2007. On 22 December 2015, Xinhua and CCTV News attacked Mr Zeng in a lengthy report accusing him of receiving funding and support from foreign organizations to provoke labour strikes. He was arrested on 4 December 2015 on the charges of "assembling a crowd to disturb public order" and is detained at the Guangzhou Detention Centre 1. Mr Zeng had been denied the right to see the lawyer until 8 June 2016 when he received the indictment. The lawyer had been assigned by the police. Mr Zeng met the lawyer hired by his family on 29 June and 4 July 2016 and passed a message to his family that he had not violated the law and had not done anything wrong. On 11 July 2016, the lawyer was shown a copy of a letter dated 8 July 2016 with Mr Zeng's signature purporting to refuse to see the lawyer his family had hired. Moreover, threats and harassment on Mr Zeng's family escalated when in April 2016, his mother filed a lawsuit against the Xinhua News Agency for an article accusing Mr Zeng of embezzlement. His parents were threatened by unknown persons, claiming to be from the national security, to withdraw the lawsuit.

- 201.** Mr Meng Han works at the Panyu Workers' Centre. In August 2013, when working at the Guangzhou Chinese Medical Hospital as an outsourced security guard, he and the cleaning workers demanded the hospital authority to negotiate their social insurance with the contracting company. While months-long protest ended with compensation to the cleaning workers, 12 security guards who rejected the settlement were arrested. Mr Meng was among those prosecuted for disturbing public order. He was sentenced to nine months of imprisonment in April 2014. He was later released and joined Panyu Workers' Centre as an organizer. He was arrested on 4 December 2015 for "assembling a crowd to disturb public order". Mr Meng met his lawyer on 1 March 2016 but already on 10 April 2016, the prosecutor, claiming that it was the decision of the national security branch, prevented the lawyer from visiting the accused. On 18 August 2016, the police delivered to Mr Meng's lawyer a termination letter signed by Mr Meng. The lawyer believed his client was forced to do so as Mr Meng told him the day before that his family was under a lot of pressure. On 27 June 2016, Mr Meng was still claiming that he was innocent and rejected the public security's request to accuse the other detained colleagues. Furthermore, Mr Meng's parents were regularly harassed by unknown thugs. On 28 March 2016, unknown persons carrying iron rods went to his parents' apartment to threaten them to move. The police also threatened the landlord to request his parents to move out and leave Zhongshan city. Since the beginning of May, the power and water supply of their apartment was cut and on 7 May, unknown persons came to their apartment and smashed the door with an axe. The neighbours were also threatened when they tried to come to the rescue.
- 202.** Ms Zhu Xiaomei worked for 15 years at Hitachi Metals factory in Guangzhou and was promoted to the level of supervisor. She was sacked in 2014 after supporting the rank and file workers in their efforts to bargain collectively to extend social insurance coverage to the whole workforce. She took the company to arbitration court for unfair dismissal and won, after which she was recruited to work as the coordinator at Panyu Workers' Centre. Ms Zhu was arrested on 4 December 2015 for "assembling a crowd to disturb public order" and was released on bail on 1 February 2016. In court, Ms Zhu was represented by a lawyer assigned under pressure.
- 203.** Mr Chen Huihai was a senior jewellery worker at Panhua Jewellery factory from 2000 to 2012. He joined Panyu Migrants Centre as a volunteer in 2003 and served as the management board member and project coordinator from 2008 to 2014. Mr Chen advised jewellery workers in Panyu in a number of labour disputes and founded a new NGO to assist workers in strikes and pressing the employers for collective negotiation. He is currently the director of Haige Labour Services Centre based in Guangzhou City. On 3 December 2015, Mr Chen

sent a text message saying that he was under surveillance by the public security authority. On 7 December 2015 he reported himself “free” via social media without revealing further details.

204. Mr Deng Xiaoming worked in a factory in Zhongshan City of Guangdong Province after dropping out of high school. He was compensated for his industrial injury with the assistance of Panyu Workers’ Centre in 2012 and after that became a volunteer and later a full-time staff for the Centre’s outreach service in Zhongshan City. Mr Deng joined Haige Workers’ Centre in 2014. He was arrested and detained on 4 December 2015 on charges of “assembling a crowd to disturb public order” and released on bail on 1 February 2016 pending further investigation, which can take up to 12 months.
205. Mr Peng Jiayong was elected by fellow workers as a bargaining representative in an industrial dispute at the French-owned Zhongshan Gallic Industries Co. Ltd. He was dismissed and lost the suit against the employer for unfair dismissal. Afterwards, Mr Peng joined Panyu Workers’ Centre and was active in labour rights advocacy and was a liaison officer of strike leaders under the labour solidarity network he formed. Since 2012 he is the Coordinator of Guangzhou Labour Solidarity Network in Guangzhou City. He was arrested on 4 December 2015 on charges of “assembling a crowd to disturb public order” and later released on bail.
206. Mr Tang Huanxing (aka Tang Jian) worked at Panyu Workers’ Centre in 2014 and was active with a number of civil rights groups in Guangzhou City. Mr Tang was reported missing by his colleagues on 3 December 2015. He was able to send a message to his friends on 31 January 2016 reporting that he had been released at the end of January and had returned to his home town in Jianxi Province. He explained in the message that he had been taken away by the public security forces on 3 December 2015 and detained for questioning.
207. The ITUC further provides the following information on the individual and collective labour conflicts in which the advisers named above participated (sorted by organization).

Panyu Workers’ Centre

Guangzhou Shatou District Sanitation Workers’ Strike
(October–November 2015) Participants: Zeng
Feiyang and Zhu Xiaomei

208. The Shatou Sanitation Workers’ dispute began in October 2015 when their employer announced that they would have to resign and start working, as of November 2015, in another district, about 10 kilometres away. The workers went to the Panyu Workers’ Centre for assistance. Staff helped the workers to organize and elect bargaining representatives. On 21 October 2015, the workers’ representatives informed the company and the local government that the workers would not voluntarily resign and that the company was legally required to pay them a compensation for the termination of their contracts. When the company did not respond, the workers decided to take collective action. On 27 October 2015, the workers gathered at the entrance to the Shatou refuse collection station chanting “no more agency labour, give us our severance pay” and “we love Shatou, we want to work here”. This protest got the attention of the local authorities, which met with the workers’ elected representatives and the employer’s representatives the following day. On 28 October 2015, about 30 workers gathered outside the meeting room in a gesture of solidarity with their elected representatives. During the bargaining session, the employer repeated its demand that the workers relocate to another district without compensation. The worker representatives rejected this demand. The local officials present at the meeting were sympathetic to the workers’ position and in the afternoon they announced that the new local contractor, Qiaoyin Co. would take on all the existing Shatou workers. After further

discussion, the representatives reached a preliminary agreement to terminate the workers' existing contracts and pay compensation of one month's salary for every year of service, based on actual take home pay. Under the agreement, more than six months' service would be calculated as one full year, and less than six months would be calculated as half a year. The deal was accepted by the workers who then agreed to return to work. However, the employer unilaterally announced the terms and conditions of the settlement rather than jointly signing a formal agreement with the workers. This prompted another protest by the workers who demanded that the settlement be jointly signed and based on the negotiated agreement. Eventually, however, the workers did agree to accept the employer's "announcement".

Lide Shoe Factory Workers' Strike (August 2014–May 2015)

Participants: Zeng Feiyang, Zhu Xiaomei,
Meng Han and Tang Huanxing

- 209.** Panyu Lide Shoes Co. Ltd. employs about 2,750 workers, which produce leather goods for brands. In the summer of 2014, the company's workers heard about plans to relocate the factory the following year to another site about an hour from Panyu. In August 2014, around 20 worker activists started to organize their fellow workers and sought assistance from the Panyu Workers' Centre. Their initial demands focused on the payment of social insurance and housing fund arrears. Management responded in November 2014 by forcing employees to sign new labour contracts with fraudulent dates shortening their length of service. On 6 December 2014, workers in one department went on strike and soon the whole factory was brought to a standstill. Workers held an employee conference to elect 11 negotiators and 50 representatives. After some progress in negotiations, management announced a deal limiting lump-sum compensation payments. The workers went on strike again on 15 December 2014. After management agreed to more concessions, the strikers returned to work on 17 December 2014. Three days later, Mr Zeng Feiyang was attacked in his office by unknown assailants. The attack is believed to be related to the centre's involvement in the dispute. Because the management continued to stall on its relocation plans, a group of around 100 activists met to discuss strategy in April 2015, and elected 19 new representatives. Police attempted to break up the meeting and detained Panyu Centre staff member Mr Meng Han. Several workers were reportedly beaten or briefly detained by police. Workers went on strike once again on 20 April 2015. Negotiators met with the management and demanded the timely resolution of all outstanding grievances including social insurance and housing fund arrears, as well as the relocation compensation based on length of service. Local government officials attended the meeting and promised to facilitate future dialogue between the workers and the management. On 22 April 2015, the management promised to address workers' grievances but workers demanded a formal written statement or signed agreement. Workers also helped to release Panyu staffer Mr Meng, who had been held under house arrest. The company and the local government issued a joint-statement promising to address all of the workers' demands. On 25 April 2015, the workers agreed to call off the strike. In its communication dated 10 October 2016, the complainant underlines that the collective actions staged at the factory were peaceful, that negotiation meetings between workers and the management took place and that the local government and official trade unions played a role in mediation and reaching resolutions which were agreed upon between management and workers.

Guangzhou University Town Sanitation Workers Strike

(August–October 2014) Participants: Zeng Feiyang,
Zhu Xiaomei, Meng Han, Deng Xiaoming,
Peng Jiayong and Chen Huihai

- 210.** In August 2014, more than 200 sanitation workers in the University Town district of southern Guangzhou were faced with the prospect of either being laid off by the GrounDey Property

Management or moving with the company to another part of the city. The company's street cleaning contract was due to expire on 1 September 2014 and the company announced that it would not seek to renew it. The employees were concerned about two key issues: firstly, getting fair and reasonable severance pay, and secondly, getting guarantees from the local government that the company taking over the cleaning contract for University Town would hire the entire existing workforce. The workers demanded talks with the company to resolve their grievances but were rebuffed. As a result, they approached Panyu Workers' Centre for assistance. The Panyu Centre gave the workers strategic advice and helped them to elect representatives to lead and carry their campaign forward. On 23 August 2014, the workers elected 18 representatives, including three treasurers to manage their campaign funds. The workers again demanded that the company meet them face to face to discuss their grievances. The company refused and on 26 August 2014 the workers went on strike, attracting a lot of attention on social media. Many members of the public visited the strikers and voiced their support. Eventually, local government officials came out to meet the striking workers and offered to mediate but the workers insisted on direct face-to-face bargaining with the company. The local government then arranged and chaired a collective bargaining meeting that took place on 2 September 2014. The meeting was attended by five of the workers' representatives, two consultants from the Panyu Workers' Centre and around 20 local government officials from various departments. Some 200 workers gathered outside the bargaining venue in support. After several hours of negotiation, the company offered employees a severance package of 1,000 yuan for every year of service. A week of negotiations between the workers and the local government (representing the company) followed, after which the company finally agreed to pay each worker 3,000 yuan for each year of service, plus social security and housing fund contributions in arrears, or an estimated total payment of 3 million yuan. The workers agreed to the settlement but immediately encountered problems when they signed on with the new contractor, Suicheng Construction and Property Co. Ltd, which refused to hire elderly employees or those without a local household registration. The move was seen by workers as an attempt by the construction company to get rid of those it considered troublemakers. Many of the workers representatives were originally from the neighbouring province of Hunan. Despite living in Guangzhou for many years, none of them had been granted a Guangzhou household registration. Eventually, the construction company did agree to hire all the workers but it took several weeks for the two sides to negotiate a new employment contract and for all the workers to sign it. The last group of workers signed their contracts on 12 October 2014.

Liansheng Moulding Factory: Demand for a wage increase
(June–October 2013) Participants: Chen Huihai,
Zeng Feiyang and Deng Xiaoming

- 211.** More than 300 workers at the Liansheng moulding factory in Guangzhou went on strike on 28 June 2013 to demand an increase in take home pay in line with the local minimum wage. On 3 July 2013, the company signed a collective wage agreement that ensured the pay increase. However, some 100 workers continued to push the company to address the wider issues of equal pay for equal work and the discriminatory practice of giving lucrative overtime allocations to those employees who had a good relationship with the management. The company refused to negotiate with the democratically elected representatives, and the local government refused to accept the legitimacy of these representatives. The workers then went to the nearby Panyu Centre to discuss their options. The centre was instrumental in organizing workers to join a peaceful protest within the factory compound, as well as petitioning at government and trade union offices. The workers also started to post reports on social media and share real-time information with each other on instant messaging platforms. In October, under pressure from the local government as well as the workers, the company compromised and signed a collective agreement that ensured that departing workers received an acceptable severance package.

Haige Labour Services Centre

Cuiheng Bag Factory dispute (March–April 2015) Participants:
Peng Jiayong (currently with Guangzhou Labour Solidarity
Network), Chen Huihai and Deng Xiaoming

- 212.** About 200 workers at the Japanese-owned Cuiheng bag factory in Zhongshan City of Guangdong Province went on strike in mid-March demanding better pay, social security and housing fund contributions, year-end bonuses and other benefits. After a week on the picket line and no response from the management, workers reached out to Mr Chen Huihai for help and advice on 22 March 2015. Mr Chen and his colleagues aided workers in the election of their representatives and the submission of a collective bargaining demand. Management rejected negotiations, sacked the workers' representatives and called the police. Several hundred riot police arrived and hauled away 26 workers, four of whom were detained for more than ten days. Many other workers were injured. When a group of volunteers from Haige Labour Services Centre visited one of the workers who had been hospitalized, two of them were approached by plain-clothed police and interrogated. An altercation ensued and one of the volunteers, Mr Peng Jiayong, was beaten so severely that he was hospitalized with a lumbar disc protrusion. On the way to the local police station the next morning to report the attack on Mr Peng, Mr Chen and his three other colleagues were attacked. As Mr Chen was parking his car, a man wearing a motorcycle helmet threw two bricks at the car. One narrowly missed Mr Chen's head, the other hit Zhu Xinhua, a workers' representative from another factory on the arm. The attacker jumped on a waiting motorbike and escaped. There were several police officers at the scene but they made no attempt to pursue the attacker. The attack was reported through social media and around 20,000 yuan were spontaneously raised for Mr Peng's medical expenses.

Tongxin Jewellery workers' strike (June–October 2014)
Participants: Chen Huihai, Deng Xiaoming and Peng Jiayong

- 213.** A two-month-long strike by 59 workers at Tongxin Jewellery in Foshan city ended on 27 August 2014 after the management finally made concessions during negotiations with the elected representatives of workers. The company promised to pay social security and housing fund contributions and to compensate for not taking annual leave. Both sides agreed to continue discussions over the payment of a higher basic salary during the low season. Mr Chen and the team advised the workers to pursue collective negotiation to resolve the dispute and the elected representatives to secure the support of the provincial federation of trade unions of Guangdong and the municipal federation. Both federations took part in the mediation to bring the management to the negotiating table. On 20 October 2014, Foshan Federation of Trade Unions reacted further to the workers' request to investigate and improve the union representation of the enterprise trade union at Tongxin factory.

Nan Fei Yan Social Work Service Centre

- 214.** Nan Fei Yan Social Work Service Centre advocates for migrant workers' rights and provides paralegal aid to injured and sick workers in Foshan city. It was formally registered at the Bureau of Civil Affairs in 2012. Injured workers and those who have contracted occupational diseases are organized to form and run mutual aid groups to receive labour law education, organize hospital visits to victims and families and take part in policy advocacy. Nan Fei Yan provides paralegal aid to these workers to claim compensation, provides hotline service for cases of industrial accidents, advocates for legislative reforms on occupational safety and health, social insurance, criminal liability of employers and set-up of a public compensation fund for the injured and sick workers. Nan Fei Yan and Mr He Xiaobo have been awarded by the local government for the labour services provided to migrant workers. However, Nan Fei Yan has been repeatedly attacked over the years. On 14 October 2014, Nan Fei Yan

called a press conference to release joint research with another NGO and Foshan University on the education of the children of the migrant workers of Foshan city. The research found a much lower admission rate of migrant children in public schools than the official statistics claimed (37 per cent according to civil groups' statistics, and 70 per cent according to the official data). Mr He was summoned by the Bureau of Civil Affairs the next day accusing him of using misleading information. On 1 May 2015, a photo exhibition of injured workers was co-organized by Nan Fei Yan. It was called off by the authorities. Three offices of Nan Fei Yan were threatened with termination of government projects, forced relocation and forced closure. In June 2015, the Bureau of Internal Affairs gave Nan Fei Yan a "bare pass" in its annual audit, claiming that the organization had undertaken unauthorized activities. Mr He believed it was related to the organization's involvement in occupational injury and disease cases. Organizations registered under the Bureau of Civil Affairs are subject to the annual audit of their activities and finances and could risk deregistration if they get a "bare pass" twice. In July, Nan Fei Yan's projects approved or funded by the Bureau were suspended or terminated. Accused of conducting "illegal operations", the migrant library of Nan Fei Yan at Shunde District was ordered to close down by the authorities. The landlord of the migrant library at Zu Miao Road was pressured to terminate the land contract with Nan Fei Yan. The library was the major venue to host labour law consultations, provide paralegal aid to workers in disputes and had been frequently visited by workers in injury cases since 2008. On 12 August 2015, the Bureau of Civil Affairs informed Nan Fei Yan of re-audits of its finances from 2012 to 2014. On 23 August 2015, Mr He filed for disclosure of information at the Bureau of Civil Affairs for the bureau's ground for re-audits. On 8 September 2015, the Bureau of Civil Affairs rejected Mr He's application for information disclosure. On 23 August 2015, the work injury labour law seminar with migrant workers at the Shunde migrant library was disrupted by the authorities. Water and electricity supplies were cut. On 15 September 2015, the Social Organisation Management Bureau of Foshan City informed Mr He of a complaint as to financial discrepancies of Nan Fei Yan from 2012 to 2014 and a re-audit of the organization's 2012 and 2013 finances. Mr He told the press that these measures were intended to force Nan Fei Yan to give up labour and migrant rights advocacy and prepare for the passage of the Foreign NGO Management Law.

- 215.** Nan Fei Yan assisted migrant worker Mr Yang Tong Xiao to win the first tort claim litigation on 30 October 2015 against his employer FuRi Construction Material Company in Sanshui district of Foshan city for not providing employees with social insurance for his work injury. This is a precedent in China, providing for better compensation to victims and the dependents.
- 216.** Since 2005, workers in Foshan Hao Xin Precious Metals Jewellery Co. Ltd began to contract silicosis. It took ten years (up to 2015) to have 176 workers complete the occupational disease certification. More than 250 others have or are suspected of having the disease. In 2010, the company agreed to pay a compensation package to the certified silicosis workers and concluded another settlement with other sick workers to cover their medication for the next 30 years. The workers, especially those still waiting for the certification, were worried about the enforcement as the company was planning to relocate to another site. From 2010 onward, the sick workers gathered themselves to protest against the company and petition the Government. This led to clashes with the police. In the protest they took on 29 December 2010, 18 of them were put under administrative detention from five to ten days by the police for blocking the traffic. The latest clash took place on 17 January 2016 when the sick workers learned that the company was closing down for business reasons. Some 18 protesting silicosis workers were detained for up to ten days. Nan Fei Yan provided paralegal assistance to Hao Xin workers on work injury certification and to ensure implementation of their compensation settlement with the company.
- 217.** In its communication dated 10 October 2016, the ITUC alleges that Ms Zhu, Mr Zeng and Mr Tang were convicted for assembling a crowd to disturb public order under section 290

of the Criminal Code. This charge arises from their role in the work stoppages at Lide Shoe Factory between December 2014 and April 2015. According to the complainant, the prosecutor claimed that the work stoppages were “illegal” on the ground that production at the factory was disrupted incurring “serious” economic loss (of RMB2.7 million) to the company. The Government claimed that the three activists were the “ringleaders” who led the workers to block the entrance and traffic.

- 218.** Furthermore, according to the ITUC, section 290 of the Criminal Code can and is being used to impose a ban on public protest and collective workplace action by criminalizing the organizers and participants on reason of public order.

Section 290: In cases where crowds are assembled to disturb public order with serious consequences; where the process of work, production, business, teaching, and scientific research are disrupted; and where serious losses have been caused, the ringleaders are to be sentenced to not less than three years but not more than seven years of fixed-term imprisonment; other active participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights. Assembling crowds to attack state organs, thus disrupting their operations and causing serious losses, the ringleaders are to be sentenced to not less than five years but not more than 10 years of fixed-term imprisonment; and other active participants are to be sentenced to not less than five year of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.

In the complainant’s view, the law on its face and in its application pose a serious risk to the exercise of freedom of association. The ability to be prosecuted for engaging in a peaceful action that may lead to economic losses is an obvious infringement of the principle of freedom of association.

- 219.** The ITUC recalls that section 290 was used in April 2014 to sentence 12 security workers at Guangzhou Chinese Medical Hospital for the three-month long work stoppage in 2013, in which the Panyu Migrant Centre was involved (and where Mr Zeng, Ms Zhu, Mr Tong and Mr Meng worked). That work stoppage and others activities, including labour organizing and training activities, were used as evidence by the prosecutor in court against the four activists. Specifically, they were accused of sharing cases and showing videos of work stoppages in other factories with Lide workers, assisting workers to draft their demands for negotiation with the management, establishing a solidarity fund for contributions to support their activities, and facilitating the election of 61 worker representatives and 13 negotiation representatives for bargaining with the management.
- 220.** According to the complainant, the prosecutor argued “illegal” operation of Panyu Migrant Centre (which was de-registered in 2007) and “illegal” labour activism (wei-chuan) that Panyu Migrant Centre and its staff promoted. The four labour advisors were accused of instigating collective action and ignoring the legal dispute resolution procedures and mediation of government officials. Under certain duress, the three activists pleaded guilty and made “confessions” in court in exchange for suspended sentences. The ITUC considers that the fact that they are now out of prison does nothing to lessen the fact that they have suffered and continue to suffer a serious violation of their freedom of association. While not certain, it is likely that they will be unable to provide any further service to workers during the pendency of their suspended sentences or risk imprisonment.
- 221.** The ITUC concludes by stating that the Government has violated the principles of freedom of association when it arrested and detained worker advocates and interfered in their respective organizations’ activities, as it deprived workers and their organizations of their right to organize their activities – in particular to obtain legal and professional advice on effective collective action. The ITUC also alleges that none of the cases of harassment suffered by the relatives of the accused were investigated by the police. The Government’s actions created a chilling effect in that cognizant of the consequences faced by their

advocates, workers will be less likely to exercise their rights. Further, as detailed in two cases above (Cuiheng Bag Factory, Lide Shoes Co. Ltd.), the Government violated the rights of workers' freedom of association when the police intervened in industrial disputes, which led to physical assaults and arrests of workers and their advocates. The ITUC stresses that the fact that those arrested and detained by the authorities were not trade unionists in an industrial dispute is irrelevant in determining whether the right to freedom of association has been violated. It points out that the Committee has previously found that the right to freedom of association can be violated when the retaliation is aimed at the supporters of workers and refers to Case No. 2189 (China), concerning the heavy prison terms for two activists acting on behalf of workers and the detention and mistreatment of an independent labour activist involved in the industrial dispute; Case No. 2528 (Philippines), concerning violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations; and Case No. 2566 (Islamic Republic of Iran), concerning pervasive intimidation and harassment of the Iranian trade unionists and human rights activists who showed solidarity with Farzad Kamangar. The ITUC considers that the arrest of advisers and paralegals violates the freedom of association of Chinese workers in that they are hindered in the exercise of their right to freedom of association and are further subject to a chilling effect in seeing the state repression aimed at their advocates for supporting them in their activities.

The Government's reply

222. In its communication dated 24 May 2016, the Government indicates that it has conducted thorough investigations into the allegations in this case and provides the following information. Mr Zeng Feiyang (41 years old), Mr Meng Han (51 years old), Mr Tang Huanxing (45 years old), Ms Zhu Xiaomei (36 years old), Mr Peng Jiayong (40 years old) and Mr Deng Xiaoming (22 years old) used to be members of Panyu Workers' Document-Processing Service Centre. The registration of the Service Centre was revoked by the commercial and industrial administration authority in 2007. As it has not since registered with any administrative department, the Service Centre is currently an illegal organization. During the period from December 2014 to April 2015, the abovementioned six persons mobilized a part of workers of Lide Shoes Factory of Panyu, to engage in work stoppages three times, which led to the mass gathering of people and eventually, disruption of public order. On 20 April 2015, several hundreds of workers of the factory blocked the entrance, denied access of transport vehicles and stopped other workers from going to normal work by blocking stairs, threatening and verbally abusing them. The abovementioned six persons were accused of the crime of gathering people to disrupt public order and thus put under criminal detention on 4 December 2015 by Panyu Branch of Guangzhou Public Security Bureau, Guangdong Province.
223. On 8 January 2016, Guangzhou municipal prosecution authority approved the arrest of Mr Zeng, Mr Meng, Mr Tang and Ms Zhu for the alleged crime of gathering people to disrupt public order and allowed Mr Peng and Mr Deng to obtain a guarantor pending trial according to the provisions of article 290 of the Criminal Law. On 20 January and 1 February 2016, the prosecution authority allowed Mr Tang and Ms Zhu to obtain a guarantor pending trial. On 7 March 2016, with the approval of Guangzhou Municipal Procuratorate, the time limit of being held in custody during investigation after arrest for Mr Zeng and Mr Meng was extended for one month for the first time, in conformity with the legislation in force. On 7 April 2016, with the approval of Guangzhou Municipal Procuratorate, the time limit of being held in custody during investigation after arrest for Mr Zeng and Mr Meng was extended for two months for the second time, in conformity with the legislation.
224. The Government further explains that Mr He Xiaobo (41 years old) was put under criminal detention on 4 December 2015 by the Foshan Branch of Guangzhou Public Security Bureau for the alleged crimes of embezzlement, misappropriation and holding forged invoices. On

8 January 2016, pursuant to sections 271, 272 and 210 of the Criminal Law, Foshan prosecution authority approved the arrest of Mr He. On 7 March 2016, with the approval of Guangdong Provincial Procuratorate, the time limit of being held in custody during investigation after arrest for Mr He was extended for one month for the first time. Mr He has been allowed to obtain a guarantor pending trial according to the law.

- 225.** The Government also explains that Mr Chen Huihai is not related to the abovementioned cases and the public security authority of China has not imposed any compulsory measures on him.
- 226.** The Government points out that the public security authority has imposed compulsory measures on Mr Zeng and another six persons not because they had organized and participated in workers' activities, but because they had engaged in gathering people to disturb public order and other criminal activities and were suspected of violating the provisions of sections 290, 271, 272 and 210 of the Criminal Law, causing damages to the public order and the interests of other citizens. When dealing with these cases, the public security authority has strictly abided by the relevant laws and regulations and safeguarded the legitimate rights of the persons concerned. The seven criminal suspects have had access to health care and maintained good state of health during the period in custody. At the same time, in the spirit of humanitarianism, the public security authority has provided appropriate care to the criminal suspects. Taking into consideration that Ms Zhu, though not in the legally defined lactation period, had a young child to nurse during the period of being held in custody, the public security authority provided a special nursing place for her.
- 227.** The Government informs that these cases are being dealt with according to the law and emphasizes that pursuant to the Constitution and the relevant laws, the Government guarantees that the citizens enjoy freedom of association and safeguards the exercising of their right. According to article 35 of the Constitution, the citizens enjoy freedom of speech, press, assembly, association, procession and demonstration. Section 3 of the Trade Union Law and section 7 of the Labour Law provide that the workers shall have the right to participate in and organize trade unions in accordance with the law. Chapter VI of the Trade Union Law specifies legal responsibilities in case of obstructing workers from participating in or organizing trade unions according to law. Freedom of association is fully safeguarded in China and the trade union organizations play an important role in the enforcement of the labour law, in particular in protecting the rights and interests of workers. However, when exercising the abovementioned rights, workers and their organizations shall abide by relevant laws and regulations of the State, including those on social management, and shall not undermine the normal public order, or damage the interests of other citizens or disrupt the normal production and life of other citizens.
- 228.** By its communication dated 23 October 2016, the Government informs that on 26 September 2016, the court heard the case involving Mr Zeng, Mr Tang and Ms Zhu. According to the Government, after due investigation, the court asserted that during the collective stoppages (on 6, 15-17 December 2014 and 20-25 April 2015), Mr Zeng and others have organized people to block the gate of the company, stop the circulation of vehicles through the gate, cause troubles in the workshops and offices, obstruct the normal work of others and seriously disturb the normal production order of the company. The court held that it was clear that the accused have collectively disturbed the social order. Considering the repentance of defendants and the legally determined situations leading to lighter sanctions, the court sentenced Mr Zeng to three years of imprisonment, with four years of probation, and Mr Tang and Ms Zhu to one year and half of imprisonment, with two years of probation. The defendants pleaded guilty, accepted the sentences, which they would not appeal. According to the Government, the defendants' rights were duly protected during the trial.

229. Regarding Mr Meng, involved in the same case, the Government informs that after the second supplementary investigation, the prosecutor submitted the case to the court and that the hearing will be held in the near future.

The Committee's conclusions

230. *The Committee notes that the ITUC, the complainant in this case, alleges arrest and detention of seven advisers and paralegals (Mr He Xiaobo, Mr Zeng Feiyang, Mr Meng Han, Ms Zhu Xiaomei, Mr Deng Xiaoming, Mr Peng Jiayong and Mr Tang Huanxing) who have provided support services to workers and their organizations in handling individual and/or collective labour disputes. The ITUC also alleges that Mr Chen Huihai, director of the Haige Labour Services Centre, was placed under surveillance by the police. The complainant indicates that on 8 June 2016, four activists, Mr Zeng Feiyang, Ms Zhu Xiaomei, Mr Tang Huanxing and Mr Meng Han were officially charged for assembling a crowd to disturb public order. Mr Zeng was sentenced to three years of imprisonment; his sentences was suspended for four years. Mr Tang and Ms Zhu were sentenced to one year and six months of imprisonment each; their sentences were suspended for two years. According to the ITUC, Mr Meng Han remains in prison. While Mr Deng and Mr Peng were released on bail on 1 February 2016, they remain under investigation. The ITUC further alleges that the Government interfered in industrial labour disputes by bringing in the police, which led to physical assaults and arrests of workers and their advocates. The Committee notes that in its communication dated 23 October 2016, the Government confirms the sentencing of Mr Zeng, Mr Tand and Ms Zhu and indicates that Mr Meng's case will be heard in the near future.*
231. *At the outset, 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 and that allegations dealing with other matters are outside its competence.*
232. *The Committee notes the detailed description provided by the complainant on the work and the organizations the eight advisers represent, as well as the cases they were involved in. While according to the information provided by the ITUC, Mr Chen Huihai, Mr Zeng Feiyang, Mr Meng Han, Ms Zhu Xiaomei, Mr Deng Xiaoming, Mr Peng Jiayong and Mr Tang Huanxing appear to be involved in assisting workers in exercising their trade union rights, this does not seem to be the case of Mr He Xiaobo, director of the Nan Fei Yan Social Work Service Centre, which advocates for migrant workers' rights and provides paralegal aid to the injured and sick workers in Foshan city. While taking note of the allegations involving Mr He with grave concern, unless the complainant provides information pointing to the violation of trade union rights in his specific case, the Committee will not pursue the examination of the case involving Mr He.*
233. *Furthermore, by way of background to this case, while noting the Government's statement that freedom of association is guaranteed through the explicit provisions in its Constitution, the Labour Law and the Trade Union Law, the Committee refers to its earlier conclusions in respect of certain significant legislative obstacles to the full guarantee of freedom of association in the country. In particular, in its examination of Case No. 2031 [321st Report, para. 165], the Committee had reiterated its conclusions in two previous complaints presented against the Government of China [see 286th Report (Case No. 1652) and 310th Report (Case No. 1930)], that many provisions of the Trade Union Law were contrary to the fundamental principles of freedom of association and had requested the Government to take the necessary steps to ensure that they were modified. The Committee further recalls that it had previously stressed the importance of the development of free and independent organizations and negotiation with all those involved in social dialogue [Case No. 2189*

(330th Report, para. 466)]. It is against this background that the Committee proceeds to examine this case.

234. With regard to the allegation of arrest and detention of seven workers' advisers, the Committee notes that according to the ITUC, the repressive measures and charges levelled against them are the Government's retaliation against them for their work in the field of labour rights and are intended to intimidate them, as well as workers and their organizations they have supported. The ITUC further alleges that on 20 December 2014, Mr Zeng was attacked in his office and believes that the attack is related to the Panyu Workers' Centre in the Lide Shoe Factory dispute. The complainant alleges that in the case of the same dispute, several workers were beaten and detained (including Mr Meng) when the police intervened in the meeting of labour activists in April 2015.
235. The Committee notes that the Government confirms the ITUC allegation that six activists, Mr Zeng Feyiang, Mr Meng Han, Ms Zhu Xiaomei, Mr Deng Xiaoming, Mr Peng Jiayong and Mr Tang Huanxing, were under investigation for the alleged crime of gathering people to disrupt public order. The Government explains that these persons used to be members of Panyu Workers' Document-processing Service Centre, the registration of which was revoked by the commercial and industrial administration authority in 2007. Being unregistered, the Centre is currently an illegal organization. The Government further explains that during the period from December 2014 to April 2015, the abovementioned six persons mobilized a part of workers of Lide Shoes Factory of Panyu to engage in work stoppages three times, which led to the mass gathering of people and eventually, to the disruption of public order. According to the Government, on 20 April 2015, several hundreds of workers of the factory blocked the entrance, denied access of transport vehicles and stopped other workers from going to normal work by blocking stairs, threatening and verbally abusing them. The abovementioned six persons were accused of the crime of gathering people to disrupt public order and thus put under criminal detention on 4 December 2015 by Panyu Branch of Guangzhou Public Security Bureau, Guangdong Province. The Committee notes that the Government points out that the investigation of workers' advisers is not related to their participation in workers' activities, but rather to their engagement in gathering people to disturb public order and other criminal activities and violating sections 290, 271, 272 and 210 of the Criminal Law (causing damages to the public order and the interests of other citizens).
236. The Committee observes that the abovementioned six activists appear to have been arrested, detained and charged for being involved in a labour dispute and considers that the detention of persons for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular. The Committee recalls 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. It further recalls that taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences in many countries [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para 302 and 651]. The Committee notes that the Government refers to the damages that the gathering caused and to other criminal activities. The Government further indicates that in the case of Ms Zhu, Mr Zeng and Mr Tang, the court found that the defendants have organized people to block the gate of the company, stop the circulation of vehicles through the gate, cause troubles in the workshops and offices, obstruct the normal work of others and seriously disturb the normal production order of the company. In this respect, the Committee notes the complainant's indication that collective actions staged at the Lide factory were peaceful. The Committee expresses its concern over the heavy sentences, albeit suspended, imposed on Mr Zeng, Ms Zhu and

Mr Tang and requests the Government to provide a copy of the court judgment. The Committee further notes the ITUC's allegation that it was likely that the labour advisors would not be able to provide any further service to workers during the pendency of their suspended sentences or risk imprisonment. It requests the Government to ensure that the three activists can continue providing advisory services to workers without hindrance.

- 237.** *Noting the Government's indication that after the second supplementary investigation in relation to Mr Meng, involved in the same case, the prosecutor submitted the case to the court and that the hearing will be held in the near future, the Committee requests the Government to provide a copy of the court judgement once it has been handed down.*
- 238.** *The Committee expects that the pending investigations will be concluded without further delay, that they will take into account the principles above and will also shed light on the alleged attack on Mr Zeng on 20 December 2014, the beating and detention of several workers of the Lide Shoes Factory and of Mr Meng in April 2015. The Committee requests the Government to keep it informed in this respect and to provide the court judgments in cases of Mr Meng Han, Mr Deng Xiaoming and Mr Peng Jiayong and once they have been handed down.*
- 239.** *The Committee notes the Government's indication that Mr Chen is not involved in the cases referred to by the complainant and that no compulsory measures have been imposed on him. While understanding that Mr Chen is not being detained, it is nevertheless not clear to the Committee whether Mr Chen has been charged, as other labour advisers, with "gathering a crowd to disturb social order", as claimed by the complainant. The Committee requests the Government to indicate whether Mr Chen has been charged with "gathering a crowd to disturb social order" and if so, to provide detailed information regarding his case.*
- 240.** *The Committee further notes the ITUC allegation of police intervention in a labour dispute that occurred at the Cuiheng Bag Factory in March–April 2015 following which four workers were detained for more than ten days and many were injured. Furthermore, according to the complainant, when a group of volunteers from Haige Labour Services Centre visited one of the workers who had been hospitalized, two of them were approached by the police and interrogated. The complainant alleges that an altercation ensued and one of the volunteers, Mr Peng Jiayong, was severely beaten and hospitalized with a lumbar disc protrusion. On the way to the local police station the next morning to report the attack on Mr Peng, Mr Chen and his three other colleagues were attacked. As Mr Chen was parking his car, a man wearing a motorcycle helmet threw two bricks at the car. One narrowly missed Mr Chen's head, the other hit Zhu Xinhua, a workers' representative from another factory on the arm. According to the ITUC, the attacker escaped while several police officers present at the scene made no attempt to pursue him. The Committee regrets that no information has been provided by the Government on these alleged incidents. The Committee expects that an independent inquiry will be conducted by the Government into these serious allegations and requests the Government to provide detailed information on its outcome.*
- 241.** *The Committee notes the allegations of pressure suffered by the relatives of Mr Zeng and Mr Meng and requests the Government to provide its observations thereon.*
- 242.** *In conclusion, the Committee regrets that the Government has not provided detailed information in respect of the disputes described in the complaint and in reply to the detailed information provided by the complainants concerning the role and activities of the six activists in helping the workers to have their demands met. The Committee is nevertheless encouraged by the information provided by the ITUC on the role of the local authorities in facilitating dialogue between workers and the management of some companies, which led, in some cases, to the resolution of the conflict. The Committee considers that the only*

*durable solution to industrial conflicts such as described in the complaint is through full respect for the right of workers to establish organizations of their own choosing, promotion of collective bargaining and creating of appropriate mechanisms where industrial disputes can be resolved through dialogue [see **Digest**, op. cit., para. 26].*

The Committee's recommendations

243. *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 provide the court judgments in cases of Mr Zeng Feyiang, Ms Zhu Xiaomei and Mr Tang Huanxing and to ensure that the three activists can continue providing advisory services to workers without hindrance.***
- (b) *The Committee expects that the pending investigation of Mr Deng Xiaoming and Mr Peng Jiayong will be concluded without further delay and that it will also shed light on the alleged attack on Mr Zeng on 20 December 2014 and the beating and detention of several workers of the Lide Shoes Factory and of Mr Meng in April 2015. The Committee requests the Government to keep it informed in this respect and to provide the court judgments in cases of Mr Meng Han, Mr Deng Xiaoming and Mr Peng Jiayong, once they have been handed down.***
- (c) *The Committee requests the Government to indicate whether Mr Chen has been charged, as other labour advisers, with “gathering a crowd to disturb social order”, as claimed by the complainant, and if so, to provide detailed information regarding his case.***
- (d) *The Committee expects that an independent inquiry will be conducted by the Government into the allegation of the police intervention in the labour dispute at the Cuiheng Bag Factory in March–April 2015 which led to the detention of four factory workers and injuries of many, including Mr Peng Jiayong, volunteer of Haige Labour Services Centre, Mr Chen and Zhu Xinhua, a workers’ representative from another factory. It requests the Government to provide detailed information on its outcome.***
- (e) *The Committee requests the Government to provide its observations on the allegations of pressure suffered by the relatives of Mr Zeng and Mr Meng.***

CASES NOS 2761 AND 3074

INTERIM REPORT

Complaints against the Government of Colombia presented by

- **the International Trade Union Confederation (ITUC)**
- **the World Federation of Trade Unions (WFTU)**
- **the Single Confederation of Workers of Colombia (CUT)**
- **the National Union of Food Industry Workers (SINALTRAINAL)**
- **the Union of Energy Workers of Colombia (SINTRAELECOL) and**
- **Cali Municipal Enterprises Union (SINTRAEMCALI)**

***Allegations: The complainant organizations
allege acts of violence (murders, attempted
murders and death threats) against trade union
leaders and members***

- 244.** The Committee has already examined the substance of Case No. 2761 on two occasions [see 363rd and 367th Reports], the last of which was at its March 2013 meeting, when it submitted an interim report to the Governing Body [see 367th Report, paras 420 to 453, approved by the Governing Body at its 317th Session].
- 245.** By way of a communication dated 4 March 2014, the Union of Energy Workers of Colombia (SINTRAELECOL) presented in the framework of Case No. 3063 concerning the right to collective bargaining, allegations relating to acts of violence. By way of a communication dated 30 May 2014, the Cali Municipal Enterprises Union (SINTRAEMCALI) presented a complaint concerning acts of violence which led to the opening of Case No. 3074. To the extent that Case No. 2761 deals with all allegations of anti-union violence occurring in Colombia since 2010, the allegations in Case No. 3063 concerning alleged acts of violence as well as all of the allegations in Case No. 3074 will be examined in the framework of Case No. 2761, as requested by the Government in communications dated 8 July and 28 October 2014.
- 246.** The Government sent its observations in communications dated 30 September 2013, 28 October 2014, and 13 April and 7 September 2016.
- 247.** 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. Previous examination of the case

- 248.** At its March 2013 meeting, the Committee made the following interim recommendations concerning the allegations made by the complainant organizations [see 367th report, para. 453]:
- (a) Deeply regretting the alleged acts of violence denounced in this case against union leaders and members, the Committee firmly expects that the new policy adopted by the Office of the Public Prosecutor concerning investigations – under which it has been decided to give priority to all cases of murders of trade unionists cited in this case and a tripartite mechanism has been set up in the form of monthly meetings to deal with concerns and

observations with respect to the investigations – will be conducive to the swift resolution of the cases that have been denounced, including the new allegations presented by the WFTU and the CUT, so that the perpetrators of all acts of violence against union leaders and members can be identified, prosecuted and convicted. The Committee requests the Government to inform it of the outcome of the investigations concerning the acts of violence in the present case, especially regarding the functioning of the tripartite mechanism established to collaborate in the investigation of acts of violence against trade unionists. As regards recommendation (c) of its previous examination of this case, the Committee requests the complainant organizations to provide the Public Prosecutor with all the necessary information so that the relevant investigations can be instituted.

- (b) The Committee draws the special attention of the Governing Body to the extreme seriousness and urgent nature of the matters dealt with in this case.

B. New allegations

249. In a communication dated 4 March 2014, SINTRAELECOL denounces, firstly, the brutal assault on 10 January 2014 against the president of the Caldas branches of SINTRAELECOL and the CUT, Mr Oscar Arturo Orozco, at the hands of the mobile anti-riot squad. The complainant states that: (i) the incidents took place during a public demonstration against the restructuring of the Caldas Hydroelectric Power Company SA ESP (CHEC); (ii) the demonstrators, including the workers' wives and children, were trampled by around 50 police officers from the mobile anti-riot squad; (iii) to protect their family members and themselves, the demonstrators tried to stop the brutal police attack with their bare hands; (iv) they were then violently beaten with batons, several of them falling to the ground; (v) after managing to get back up, union president Oscar Arturo Orozco used his megaphone to plead with the police to call off the police attack; (vi) at that moment, a member of the mobile anti-riot squad set off an explosive device on the ground; (vii) fragments from the device hit Oscar Arturo Orozco, who lost his left eye and sustained damage to his lower eye socket.

250. The complainant alleges, secondly, that Mr Oscar Lema, branch president of SINTRAELECOL in Magdalena, has been the target of death threats, yet failed to receive the protection sought from the public authorities. In this regard, the complainant states that: (i) given the new threats he received on 13 January 2014, the relevant bodies were asked to carry out a risk assessment and to implement various security measures; (ii) although a response was received indicating that a request had been submitted for a review of preventive measures at the trade union headquarters' facilities, the protection scheme requested has failed to materialize; (iii) to ensure his safety, Mr Lema had to move home, and even then the death threats did not stop; and (iv) years before, Mr Lema had already been the victim of death threats, along with Mr Eduardo Vásquez, the union's treasurer, who was ultimately murdered by a paramilitary movement.

251. In a communication dated 30 May 2014, SINTRAEMCALI denounces acts of violence directed against the organization's headquarters and the vehicle of one of its officials. The complainant states specifically that: (i) in the early morning of 16 April 2014, four individuals doused the door of the union headquarters with petrol and threw incendiary bombs at it, causing major damage to the building; (ii) on 20 May 2014, several individuals set fire to the car belonging to Mr José Ernesto Reyes, vice-president of SINTRAEMCALI, who suffered burns to his legs while trying to extinguish the fire during the incident; (iii) these episodes occurred after SINTRAEMCALI had requested the National Protection Unit to provide urgent protection for all members of the executive committee.

252. The complainant adds that the aforementioned acts of violence took place: (i) four days after the judge of Municipal Criminal Court No. 29, which has jurisdiction in the city of Bogotá, ordered the former President of the Republic, Mr Álvaro Uribe Vélez, and the former Vice-

President of the Republic, Mr Francisco Santos Calderón, to make symbolic acts of apology for the stigmatizing statements both had made in 2007 against SINTRAEMCALI, SINTRAUNICOL and SINTRATELEFONOS; and (ii) three days before the start of the trial concerning the “Operation Dragon” case, the name given to a plot to persecute and destroy trade union, human rights advocacy and political opposition organizations.

C. The Government’s response

Investigation policy for acts of anti-union violence

- 253.** While recognizing the impunity gap that exists and recalling the independence of the different government branches, the Government states that it has collaborated with the Office of the Public Prosecutor in allocating resources to ensure that it has the tools needed to move the investigations forward. In communications dated 30 September 2013 and 28 October 2014, the Government states that the Prosecutor’s subunit that deals exclusively with the issue of anti-union violence, created within the Office of the Public Prosecutor’s National Human Rights Unit, has 25 specialized prosecutors deployed in several cities across the country. It also has a special group of more than 100 judicial investigators, composed of members of the Technical Investigation Unit and national police investigators. There are also three specialized courts dealing exclusively with the issue.
- 254.** In these communications, the Government recalls once again that the Public Prosecutor had found that acts of violence perpetrated against workers and trade unionists were being investigated in isolation. Based on this analysis, the Office of the Public Prosecutor adopted Directive No. 001 on 4 October 2012 “establishing criteria for the prioritization of situations and cases and introducing a new criminal investigation management system in the Office of the Public Prosecutor” in order to combat organized crime more efficiently and determine whether there were, or still are, criminal policies and plans aimed at curtailing workers’ right to freedom of association. The Government states that, as part of the implementation of this policy, the Analysis and Context Unit was established with the aim of coordinating the information currently available in the various units of the Office of the Public Prosecutor. The Analysis and Context Unit has given priority to the problem of violence committed against trade unionists and already has a team of five public prosecutors, six analysts and four investigators. In this connection, the Analysis and Context Unit agreed to prioritize four key situations relating to the most serious violations of the right of association in Colombia from the 1990s to the present day. These situations, which led to the reassignment of 44 investigations to the Analysis and Context Unit, concern: (i) several trade unions of the Cauca valley, including SINTRAEMCALI, the Valle Single Trade Union of Education Workers (SUTEV) and sugar cane cutters’ trade unions; (ii) trade unions in universities in the Caribbean region; (iii) unions of workers in the mining and energy sector; and (iv) trade unions in the banana industry in the 1990s. The Government adds that the Inter-institutional Committee on Human Rights has been conducting a tripartite analysis of the progress made in combating impunity and violence against trade union organizations.
- 255.** In a communication dated 13 April 2016, the Government states that the internal structure of the Office of the Public Prosecutor has been modernized and restructured. In this connection, work in the area of violence against trade union organizations is being undertaken primarily by the following four directorates of the Office of the Public Prosecutor: (i) the National Directorate for Analysis and Context; (ii) the National Directorate for Coordination of Public Prosecutors; (iii) the Human Rights Directorate; and (iv) the National Directorate for District Prosecutors’ Offices and Public Safety. The Office of the Public Prosecutor has also developed strategies for prioritizing and vetting cases. In this context, the Office of the Public Prosecutor’s Unit for Human Rights and International Humanitarian Law established a follow-up group for investigations under each topic at the

national level, which has enabled it to identify those showing little progress in investigations, with the aim of creating the necessary procedural impetus through these offices. Monitoring and follow-up of investigations where the victims are trade unionists is carried out, and monthly legal technical committees and working groups are being held in order to review, monitor and evaluate the effective and efficient development of the investigative function. The Government states that these kinds of activities lead to important progress being made such as establishing the truth and merits of the key arguments in a case and identifying the causal link as a precondition for criminal liability.

256. The Government goes on to refer to the investigations into threats against members of the trade union movement, for which only two convictions have been handed down. Since the establishment of the Public Prosecutor's subunit, a joint strategy has been under development to analyse both national and local information on death threats that have occurred since 2005 to the present date and whose investigations are still open. There are 192 cases of threats under investigation in total, plus two cases that have reached trial, with two defendants.

257. The Government also states that the ILO has been a key player in providing support to train judges and prosecutors through the project entitled "Promoting compliance with international labour standards". It highlights, among several initiatives, the specialized diploma in investigating and prosecuting offences committed against trade unionists.

Progress made in the investigations

258. The Government reports that significant progress has been made in the investigations into the murders and other acts of violence examined in the context of the present case, highlighting the following results:

- In 2014, the national police assisted in solving 54 cases, arrested 66 persons and helped link 61 suspects to offences. In 2015, they arrested five persons in connection with murders in 2015, 48 persons in connection with murders committed in other years and linked 73 persons to offences in order to bring prosecutions.
- In 2014, the Office of the Public Prosecutor issued 63 arrest warrants, submitted 25 indictments and brought 14 cases to trial; and in 2015, 62 persons were linked to offences and charged, three indictments were submitted, 19 persons were arrested, 15 of whom are currently in custody, and 20 applications were made for protective measures.
- The above actions by the police and prosecutors have led to judges handing down 22 convictions, meaning that to date 700 convictions have been handed down for offences committed against trade unionists, with 569 persons receiving sentences.

259. In its communications of April and September 2016, the Government provides information on the specific progress made in Case No. 2761: (i) 78 cases are still open; (ii) of these 78 active cases, 51 are at the inquiry stage; (iii) two cases have resulted in convictions, although some aspects of those cases remain at the inquiry stage; (iv) one case is under investigation; (v) seven cases are at the preliminary investigation stage; (vi) one case is at the arrest-warrant stage; (vii) one case is at the pre-trial stage; (viii) 13 cases are at trial; (ix) two cases have led to final convictions; and (x) in total, 12 final or other convictions have been handed down in connection with the aforementioned cases and 21 persons have been linked to them.

Information on protective measures

- 260.** In its communication of 13 April 2016, the Government states that it remains fully committed to the protection of trade union leaders and activists, which is why it will continue its efforts to ensure the protection programme (National Protection Unit) is resourced. The unit's budget allocated to the protection of trade union leaders was US\$18.5 million in 2015. The Government further states that: (i) from 2012 to the present date, the National Protection Unit conducted 2,782 risk assessments for trade union leaders or activists; (ii) all requests for protective measures for trade union members provide for a risk assessment; (iii) there are currently 589 trade unionists under protection, who benefit from different measures, such as means of communication, bulletproof vests, transport support, relocation support, armoured vehicles, conventional vehicles and officials responsible for protection; (iv) more than 400 trade unionists benefit from protection plans with measures that include armoured vehicles, conventional vehicles and escorts; (v) there have been no cases of murder among the trade unionists covered by the programme, nor among those whose protection was withdrawn following an updated risk assessment; (vi) in 2014, 11 applications for emergency procedures were received from trade unionists, eight of which from trade union leaders and three of which from trade union activists, and, of those, emergency procedures were granted in six cases; (vii) in 2015, 28 applications for emergency procedures were received from trade unionists, 25 of which from trade union leaders and three from trade union activists and, of those, 24 were granted emergency procedures; (viii) given the imminent danger in these cases, they were dealt with as a priority for the implementation of urgent measures.
- 261.** The Government adds that the National Protection Unit has been implementing collective protection schemes for trade unionists. These schemes are assigned by the Committee for Risk Assessment and the Recommendation of Measures, in which the workers' confederations participate. The schemes are submitted to the committee after a risk assessment has been carried out in each branch of the national executive committees and regional and local subcommittees, where trade unionists have the opportunity to express their views not only on the threats, risks and vulnerabilities, but also on the protective measures that they consider should be implemented. These observations are weighed against the technical results of the risk assessments, and these considerations are presented to the committee.
- 262.** In its communication of 7 September 2016, the Government states that the peace process currently under way establishes some agreements on security guarantees and combating criminal organizations. The agreement provides for several initiatives, including: (i) the creation of a special investigation unit for dismantling criminal organizations that threaten human rights advocates, social movements or political movements; and (ii) the creation of a comprehensive safety and protection programme for communities and organizations in the territories. Social organizations and communities will participate in the programme, which will have a special protection protocol for the groups affected by the conflict.

Collective redress for the trade union movement

- 263.** The Government states that it has recognized the trade union movement as a victim of acts of violence and that it has a duty to provide collective redress to trade unions, which is not only a legal obligation established by Act No. 1448 of 2011, but also a political and ethical obligation. The Government adds that: (i) on 10 July 2012, an initial meeting was held with the CTC, CUT and CGT trade union confederations and the FECODE trade union federation, which responded to the State's call; (ii) there have since been several meetings with delegates from the trade union movement, the Comprehensive Victim Support and Reparation Unit for victims of the armed conflict and the Ministry of Labour to chart the course for the process, and especially to listen to the trade union movement, which from the

outset has been reluctant to embark on the process; (iii) under the programme to provide collective redress to the trade union movement, in April 2014 and April 2015 meetings took place with the President of the Republic, who reaffirmed the commitment of the State to the process of collective redress for the trade union movement; and (iv) during these discussions, it was decided to create a high-level round table to discuss the collective redress measures to be implemented.

New allegations of violence

264. By way of a communication dated 28 October 2014, the Government communicated its observations regarding the allegations of violent acts directed at the SINTRAEMCALI headquarters and the vehicle of one of its officials. The Government first submits the observations of the EMCALI enterprise, which states that it: (i) has no knowledge of the perpetrators or instigators of the acts or their motives; (ii) is always attentive to the requirements of the public authorities concerning the safety of SINTRAEMCALI leaders and the leaders of other organizations present in the enterprise; and (iii) is developing a policy that is fully respectful of the rights to freedom of association and collective bargaining. The Government then submits the responses of the Public Prosecutor's Office and the National Protection Unit and its own observations, indicating that: (i) the unit of the Public Prosecutor's Office attached to the specialized judges of the criminal circuit is conducting a criminal inquiry into terrorism concerning the events of April 2014; (ii) on 12 June 2014 a judicial investigator visited the enterprise and met Mr Jorge Iván Vélez Calvo, the president of SINTRAEMCALI; (iii) the events are being examined by the Office of the Counsel for Cali Province, the management of the President's Programme for Human Rights and International Humanitarian Law, the Office of the Vice-President of Colombia and the Office of the Counsel for Valle Region; (iv) Mr José Ernesto Reyes Mosquera is receiving protective measures provided by the Unit, as are the other members of the SINTRAEMCALI executive committee; (v) Operation Dragon refers to events that occurred in 2004 that were investigated by the Attorney-General of the Nation and the Public Prosecutor's Office, for which the outcome of the investigation has been communicated to the Committee on Freedom of Association; and (vi) it will be the judicial authorities that will be responsible for determining whether the events of April 2014 are related to the events of 2004.

The Committee's conclusions

265. *The Committee recalls that these cases concern allegations of numerous murders of leaders and members of the trade union movement and other acts of anti-union violence. During its last review of Case No. 2761, the Committee noted that all the cases reported in this complaint were investigated, that the Prosecutor was launching a new investigation policy and that significant resources were being dedicated to combatting impunity and protecting trade union leaders and trade unionists at risk. The Committee had asked the Government especially to provide information on the outcome of the investigations into the alleged acts of violence in this case and on the functioning of the tripartite mechanism established to collaborate with the investigations into acts of violence against trade unionists.*

Investigation initiatives and outcomes

266. *The Committee takes note of the information provided by the Government concerning both the quantitative and the qualitative efforts made by the public authorities to resolve the cases of acts of anti-union violence and punish the guilty parties. In this respect, the Committee notes in particular that: (i) the national police, the Public Prosecutor's Office and the judiciary have specific staff and units dedicated exclusively to acts of anti-union violence; (ii) under the new investigation policy launched in 2012 by the Public Prosecutor's Office,*

the Analysis and Context Unit prioritized four key situations related to the most serious violations of the right to freedom of association in Colombia since the 1990s; (iii) the National Unit for Human Rights and International Humanitarian Law of the Office of the Public Prosecutor established a group to follow up on the investigations under each topic at the national level to identify those with little investigative progress, with the aim of taking action to move the cases forward. This methodology applies to cases where the victims are trade unionists; (iv) a joint strategy is being designed to analyse both national and local information on cases of death threats against trade unionists that have occurred since 2005 and that are still open; and (v) the Inter-institutional Commission for Human Rights has been conducting a tripartite analysis of the progress made in combating impunity and violence against trade union organizations.

- 267.** *The Committee also takes note of the information provided by the Government concerning the progress made in resolving and punishing all the acts of anti-union violence committed in the country, where it indicates that: (i) as a result of the actions of the police and the Public Prosecutor's Office, the courts handed down 22 convictions in 2015; (ii) a total of 700 convictions have been handed down for crimes perpetrated against members of the trade union movement; (iii) the investigation into a large number of reports of death threats has led to only two convictions for that offence. The Committee also takes note of the information communicated by the Government concerning the investigation into the acts of violence reported in this case, where it indicates that: (i) of the 83 murder cases assigned to the Public Prosecutor's Office, involving 105 victims, 78 cases are still open; (ii) of those 78 cases, 51 are at the inquiry stage; (iii) two cases have led to convictions although some aspects of those cases remain at the inquiry stage; (iv) one case is under investigation; (v) seven cases are at the preliminary investigation stage; (vi) one case is at the arrest-warrant stage; (vii) one case is at the pre-trial stage; (viii) 13 cases are at trial; (ix) two cases have led to final convictions; and (x) in total, 12 final or other convictions have been handed down in connection with the aforementioned cases and 21 persons have been linked to them.*
- 268.** *While taking due note of the significant efforts and the various initiatives of the public authorities to achieve better efficacy in the investigation of the acts of violence perpetrated against trade union officials and trade unionists, the Committee notes with concern that, at least in respect of the acts reported in this case, progress in the investigations has been limited. The Committee observes in particular that, since its last review of this case in March 2013, the number of convictions has increased from 11 to 12 and that, many years after the acts were committed, the vast majority of cases of murder and other acts of violence reported in this case remain unpunished. In this respect, the Committee recalls that the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights, and emphasizes the need, in a case in which judicial inquiries connected with the death of trade unionists seem to be taking a long time to conclude, for proceedings to be brought to a speedy conclusion [see Digest of decisions and principles of the Freedom of Association Committee, fifth (revised) edition, 2006, paras 52 and 53].*
- 269.** *Under these conditions, taking into account the substantial initiatives already adopted in this regard by the public authorities, the Committee urges the Government to continue taking all the measures necessary to ensure that all of the acts of anti-union violence reported in this case are brought to justice. In this respect, the Committee requests the Government to facilitate an inter-institutional evaluation of the investigation strategies used by the public authorities in the cases of violence against trade union officials and trade unionists and to keep it informed of the outcomes. Noting that it has few elements on the actual functioning of the tripartite mechanism established in 2012 to collaborate with the investigations into the acts of violence against trade unionists, the Committee requests the Government to provide information in this regard. Likewise, the Committee requests the Government to*

provide further information on the types of anti-union offences, apparently not reported in this case, that led to the recent convictions.

New allegations of violence

- 270.** *The Committee takes note of the allegations of SINTRAELECOL, according to which: (i) the trade union leader Mr Oscar Arturo Orozco lost an eye in January 2014 as a consequence of the violent repression of a demonstration by a squad of riot police; and (ii) the trade union leader Mr Oscar Lema was the target of death threats that obliged him to move home without having been afforded the protection requested.*
- 271.** *The Committee notes with regret that the Government has not communicated its observations on these allegations and requests it to do so promptly. As regards SINTRAELECOL's first allegation, the Committee recalls the principle that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace [see **Digest**, op. cit., para. 140]. As to SINTRAELECOL's second allegation, the Committee requests the Government to ensure that Mr Oscar Lema's situation has been duly assessed in order to provide him with any protective measures he might require.*
- 272.** *The Committee also takes note of the allegations of SINTRAEMCALI, according to which the headquarters of the organization and the vehicle of one of its officials were set on fire in April and May 2014, days after a criminal court judge had ordered that a public apology be made to the organization for statements stigmatizing it and days before the opening of a court case about an alleged plan dating back to 2004 to persecute and to destroy trade unions. In this regard, the Committee notes that the Government states that the Public Prosecutor's Office is conducting a criminal inquiry into terrorism in connection with the arson attack on the seat of the organization in April 2014, and that Mr José Ernesto Reyes, owner of the vehicle set on fire in May 2014 as well as all SINTRAEMCALI leaders are receiving protective measures. The Committee notes nonetheless that it has received no information from the Government concerning any inquiry relating to the arson of the vehicle of Mr José Ernesto Reyes in May 2014. The Committee therefore requests the Government to ensure that an inquiry is initiated by the competent authorities into the arson of the vehicle of Mr José Ernesto Reyes, and to keep it informed of the outcome of that inquiry and the investigations conducted by the Public Prosecutor's Office in connection with the arson attack on the seat of SINTRAEMCALI.*

Protective measures

- 273.** *The Committee notes that the Government states that the strong commitment of the public authorities to providing security to the members of the trade union movement is demonstrated by: (i) the allocation in 2015 of a budget of US\$18.5 million for the protection of trade union leaders; (ii) the fact that 2,782 risk assessments for trade union leaders and activists have been conducted since 2012; (iii) the protection currently provided, through a range of measures, to 589 trade unionists; (iv) the application to more than 400 trade unionists of protection measure plans that include armoured vehicles, conventional vehicles and escorts. The Committee also takes note of the Government's statement that there have been no cases of murder of trade unionists among those covered by the protection programme, nor among those whose protection was withdrawn following a renewed risk*

assessment. The Committee invites the Government to maintain the efforts described and to keep it informed in this regard.

The Committee's recommendations

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

- (a) The Committee urges the Government to continue taking all the measures necessary to ensure that all of the acts of anti-union violence reported in this case are resolved and that the perpetrators and instigators are brought to justice.*
- (b) The Committee requests the Government to facilitate an inter-institutional evaluation of the investigation strategies used by the public authorities in the cases of violence against trade union officials and trade unionists. The Committee requests the Government to keep it informed of the outcome.*
- (c) The Committee requests the Government to provide information on the concrete functioning of the tripartite mechanism established in 2012 to collaborate with the investigations into the acts of violence against trade unionists.*
- (d) The Committee requests the Government to provide further information on the types of anti-union offences, not evident in this case, that have led to recent convictions.*
- (e) The Committee requests the Government to communicate promptly its observations on the allegations presented by SINTRAEECOL and to ensure that the situation of Mr Oscar Lema has been duly assessed in order to provide him with any protective measures he might require.*
- (f) The Committee requests the Government to ensure that an inquiry is initiated by the competent authorities into the arson of the vehicle of Mr José Ernesto Reyes, and to keep it informed of the outcome of that inquiry and the investigations conducted by the Public Prosecutor's Office in relation to the arson attacks on the headquarters of SINTRAEMCALI.*
- (g) The Committee invites the Government to maintain its efforts to ensure the safety of trade union leaders and trade unionists in the country and to continue to keep it informed in this regard.*
- (h) The Committee draws the particular attention of the Governing Body to the extreme seriousness and urgency of this case.*

Complaints against the Government of Colombia presented by

- the Single Confederation of Workers of Colombia (CUT)
- the Workers Trade Union Confederation of the Oil Industry (USO) and
- the National Association of Telephone and Communications Engineers (ATELCA)

Allegations: The complainants allege that the pension clauses of a collective enterprise agreement in the oil sector have not been implemented since 31 July 2010, and that the pension scheme for former employees of a company in the telecommunications sector has been changed unilaterally in violation of the collective enterprise agreement

- 275.** The complaint is contained in a communication dated 25 May 2012 from the Single Confederation of Workers of Colombia (CUT) and the Workers' Trade Union Confederation of the Oil Industry (USO), communications dated 1 October 2013, and 26 February and 2 May 2016 from the USO, and a communication dated 4 February 2014 from the National Association of Telephone and Communications Engineers (ATELCA).
- 276.** The Government sent its observations in communications dated 23 August 2013 and 3 March, 28 April and 22 October 2014.
- 277.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

Failure to award new conventional retirement pensions in a company in the oil sector as from 31 July 2010

- 278.** In a communication dated 25 May 2012, the CUT and the USO report that Ecopetrol SA (hereinafter "the oil company") and the State of Colombia have violated the provisions of a collective agreement awarding the oil company's employees a conventional old-age pension, which was signed by the USO and the oil company in 2009. The complainants maintain that the alleged violation of the agreement is contrary to Article 4 of ILO Convention No. 98. On this point, the complainants maintain that: (i) since 1970, all of the collective agreements signed by the company and the USO have contained retirement clauses awarding employees a company old-age pension; (ii) like its predecessors, the collective agreement signed in 2009, which remained in force until June 2014, contains provisions – particularly in article 109 – that establish the modalities for the conventional pensions to which the oil company's employees are entitled; (iii) since 31 July 2010, although this clause of the agreement was still in force, the oil company has refused to award new conventional pensions on the grounds that Legislative Act No. 1 (2005) had modified the national pension

scheme by amending the Constitution, excluding old-age pensions from the scope of collective bargaining; (iv) no action has been taken on the written complaints submitted to the Ministry of Labour and the Ministry of Finance; and (v) while some lower court judges have ruled that the *tutela* proceedings brought by the employees were admissible, the Constitutional Court has declared them inadmissible on the grounds that the dispute should have been brought before a lower labour court instead.

- 279.** The complainants also maintain that: (i) under the ILO Conventions on freedom of association and collective bargaining that Colombia has ratified, the issue of pensions cannot be excluded from the scope of collective bargaining; (ii) the right to a conventional pension is an acquired right of the oil company's employees and is protected both by the country's Constitution and by ILO Convention No. 98; (iii) paragraph 109 of the agreement was in force prior to 31 July 2010, is still in force and should therefore be implemented; (iv) while Legislative Act No. 1 (2005) amending article 48 of the Constitution states that lawfully acquired rights must be respected, its content contradicts and flagrantly violates this principle by establishing that, as from 31 July 2010, conventional pension clauses shall be null and void; and (v) the recommendations made by the Committee on Freedom of Association in Case No. 2434 are fully applicable to this case and must be followed by the Colombian authorities; this entails payment of a conventional company pension.
- 280.** The complainants add that the company has a special fund for the payment of conventional pensions, which currently contains 13,000 billion (13,000,000,000,000) Colombian pesos (COP); thus, the conventional pension scheme is financially sustainable. They indicate that under Colombian law, the money deposited in this fund constitutes a parafiscal contribution that belongs neither to the employer nor to the State nor to the employee in so far as it has a specific purpose: the payment of conventional pensions. Pursuant to Convention No. 98, and as requested by the Committee on Freedom of Association in Case No. 2434, the State has a duty to promote an agreed solution.
- 281.** In a communication dated 1 October 2013, the USO states that the failure to implement conventional pension clauses is one example of an extremely negative attitude towards the rights of pensioners, as seen from: (i) the Colombian Pension Administration (Colpensiones) Circular No. 4 (2013); the complainants state that Colpensiones is the highest level social security body on pensions and that the mentioned Circular unlawfully applies to all pensions a Constitutional Court decision (No. C-258 (2013)) concerning the pensions of members of Congress, which renders legislation allowing for special and transitional schemes null and void; and (ii) the unilateral transfer of the pensions of 4,000 employees of the Bogotá Telecommunications company (ETB) (hereinafter "the telecommunications company") from the public to the private sector by the national pension management body without authorization from the employees concerned sets a precedent that could affect the oil company's pensioners in the future.
- 282.** In a communication sent in February 2016, the USO states that the allegations and requests that it presented in 2012 are more relevant and urgent than ever in light of the erosion of pensioners' rights in Colombia. It therefore requests that a preliminary contact mission be established as part of the consideration of this case. The complainant also maintains that: (i) three groups lie outside the scope of the Social Security Act (Act No. 100 (1993)): members of the military, teachers and the oil company's employees; (ii) while the State has protected the pension rights of workers in the first two of these categories from the impact of Legislative Act No. 1 (2005), including through an agreement signed by the teachers' union and the authorities, the issue of the oil company's employees has yet to be resolved; (iii) while Constitutional Court Judgment SU 555 (2014) on the impact of Legislative Act No. 1 (2005) refers to the recommendations of the Committee on Freedom of Association in Case No. 2434, it does not provide for their implementation and prohibits the consolidation of conventional pension rights as from 31 July 2010.

283. In the same communication, the complainant refers to the Attorney General's Opinion No. DTSS 001716 of February 2016 on the pension rights of Social Security Institute employees. The complainant states that, based on the aforementioned Judgment No. SU 555 (2014), the Attorney General stated that conventional pension clauses could remain in force after 31 July 2010, if it was the manifest will of the parties that they continue to apply after that date. The complainant considers that article 109 of the collective enterprise agreement meets this requirement by providing that "the company shall continue to award the lawful lifelong retirement or old-age pension"; this constitutes a mandate for the future.

Pension transfer by a company in the telecommunications sector

284. In a communication dated 4 February 2014, ATELCA alleges that the telecommunications company and the Ministry of Labour are not implementing the pension clauses in the collective enterprise agreement not only because, as with the first allegation in this case, no new conventional pensions have been awarded since 31 August 2010, but also because the telecommunications company and the Ministry have unilaterally transferred the pensions of the company's former employees from the public to the private sector without their authorization through a "pension transfer" mechanism. In this regard, the complainant states that: (i) since 1972, the telecommunications company's collective agreements have made provision for a conventional pension with two modalities for receiving it (no age requirement for employees with 25 years of service or, for those aged 50 and over, 20 years of service); (ii) in the most recent agreement, signed in 2013, the pension clauses were not repealed; thus, under article 478 of the Labour Code, they remain fully applicable; (iii) in 2003, the telecommunications company established a fund for the discharge of its pension liability; (iv) this fund currently contains COP1,375 billion; this ensures the sustainability of the conventional pension scheme and enables the telecommunications company to pay pensions directly; (v) in 2012, at the company's request, the Ministry of Labour authorized a pension transfer whereby the Social Security Institute assumed the telecommunications company's payment obligation; (vi) on 7 December 2012 and 28 May 2013, however, the telecommunications company's board of directors stated that the pensions would be transferred not to the Social Security Institute but to a private insurance company, Positiva Compañía de Seguros SA (hereinafter the "insurance company"), which administers the private pension scheme (Colombia has two parallel pension schemes: an average premium scheme with defined benefits (the public scheme) and an individual savings scheme (the private scheme); (vii) although the telecommunications company is not undergoing liquidation or restructuring, the pension scheme's members were not asked to give their express consent to the aforementioned transfer; this violates the rules on pension transfer; (viii) the telecommunications company stated on its website that it had decided to transfer its pension liability and that, as from 6 September 2013, pensions would be handled "through a life annuity, managed by the insurance company, or a programmed retirement scheme"; in Colombia, these are two types of individual savings scheme; (ix) while the insurance company is a State entity, it manages the individual savings scheme, not the average premium scheme with wage-based defined benefits; (x) letter dated 28 August 2013, 971 of the telecommunications company's pensioners stated that they had not authorized a transfer of, or change in the pension scheme; and (xi) the telecommunications company, with the support of the Colombian Government, has ignored this objection.
285. For the aforementioned reasons, the complainant states that not only have the conventional pension clauses not been implemented since Legislative Act No. 1 entered into force in 2005 – a fact that resulted in the presentation of Case No. 2434 to the Committee – but it is feared that the aforementioned pension transfer may be the first step towards a breach of the obligation to pay pensions that have already been consolidated as provided in the collective agreement. Pursuant to ILO Conventions Nos 87, 98 and 154, rights acquired under an agreement by employees who have consolidated their entitlement to a conventional pension

must be protected, and these employees must not be transferred to an individual savings scheme without their authorization. The complainant adds that all pension matters must be agreed with the pensioners' representatives – who, in the case of conventional pensions, are the trade unions signatory to the agreement – and any change in a conventional pension must be made not unilaterally, but by agreement between the signatories.

B. The Government's reply

Failure to award new conventional retirement pensions in a company in the oil sector as from July 2010

- 286.** Concerning the first aspect of the case (failure to implement the pension clauses contained in the Ecopetrol SA collective agreement as from 31 August 2010, allegedly violating ILO Convention No. 98), the Government, in a communication dated 23 August 2013, states that the failure to award conventional pensions as from 31 August 2010 is consistent with paragraph 2 and the third provisional paragraph of Legislative Act 1 (2005): (i) paragraph 2: "With effect from the entry into force of this Legislative Act, pension arrangements other than those set out in the General Pension System legislation cannot be established by accords, collective labour agreements, awards or legal acts of any kind"; and (ii) third provisional paragraph: "The pension rules contained in legitimately concluded accords, collective agreements, awards or agreements and in force as at the date of entry into force of this Legislative Act shall remain in force for the term originally agreed. Accords, agreements or awards signed between the entry into force of this Legislative Act and 31 July 2010, may not establish more favourable pension conditions than those currently in force. In any event, they shall become null and void on 31 July 2010."
- 287.** The Government states that, in light of the foregoing: (i) pension benefits established in collective agreements remained in force until the end of the term originally agreed, or of the period of their extension as provided in article 478 of the Labour Code, but not beyond 31 July 2010, when, in accordance with a provision of the Constitution, they became null and void; (ii) the aforementioned paragraphs of the Legislative Act had no impact on the acquired rights of pensioners or the legitimate expectations of individuals who would soon meet the conventional criteria for retirement since they were given five years from the entry into force of the Legislative Act in which to meet those criteria and avail themselves of the conventional pension scheme; (iii) this position has been confirmed by both the Supreme Court and the Constitutional Court; and (iv) in light of the foregoing, it is logical that the company has not awarded any new conventional pensions since 31 August 2010.
- 288.** In a communication dated 28 April 2014, the Government sent the company's observations, stating that: (i) Colpensiones Circular No. 4 (2013), to which the complainants object, establishes the basic legal pension requirements in accordance with the case law of the Constitutional Court; (ii) pursuant to Legislative Act No. 1 (2005), the pension rules contained in the company's collective agreement remained in force until 31 July 2010; and (iii) those of the oil company's employees who had no pension rights as at 31 July 2010, were required by law to join the General Pension Scheme.
- 289.** More broadly, the Government states that the restrictions on collective bargaining established in Legislative Act No. 1 (2005), which the Committee has already examined in Case No. 2434, do not disregard the ILO Conventions on freedom of association and collective bargaining that Colombia has ratified since recognition of the collective rights of employees and their organizations in these Conventions does not prevent domestic law from being adjusted in order to ensure the financial health and equity of the pension scheme.

Transfer of pensions by a company in the telecommunications sector

290. Concerning the second element of this complaint, the pension transfer carried out by the telecommunications company, whereby an insurance company assumed the telecommunications company's pension liability, the Government first sent the company's reply in a communication dated 22 October 2014. The telecommunications company began by explaining the decision-making process that had led to the pension transfer: (i) according to Decree No. 1260 (2000), the pension transfer is not merely a mechanism for ensuring future discharge of the pension liability of private companies undergoing insolvency proceedings or restructuring; it is becoming a tool that all companies can use in order to discharge such liability; (ii) the decision to transfer the telecommunications company's pension liability was taken at a shareholders' meeting held on 20 November 2012; (iii) on 7 December 2012, the board of directors approved the transfer of the telecommunications company's full pension liability to Positiva Compañía de Seguros SA; (iv) before these internal decisions were taken, the required external authorizations were obtained from the Ministry of Labour on 3 May 2012 and the Supervisory Authority for Companies on 12 May 2012; (v) this procedure was fully consistent with the legislation in force, which establishes that employers themselves may decide whether to transfer pension liability to an insurance company or to Colpensiones and that voluntary pension transfer is a unilateral act to be carried out at the sole discretion of the company; and (vi) notwithstanding the foregoing, before the transfer was carried out, the telecommunications company engaged in a process of outreach, dissemination and consultation on the pension transfer, including at two meetings with the company's two trade unions, ATELCA and the Trade Union of Workers of the Bogotá Telecommunications Enterprise (SINTRATELEFONOS) – as well as with the Bogotá Telecommunications Enterprise Pensioners' Association (APETB), held on 13 and 28 November 2012.

291. Additionally, the company mentions the impact of the transfer on the pension rights of its former employees, stating that: (i) transfer of a company's pension liability does not change either the nature or the content of those employees' pension rights; (ii) from the pensioners' point of view, the only change is in the entity that pays the benefits; (iii) in the case of the telecommunications company, the average pension scheme (a public pension scheme based on the former employee's wages) of which the pensioners are members has not changed; it is still part of the General Pension Scheme and is administered by Colpensiones; (iv) the pension transfer carried out by the telecommunications company also entails the establishment of a life annuity with an insurance company in order to ensure the lifelong income to which the pension rights of the company's former employees entitle them; (v) after the transfer, the insurance company will pay pensions under the same terms as those formerly practised by the telecommunications company through a life annuity that preserves pensioners' rights and maintains the current level of services; and (vi) thus, the telecommunications company has not undermined pension rights or unilaterally chosen a pension scheme since the pension transfer has no impact on former employees' right to the average premium pension handled by the General Pension Scheme, which is still compatible with the conventional pension that was transferred.

292. The Government then makes its own observations on the pension transfer carried out by the telecommunications company, stating that: (i) the law allows any companies with a pension liability to make voluntary use of the lawful mechanisms for standardizing this liability, and to choose the company to which they will transfer it without the need for the pensioners' or former employees' consent; (ii) it is for the employer to choose the entity with which the transfer will be carried out, which may be the Social Security Institute (now Colpensiones), an insurance company through a life annuity, or a pension fund administrator through programmed retirement; (iii) the pension transfer does not change either the nature of the pensions or the content of the pensioners' rights, but only the entity that pays the benefits;

(iv) it was perfectly legal for the telecommunications company to choose the option of a life annuity through an insurance company; and (v) the insurance company will make lifelong monthly payments to pensioners under the terms originally practised by the telecommunications company in awarding retirement pensions.

The Committee's conclusions

293. *The Committee observes that this case concerns allegations that the clauses of a collective enterprise agreement in the oil sector that provide for an old-age pension have not been implemented since 31 July 2010, and that the pension scheme for former employees of a company in the telecommunications sector has been changed unilaterally in violation of the collective enterprise agreement.*

Failure to award new conventional retirement pensions in a company in the oil sector as from 31 July 2010

294. *With regard to the first element of this case, the Committee first notes that, according to the complainants, (i) since 31 August 2010, Ecopetrol SA (hereinafter "the oil company") and the public authorities have refused to award conventional pensions to employees who have recently met the pension requirements established in the collective enterprise agreement; (ii) however, the company has substantial funds that ensure the sustainability of the conventional pension and the money deposited in this fund constitutes a parafiscal contribution that belongs neither to the employer nor to the State; (iii) the failure to award conventional pensions is based on Legislative Act No. 1 (2005), which excludes old-age pensions from the scope of collective bargaining and provides that conventional clauses concerning such pensions shall be null and void as from 31 July 2010; (iv) application of the Legislative Act constitutes a direct violation of the provisions of the company's collective agreement, signed in 2009 and in force until 2014, article 109 of which states that the company shall continue to award the lawful lifelong retirement or old-age pension – equivalent to 75 per cent of the average wage earned during the last year of service – to employees who meet the criteria established in that article; (v) violation of the pension clause of an agreement currently in force is a clear violation of ILO Convention No. 98 and of the recommendations made by the Committee on Freedom of Association in Case No. 2434 with regard to Legislative Act No. 1 (2005) and undermines the rights acquired by employees through collective bargaining; and (vi) pursuant to Convention No. 98, and as requested by the Committee on Freedom of Association, the State has a duty to promote an agreed solution to this dispute.*

295. *The Committee also takes note of the Government's statement that: (i) the oil company's failure to award new conventional pensions as from 31 July 2010 is fully consistent with the provisions of Legislative Act No. 1 (2005) amending article 48 of Colombia's Constitution, and with the relevant case law of the Supreme Court and the Constitutional Court; (ii) pursuant to the aforementioned Legislative Act, pension benefits established in collective agreements signed prior to the entry into force of the amendment to the Constitution remained in force until the end of the term originally agreed, or of the period of their extension as provided in article 478 of the Labour Code, but not beyond 31 July 2010, when they became null and void; (iii) accords, agreements or awards signed after the entry into force of the Legislative Act may not establish more favourable pension conditions than those provided by law; (iv) the aforementioned provisions had no impact on the acquired rights of pensioners or the legitimate expectations of individuals who would soon meet the conventional criteria for retirement since they were given five years as from the entry into force of the Legislative Act in which to meet those criteria and avail themselves of the conventional pension scheme; and (v) the ILO Conventions on freedom of association and collective bargaining that Colombia has ratified are not being disregarded since these*

Conventions do not prevent domestic law from being adjusted in order to ensure the financial health and equity of the pension scheme.

- 296.** *In light of the foregoing, the Committee observes that this complaint concerns, first, a company's failure to award new conventional pensions as from 31 August 2010 although the collective agreement that it signed in 2009, which remained in force until 2014, included clauses establishing its former employees' right to a pension. The Committee also observes that the failure to award conventional pensions arises from the application of Legislative Act No. 1 (2005), pursuant to which accords, agreements or awards signed after the entry into force of the Legislative Act may not establish more favourable pension conditions than those provided by law. On this point, the Committee recalls, that, as noted by the complainants and the Government, it had occasion to rule on the compatibility of the aforementioned Legislative Act with the principles of freedom of association and collective bargaining in Case No. 2434 and, on that occasion, made the following recommendations: (i) with regard to agreements concluded prior to the entry into force of the legislation, the Committee requested the Government to adopt the necessary measures to ensure that collective agreements containing pensions clauses, which were valid beyond 31 July 2010, remained in effect until their expiry date; (ii) with regard to agreements concluded after the entry into force of Legislative Act No. 1 (2005), it requested the Government, in view of the particular circumstances of this case and in order to ensure harmonious industrial relations in the country, to hold new in-depth consultations on retirement and pensions, exclusively with the social partners, in order to find a solution acceptable to all the parties concerned in accordance with the Conventions on freedom of association and collective bargaining ratified by Colombia, in particular ensuring that the parties involved in collective bargaining could improve the legal provisions on retirement and pension schemes by mutual agreement [see Report No. 349, March 2008, para. 671].*
- 297.** *Observing that the failure to implement the pension clauses in the agreement signed by the USO and the oil company arises directly from the application of Legislative Act No. 1 (2005), the Committee reaffirms the full validity of its recommendations in Case No. 2434. Recalling that the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of principles of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 925], the Committee requests the Government, in consultation with the social partners, to assess the reforms needed in order to ensure that the existence of a general mandatory pension scheme and the objective of its financial health are compatible with respect to the principle of collective bargaining on pensions.*

Transfer of pensions by a company in the telecommunications sector

- 298.** *With regard to the second element of this case, the Committee notes that, according to the complainants: (i) since 1972, the collective agreements of the Bogotá Telecommunications company (hereinafter "the telecommunications company") have made provision for the award of a conventional pension; (ii) although, pursuant to Legislative Act No. 1 (2005), no new conventional pensions have been awarded since 31 July 2010, those awarded prior to that date are still being paid; (iii) a fund, which currently contains COP1,375 billion, ensures the sustainability of the aforementioned conventional pension and enables the company to pay pensions awarded prior to 31 July 2010 directly; (iv) in November 2012, with authorization from the Ministry of Labour but without the consent of the pensioners or their representative organizations, the telecommunications company carried out a "pension transfer" to an insurance company; (v) thus, the funds allocated for payment of the conventional pensions were transferred to the insurance company, which will henceforth be responsible for paying the pensions; (vi) however, since the insurance company manages the individual savings scheme, not the average premium scheme with wage-based defined*

benefits, the pension transfer will entail paying pensioners a life annuity; this constitutes a change in the pension scheme that violates the provisions of the collective agreement; and (vii) consequently, the pension transfer carried out unilaterally by the telecommunications company does not meet the requirement that any decision on pension matters be agreed with the pensioners and their representative organizations, and that any change in a conventional pension be made by agreement between the signatories to the agreement.

- 299.** *The Committee also takes note of the following observations by the telecommunications company and the Government: (i) transfer of a pension liability changes neither the nature nor the content of those employees' pension rights; the only change is in the entity that pays the benefits; (ii) the pension transfer carried out by the company was authorized by the Ministry of Labour in May 2012 and is fully consistent with the legislation in force, which does not require pensioners' consent; (iii) the company nevertheless held two outreach, dissemination and consultation meetings with its trade unions in November 2012; (iv) by law, it is for the employer to choose the entity with which the transfer will be carried out, which may be the Social Security Institute (now Colpensiones), an insurance company through a life annuity, or a pension fund administrator through programmed retirement; (v) it was perfectly legal for the telecommunications company to choose the option of a life annuity through an insurance company; (vi) as a result of the transfer, the insurance company will make monthly payments to pensioners in the form of a life annuity under the terms originally practised by the telecommunications company in awarding retirement pensions; and (vii) the pension transfer has no impact on the right of former employees to the average premium pension handled by the General Pension Scheme, which is still compatible with the conventional pension that has been transferred.*
- 300.** *In light of the foregoing, the Committee notes that the complainant, the Government and the telecommunications company agree that the company has transferred the funds for payment of the old-age pension established in its collective agreement to an insurance company so that the latter could handle payment of a life annuity to pension recipients. The complainants allege that this transfer of responsibility also entails a transfer from the public to the private pension scheme, in violation of the provisions of the collective agreement, and that the decision to carry out the pension transfer should have been taken in consultation with the pensioners and their representative organizations.*
- 301.** *Concerning the allegation that a unilateral change in the pension scheme as a result of the transfer violated the collective agreement, the Committee notes that both the telecommunications company and the Government maintain that the pension transfer entails only a change in the entity that pays pension benefits and in no way alters the pension scheme or the rights of pensioners, which remain unchanged. In particular, the Committee takes note of the company's statement that, even prior to the transfer, its old-age pension entailed payment of a life annuity in addition to the legal old-age pension and that the transfer has no impact on former employees' receipt of the average premium pension handled by the General Pension Scheme. On this point, the Committee would like to recall that mutual respect for the commitment undertaken in collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground [see **Digest**, op. cit., para. 940]. In the specific case under consideration, noting that there are conflicting accounts of the impact of the pension transfer on the pension scheme as applied to the recipients of conventional pensions and the fact that the complainants have not provided concrete evidence of the alleged change in the pension scheme, the Committee does not have sufficient information to determine whether the collective agreement was violated. Under the circumstances, the Committee will not pursue the examination of this allegation.*
- 302.** *Concerning the alleged failure to hold consultations on the pension transfer with the organizations representing the recipients of conventional pensions, including the company's*

two trade unions, the Committee takes note of the Government's statement that by law the transfer of a pension does not require the pensioners' consent and that it is for the employer to choose the entity with which the transfer will be carried out. The Committee also notes that, according to the company, it held two outreach, dissemination and consultation meetings with its trade unions in November 2012.

- 303.** *The Committee recalls that it has often emphasized the importance of holding meaningful consultations with representative workers' and employers' organizations before taking decisions that affect their economic and social interests. In this regard, the Committee considers that the social partners should also be consulted where the employer's decision affects the handling of the old-age pensions of its current and former employees. In the case under consideration, the Committee observes that while the company organized meetings with its trade unions, these meetings were held after the decision to transfer the pensions had been taken. In light of the foregoing and taking into account the consequences that these types of measures may have in the future, the Committee invites the Government to take the necessary measures to ensure that prior consultations with the representative social partners are held before decisions with an impact on the management of employees' old-age pensions are taken at the State or company level.*

The Committee's recommendations

- 304.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government, in consultation with the social partners, to assess the reforms needed in order to ensure that the existence of a general mandatory pension scheme and the objective of its financial health are compatible with respect for the principle of collective bargaining on pensions.*
 - (b) The Committee invites the Government to take the necessary measures to ensure that prior consultations with the representative social partners are held before decisions with an impact on the management of employees' old-age pensions are taken at the State or company level.*

CASE NO. 3097

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

**Complaint against the Government of Colombia
presented by
the National Union of Mining, Petrochemical, Bio-Diesel Fuels
and Energy Industry Workers (SINTRAMIENERGETICA)**

Allegations: The complainant organization reports violations of the right to strike and to engage in collective bargaining by the Ministry of Labour and the Colombian courts in connection with collective disputes in several enterprises in the mining sector

- 305.** The complaint is contained in a communication dated 4 June 2014 from the National Union of Mining, Petrochemical, Bio-Diesel Fuels and Energy Industry Workers (SINTRAMIENERGETICA).
- 306.** The Government sent its observations in a communication dated 22 May 2015.
- 307.** 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), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

First collective dispute

- 308.** The complainant organization alleges, first, the violation of the right to strike and to engage in collective bargaining in connection with a collective dispute that occurred in the Drummond Ltd enterprise. The complainant organization states specifically that: (i) SINTRAMIENERGETICA is the majority trade union in the enterprise, as it has over 50 per cent of the workers in the enterprise as members; (ii) a series of collective labour agreements have been signed between the enterprise and the trade union; (iii) in accordance with the legislation in force, SINTRAMIENERGETICA denounced the existing collective agreement and submitted a new set of claims, the negotiation (direct settlement phase) of which began on 28 May 2013; (iv) the direct settlement phase was extended on 17 June 2013 and ended on 7 July 2013 with no agreement reached; (v) in accordance with the legislation in force, SINTRAMIENERGETICA, as the majority trade union, called a meeting of trade union members to decide whether to declare a strike or to submit the dispute to an arbitration tribunal; (vi) the majority of the trade union members opted to call a strike, which started on 23 July 2013; (vii) on 23 August 2013, a group of 47 non-unionized workers informed the Ministry of Labour that a general meeting of workers from the enterprise would be held on 29, 30 and 31 August 2013, to determine whether to continue with the strike or to settle the dispute through an arbitration tribunal; (viii) despite the fact that SINTRAMIENERGETICA was the sole party to the collective dispute and therefore the only party entitled to end the strike, the Ministry of Labour ordered, by means of Decision No. 3256 of 2013, the establishment of a compulsory arbitration tribunal in the enterprise; (ix) SINTRAMIENERGETICA filed an appeal for the reversal of the decision, which was

rejected by a new decision dated 5 November 2013, and on 9 December 2013, an order was given for a referral to a compulsory arbitration tribunal, which clearly violated the trade union autonomy protected under the ILO Conventions; and (x) despite the fact that the strike was called in conformity with the law, the High Court of Valledupar declared it illegal in a ruling of 19 February 2014, against which SINTRAMIENERGETICA filed an appeal.

Second collective dispute

- 309.** Second, the complainant organization claims that the same enterprise filed a multi-million dollar (US\$6,260,219.28) lawsuit against the National Union of Workers in the Metal Engineering, Machinery, Metallurgical, and Railways Industry and in the Allied Distribution and Transport Sector (SINTRAIME) trade union organization to compensate for the alleged damages incurred during a work stoppage in March 2013. The complainant organization adds that the acts that gave rise to the legal action are a normal part of the relations between workers and employers, and thus the enterprise is using intimidation to discourage the future exercise of collective rights.

Third collective dispute

- 310.** Third, the complainant organization alleges the violation of the right to strike and to engage in collective bargaining, in connection with a collective dispute in the Carbones de La Jagua SA enterprise. In this regard, the complainant organization states specifically that: (i) SINTRAMIENERGETICA is the majority trade union in the enterprise, which is engaged in the mining and agglomeration of coal; (ii) the collective agreement signed by the enterprise and the trade union organization, which expired on 30 April 2012, was denounced by both parties; (iii) as a result of the failure of the parties to reach an agreement during the direct settlement phase, the trade union, in accordance with the legislation in force, voted in favour of calling a strike, which took place in July 2012; (iv) the enterprise initiated legal action, alleging that the work stoppage had been illegal; (v) the place of work, the La Jagua open-pit coal mine, is run by three enterprises owned by Glencore: Carbones de La Jagua SA, which was acquired in 2005; Consorcio Minero Unido SA, which was acquired in 2006; and Carbones El Tesoro SA, which was acquired in 2007; (vi) while, on the date that the legal action was launched, the plaintiff enterprise had stated that the three enterprises did not form a single business entity, shortly afterwards Glencore merged them into one entity; and (vii) the enterprise alleged before the court that the strike had not been conducted peacefully, as the power had been cut off in the enterprise, the access routes to “other enterprises” had been blocked, the workers had taken over the premises of the enterprise in a violent manner, and the workers’ accommodation had been looted.
- 311.** The complainant organization also states that the plaintiff enterprise added that the trade union had breached the physical boundaries between the three enterprises, thus impeding the operations of enterprises that were not involved in the dispute. Nevertheless, SINTRAMIENERGETICA successfully proved that the three mining enterprises worked together, that there were no clear physical boundaries separating them, and that they shared the same administrative and operative staff (including the same head of human resources management), and that therefore it could not be claimed that the three mining enterprises were independent, and it was materially impossible for the work stoppage not to affect the activities of all three enterprises, given the overlap between them. The enterprise also alleged that the trade union organization had refused to accept a contingency plan that would have enabled the fundamental activities of the enterprise to be maintained, despite the fact that SINTRAMIENERGETICA had submitted a corresponding proposal on 27 July 2012, which was not signed by the enterprise.

- 312.** The complainant organization notes that, by means of an order of 27 August 2012, the High Court of Valledupar, after having examined in detail all of the evidence, declared that the strike had been legal. The court found that, even though there had been some tension, which was normal for this type of dispute, the strike had been carried out peacefully and no evidence of the alleged acts had been presented.
- 313.** The complainant organization states that by a ruling of 10 April 2013, the Supreme Court of Justice reversed the lower court's decision and declared that the work stoppage had been illegal. The complainant organization alleges specifically that the Supreme Court of Justice did not carry out a legal analysis of the structure of the single business entity and that it took into account testimonies of alleged acts of violence which had not been deemed valid by the High Court of Valledupar. The complainant organization also alleges that the Supreme Court of Justice carried out a partial and biased analysis of the evidence, in so far as it: (i) prioritized consideration of the sections of statements from which strong tensions could be inferred; (ii) paid little attention to the statements that indicated that the strike had been peaceful; and (iii) failed to recognize the records produced by officials from the Ministry of Labour that formed the basis for the lower court's decision.
- 314.** The complainant organization concludes the presentation of its allegations by stating that the examples described are contrary to trade union autonomy, the right to strike and the promotion of collective bargaining, and thus violate ILO Conventions Nos 87, 98 and 154, which Colombia has ratified.

B. The Government's reply

First collective dispute

- 315.** In a communication dated 22 May 2015, the Government refers, first of all, to the collective dispute between the trade union organization SINTRAMIENERGETICA and the Drummond Ltd. enterprise, and forwards the response from the enterprise. With regard to the claim that the strike action initiated by SINTRAMIENERGETICA was ended through a ballot held by a group of non-unionized workers, the enterprise states that: (i) the decision to stop the strike action and to request a referral to an arbitration tribunal was made by the majority of the workers in the enterprise, and that the enterprise was not directly involved in the ballot; (ii) SINTRAMIENERGETICA demonstrated a lack of good faith throughout the negotiations, as it rejected repeated offers by the enterprise to increase bonuses for signing the collective agreement and to increase wages; (iii) on 6 August 2013, the Deputy Minister of Labour Relations called a meeting between the enterprise and the three trade unions involved in the dispute (SINTRAMIENERGETICA, SINTRADRUMMOND and AGRETRITRENES), and SINTRAMIENERGETICA declined to attend the meeting; (iv) the complainant organization does not explain why the decision by the majority of workers from the enterprise to refer the dispute to the arbitration tribunal violated ILO Conventions Nos 87 and 98, nor does it question the ballot process. From a more general perspective, the enterprise considers that the referral to the arbitration tribunal was not contrary to the principles of freedom of association and collective bargaining, given that it was not imposed by the administrative authorities or by the employer, but rather was the result of a democratic decision by the workers, and this solution was accepted rather than questioned by the enterprise.
- 316.** The enterprise refers secondly to the declaration that the strike carried out by SINTRAMIENERGETICA from 23 July to 13 September 2013 was illegal. The enterprise states that the non-peaceful nature of the work stoppage, particularly on the day on which the workers of the enterprise voted on whether to continue with the strike action, was the reason for the decisions of both the High Court of Valledupar and the Supreme Court of

Justice, which were founded on, inter alia, the recommendations of the Committee on Freedom of Association.

- 317.** The Government goes on to provide its own observations on the dispute between the first enterprise and SINTRAMIENERGETICA. It indicates that, as a result of the failure to achieve consensus on the signing of a new collective agreement, the workers of the enterprise opted to call a strike. During the strike, the Ministry of Labour, which had made available its good offices to ensure the continuation of negotiations, was informed by a group of 47 workers that a general meeting of workers would be held to determine whether to pursue the strike action or to request a referral to an arbitration tribunal. The labour inspectorate was able to confirm that the majority of workers were in favour of a referral to an arbitration tribunal, which was established through a decision dated 13 September 2013. The Government also indicates that: (i) such action was in line with article 445.2 of the Substantive Labour Code, according to which “during a strike, the majority of workers at the enterprise or of the general assembly of members of the trade union or unions that together represent more than half of those workers shall determine whether to refer the dispute to an arbitration tribunal”; and (ii) the appeal for the protection of fundamental rights (*tutela*) filed by the trade union organization against the decision of the Ministry of Labour was rejected at first instance and on appeal.

Second collective dispute

- 318.** The Government provides the reply of the enterprise regarding the allegation that the enterprise was taking multi-million dollar (US\$ 6,260,219.28) legal action against SINTRAIME to compensate for the alleged damages incurred during the work stoppage. The enterprise states that: (i) between 14 March and 26 March 2013, SINTRAIME blocked the entrances to several mines owned by the enterprise, as well as the public roads leading to them; (ii) these actions also included intimidation of employees from the enterprise and from subcontractor enterprises who wished to exercise their freedom to work; (iii) this violation of the freedom to work was noted on repeated occasions by the labour inspectorate; (iv) SINTRAIME’s illegal actions caused serious economic losses to the enterprise and undermined the intention of maintaining a relationship of trust between the parties; and (v) in this regard, the legal action initiated by the enterprise is not an act of aggression and does not intend to discourage the exercise of freedom of association.

Third collective dispute

- 319.** With regard to the collective dispute between the SINTRAMIENERGETICA trade union organization and the Carbones de La Jagua SA. enterprise, the Government forwards the reply from the enterprise, which states that: (i) the strike called by SINTRAMIENERGETICA in July 2012 was declared illegal on the grounds that acts of violence were carried out during the work stoppage and the enterprise was occupied, which violated the provisions of the Substantive Labour Code and impeded the implementation of a contingency plan to ensure safety on the premises; (ii) the violence exercised by the striking workers affected not only the enterprise but also third parties that were not involved in the dispute; (iii) in a report dated 15 August 2012, the Labour Inspectorate of Curumani noted the aggressive behaviour of the branch president of SINTRAMIENERGETICA; (iv) the trade union organizations of Colombia had been claiming for many years that the courts are responsible for declaring a strike illegal, which means accepting court decisions that do not favour the interests of trade unions; and (v) the ruling of the Supreme Court has been subject to two appeals for the protection of fundamental rights (*tutela*) filed before the Criminal Appeals Chamber of the Supreme Court of Justice and the District Council of the Judiciary.

320. The Government then provides its own observations regarding the dispute, stating that the decision of the High Court of Valledupar which recognized the legality of the work stoppage carried out by SINTRAMIENERGETICA was reversed by the Supreme Court of Justice through a ruling of 10 April 2013, and that that ruling was based on the fact that acts of violence were committed during the strike, in accordance with the principles of the Committee on Freedom of Association.

The Committee's conclusions

321. *The Committee observes that, in this case, the complainant organization alleges that the Ministry of Labour and the Colombian courts violated the right to strike and to engage in collective bargaining in the context of three collective disputes in the mining sector.*

First collective dispute

322. *The Committee notes that the complainant organization refers first of all to a collective dispute between the Drummond Ltd enterprise and SINTRAMIENERGETICA, in which the trade union organization, which is the majority union in the enterprise, decided, in response to the lack of agreement over the renegotiation of the enterprise's collective agreement, to call a strike, which began on 23 July 2013. The complainant organization alleges, first, that the Ministry of Labour violated its trade union autonomy and its right to strike by stopping the strike and referring the matter to an arbitration tribunal after 47 non-unionized workers held a general meeting on 23 August 2013, of all the workers in the enterprise, who voted in favour of ending the strike and referral to an arbitration tribunal. The complainant organization states that, given that the strike was called by SINTRAMIENERGETICA, it was the sole party to the dispute and thus the only party entitled to end the work stoppage.*
323. *In this regard, the Committee notes the concurring replies from the enterprise and the Government, in which they state that: (i) under Colombian legislation (article 444.2 of the Substantive Labour Code), a strike may be declared either by the majority trade union organizations (through a vote by an assembly of their members) or the absolute majority of the workforce in an enterprise; (ii) similarly, the Substantive Labour Code (articles 445.2 and 448) establishes that both the majority trade union organization and the majority of the workforce of an enterprise can end the strike action while it is under way and request the referral to an arbitration tribunal; (iii) the complainant organization has not alleged that the ballot held by all of the workers of the enterprise gave rise to irregularities; and (iv) the appointment of an arbitration tribunal in this case was fully in line with legal provisions, as demonstrated by the court rulings that rejected the union's appeal for the protection of fundamental rights (tutela).*
324. *Regarding the first allegation, the Committee notes that the complainant organization, the enterprise and the Government agree on the sequence of events and that the regularity of the vote by the majority of the workers to end the strike action was not questioned by the complainant organization. The Committee observes, however, that this first aspect of the complaint involves determining whether or not the fact that a vote by all of the workers in the enterprise ended the strike called by SINTRAMIENERGETICA is contrary to the principles of freedom of association. The Committee notes that, under Colombian legislation: (i) both a majority trade union organization and an absolute majority of the workforce in an enterprise may call a strike (article 444.2 of the Substantive Labour Code) and also end a strike that is under way, as well as request the appointment of an arbitration tribunal (articles 445.2 and 448 of the Substantive Labour Code); and (ii) the declaration of a strike has an effect – in particular the suspension of employment contracts – on all workers, regardless of whether they are members of a trade union, or whether they have voted in favour of the strike (article 448.2 of the Substantive Labour Code). In these specific*

circumstances, the Committee considers that the majority vote in favour of putting an end to strike action and regulating the appointment of an arbitration tribunal, is not contrary to the principles of freedom of association.

- 325.** *In the context of the same collective dispute, the Committee notes the complainant organization's allegation that the Colombian courts violated Convention No. 87 and the principles of freedom of association by declaring illegal the strike action initiated by SINTRAMIENERGETICA on 23 July 2013. The Committee notes in this regard that the enterprise states that both the High Court of Valledupar and the Supreme Court of Justice declared the strike illegal on the grounds that acts of violence were committed during the work stoppage. Observing that the complainant organization does not indicate in what manner those rulings violated the principles of freedom of association, the Committee will not pursue its examination of this allegation.*

Second collective dispute

- 326.** *The Committee notes the complainant organization's allegation that the Drummond Ltd enterprise is taking multi-million dollar legal action (US\$6,260,219.28) against SINTRAIME seeking compensation for the alleged losses incurred during a work stoppage carried out in March 2013. The Committee also notes that the complainant organization adds that the acts that gave rise to the legal action are a normal part of the relations between workers and employers, and that the enterprise therefore intended to use intimidation to discourage the future exercise of collective rights. The Committee also notes the reply from the enterprise, forwarded by the Government, according to which, between 14 and 26 March 2013, SINTRAIME carried out a work stoppage during which it conducted acts of intimidation and blocked transportation routes, thus violating the freedom to work of employees from the enterprise and the subcontractor enterprises, and causing serious economic losses to the enterprise. Noting that the Government has not provided its observations on this allegation, and emphasizing that the penalties imposed in cases of abusive strikes should not discourage the legitimate exercise of trade union rights, the Committee requests the Government to keep it informed of developments in the legal action initiated by the enterprise against SINTRAIME.*

Third collective dispute

- 327.** *The Committee notes that the complainant organization refers lastly to the declaration by the Supreme Court of Justice that the strike carried out by SINTRAMIENERGETICA in July 2012 in the Carbones de La Jagua SA enterprise was illegal. The Committee particularly notes that the complainant organization alleges that: (i) unlike the High Court of Valledupar, which had found the strike to be peaceful and declared it legal, the Supreme Court of Justice had examined the available testimonies in a partial and biased manner and concluded that the strike had not been carried out peacefully; and (ii) the Supreme Court of Justice had not taken into account reports of officials from the Ministry of Labour who were present at the time of the events, which attested to the peaceful nature of the strike.*
- 328.** *The Committee also notes that the Government and the enterprise both indicate that the ruling by the Supreme Court of Justice which reversed the decision by the High Court of Valledupar and declared the strike illegal was issued, in accordance with the principles of the Committee on Freedom of Association, on the grounds that several acts of violence had been committed at the beginning of the strike and the workplace had been illegally occupied throughout the work stoppage. The Committee notes lastly that the ruling by the Supreme Court of Justice was subject to two appeals for the protection of fundamental rights (tutela) before the Criminal Appeals Chamber of the Supreme Court of Justice and the District Council of the Judiciary.*

- 329.** *Based on the text of the rulings of the court of first instance and the Supreme Court provided by both the complainant organization and the Government, the Committee notes firstly that the High Court of Valledupar found, primarily on the basis of the inspection reports of the labour inspectorate, that: (i) the work stoppage had been conducted peacefully; (ii) even though there had been arguments and situations of tension at the start of the strike, such occurrences were normal, as strikes were a tool used to exert pressure which could lead to this type of confrontation; (iii) the presence of some workers on the mine premises did not make the strike illegal, as the entry of management staff had not been impeded, no acts of aggression had been instigated by the trade union, and the presence of workers had allowed for the enterprise premises to be protected in the absence of agreement on a contingency plan. The Committee further observes that the Supreme Court of Justice considered that: (i) its analysis had to be based on articles 446 and 450(f) of the Substantive Labour Code, pursuant to which strikes must be carried out in an orderly and peaceful manner, and any collective suspension of work that is not peaceful is illegal; (ii) contrary to the finding of the High Court of Valledupar, the testimonies of two workers from the enterprise had to be taken into account, as they did not hold management posts or positions of trust; (iii) the fact that the work stoppage was carried out in a normal and peaceful manner as from its second day does not excuse certain acts of violence that occurred on the first day; and (iv) the enterprise premises were illegally occupied by unionized workers throughout the work stoppage, and therefore the strike called by SINTRAMIENERGETICA had not simply been a peaceful suspension of work and had to be declared illegal.*
- 330.** *The Committee observes that the way in which the strike developed in the enterprise was considered differently by the labour inspectorate and the different courts involved, and that two appeals for the protection of fundamental rights (tutela) relating to the case are still pending before the Criminal Appeals Chamber of the Supreme Court of Justice and the District Council of the Judiciary. The Committee requests the Government to keep it informed of the outcome of the aforementioned appeals for the protection of fundamental rights (tutela).*

The Committee's recommendations

- 331.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The first collective dispute does not call for further examination.*
 - (b) With respect to the second collective dispute, the Committee requests the Government to keep it informed of developments in the legal action taken by the enterprise against SINTRAIME.*
 - (c) With respect to the third collective dispute, the Committee requests the Government to keep it informed of the two appeals for the protection of fundamental rights (tutela) pending before the Criminal Appeals Chamber of the Supreme Court of Justice and the District Council of the Judiciary in relation to the strike carried out by SINTRAMIENERGETICA.*

CASE NO. 3067

INTERIM REPORT

Complaint against the Government of the Democratic Republic of the Congo
presented by

- **the Congolese Labour Confederation (CCT)**
- **the Espoir Union (ESPOIR)**
- **the National Union of Teachers in Catholic Schools (SYNECAT)**
- **the Union of State Officials and Civil Servants (SYAPE)**
- **the National Trade Union of Mobilization of Officials and Civil Servants of the Congolese State (SYNAMAPEC)**
- **the Union of Workers - State Officials and Civil Servants (UTAFE)**
- **the National Union of Officials and Civil Servants in the Agri-rural Sector (SYNAFAR)**
- **the General Trade Union of the State and Para-State Finance Administration, and Banks (SYGEMIFIN)**
- **the Trade Union of Workers of the Congo (SYNTRACO)**
- **the State Civil Servants and Public Officials Trade Union (SYFAP) and**
- **the National Board of State Officials and Civil Servants (DINAFET)**

Allegations: The complainants denounce Government interference in trade union elections in the public administration, intimidation, and the suspension and detention of union officials at the instigation of the Ministry of Public Service

- 332.** The Committee last examined this case, brought by sixteen public service unions, during its meeting in November 2015 and on that occasion presented an interim report to the Governing Body [see 376th Report, approved by the Governing Body at its 325th Session (November 2015), paras 928–956].
- 333.** The Union of State Officials and Civil Servants (SYAPE) provided additional information in a communication dated 11 August 2016.
- 334.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case on two occasions. At its meeting in June 2016 [see 379th Report, para. 9], the Committee expressed regret at the Government's persistent non-cooperation and launched an urgent appeal to the Government indicating that a report would be presented on the substance of the matter at its next meeting, even if the information or observations requested had not been received on time. In addition, a Government delegation had met with the two Vice-Chairpersons and the coordinator of the Government members of the Committee in order to address the Government's lack of response and how it could be resolved. To date, the Government has not sent any information.
- 335.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

336. During its previous examination of the case in November 2010, the Committee made the following recommendations [see 376th Report, para. 956]:

- (a) The Committee regrets that the Government has not replied to the complainants' allegations, despite being requested several times, including through an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.
- (b) The Committee urges the Government to take without delay the necessary steps related to the contested 2013 decrees adopted by the Ministry of Public Service in order to review them in consultation with the relevant workers' organizations. The Committee requests the Government to keep it informed in this regard.
- (c) The Committee urges the Government, in addition to reviewing the 2013 decrees, to hold, without delay, consultations with all the relevant representative workers' organizations, particularly the INSP and the SIAP, on ways of representing workers' interests in terms of collective bargaining in public administration. The Committee requests the Government to keep it informed in this regard.
- (d) The Committee requests the Government to provide the INAP's founding document and the handover document between the INSP and the INAP and to report its observations on the matter.
- (e) The Committee expects the Government to issue immediate instructions so that trade union members who are exercising their rightful trade union duties in public administration cannot be subjected to prejudice in the workplace and so that those responsible for these acts are punished. Furthermore, the Committee urges the Government to conduct investigations on the aforementioned disciplinary action cases against trade union leaders in order to determine if they were punished for carrying out the lawful exercise of their trade union activities and, if appropriate, to award compensation that sufficiently discourages further disciplinary action.
- (f) Noting that Mr Muhimanyi and Mr Endole Yalele filed a complaint before the appeals court for the violation of the legal time limit for concluding a disciplinary case, the Committee urges the Government to keep it informed of the result of this complaint.
- (g) The Committee urges the Government to conduct without delay an investigation into the circumstances behind the arrest and detention of trade union leaders in July 2013 and November 2014 and to keep it informed of the findings and follow-up action.
- (h) The Committee urges the Government to keep it informed of the status of the complaint filed by Mr Modeste Kayombo-Rashidi with the Kinshasa/Gombe prosecution authorities against Mr Constant Lueteta, INAP Secretary, for having made death threats.
- (i) The Committee urges the Government to inform it of the follow-up given to the administrative and judicial appeals brought by the complainants.

B. Additional information from the complainants

337. In a communication dated 24 May 2016, the complainant organizations, grouped under the Independent Trade Unions of the Public Administration (SIAP), report that the situation has remained unchanged since the Committee's recommendations. Additionally, the complainant organizations reported reprisals against certain trade union leaders and members, in particular the dismissal of Mr Nkungi Masewu, President of Union of State Officials and Civil Servants (SYAPE), and Mr Embusa Endole, President of the Espoir union, as well as disciplinary action against Mr Gongwaka, Mr Kaleba and Mr Kalambay.

338. Furthermore, recalling that the latest disputed elections were for the central services, the complainant organizations report ongoing consultations in which the administration had decided to work exclusively with the National Public Administration Inter-union

Association (INAP) to organize elections in other public administration bodies (such as education, health and related services in some public administrations), including in the provinces.

339. In a communication dated 11 August 2016, the SYAPE reports disciplinary measures, including dismissal from the public service, against several trade union leaders in reprisal for sending open letters to the Government. According to the SYAPE, the Minister of the Public Service requested the Secretary-General of the Public Service responsible for personnel matters to initiate disciplinary action against the trade union leaders who had signed the two open letters addressed to the Prime Minister in January and February 2014. The SYAPE indicates that its President, Mr Nkungi Masewu, is one of the targeted leaders and that he was informed of his dismissal by the order terminating the employment of managerial level administrative officials in the various ministries (Order No. 16-056 of 3 May 2016), which had been reviewed by the Council of Ministers. The reason for the dismissal was reported to be the use in the letters of defamatory language concerning the Minister of the Public Service.

The Committee's conclusions

340. *The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the recommendations made in November 2015 and a meeting with a Government delegation in June 2016, the Government has to date not provided any reply to or observations on the complainant organizations' allegations or the Committee's recommendations, even though it has been requested to do so several times, including through an urgent appeal. In view of its continuing failure to respond to complaints, the Committee invites the Government, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, to come before the Committee at its next session in March 2017 so that it may obtain detailed information on the steps taken by the Government in relation to the pending cases.*
341. *Under these circumstances, and in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a new report on the substance of the case without being able to take account of the information which it had hoped to receive from the Government.*
342. *The Committee once again reminds the Government that the purpose of the whole procedure instituted by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee is confident that, while the procedure protects governments against unreasonable accusations, they must recognize the importance of formulating, for objective examination, detailed replies concerning the allegations brought against them [see First Report of the Committee, para. 31].*
343. *The Committee notes that this case, presented by sixteen public administration trade unions, concerns the interference, with impunity, of the Government as employer, in trade union activities, particularly intimidation of, and disciplinary measures against trade union officials, and the adoption of contentious regulations concerning the organization of trade union elections in the public administration aimed at the establishment of an inter-union association under the control of the Government as its sole representative.*
344. *The Committee noted with concern that, in a communication dated 24 May 2016, the complainant organizations refer to reprisals against trade union leaders and members following the adoption of the Committee's previous recommendations in November 2015.*

*These include the dismissal of Mr Nkungi Masewu, President of SYAPE, and Mr Embusa Endole, President of the Espoir Union, as well as disciplinary action against Mr Gongwaka, Mr Kaleba and Mr Kalambay, all trade union members. The Committee firmly recalls that trade union leaders should not be subject to retaliatory measures, and in particular arrest and detention, for having exercised their rights which derive from the ratification of ILO instruments on freedom of association, in this case for having lodged a complaint with the Committee on Freedom of Association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 74]. The Committee urges the Government to provide detailed information without delay on the reasons for and the status of the dismissals and disciplinary action against the aforementioned trade union leaders and members.*

- 345.** *In addition, noting with concern the allegations relating to consultations being undertaken between the administration and the INAP alone, regarding holding future elections in those bodies that had not held elections in 2013, the Committee recalls that the development of harmonious industrial relations in the public sector requires respect for the principles of non-interference, the recognition of the most representative organizations and autonomy of the parties to collective bargaining. Therefore, the Committee must express its concern at the latest allegations reporting that the situation has remained unchanged since its previous recommendations. Such a situation is not conducive to peaceful industrial relations. As a result, the Committee must once again urge the Government to undertake consultations with all the relevant representative workers' organizations without delay, including the National Inter-union Body for the Public Sector (INSP) and the SIAP, on ways of representing workers' interests in collective bargaining in the public administration. The Committee requests the Government to keep it informed in this regard.*
- 346.** *The Committee also notes with concern the recent allegations that trade union leaders in the public service have been subjected to disciplinary measures, including dismissal, for having signed two open letters addressed to the Prime Minister in January and February 2014. The President of the SYAPE, Mr Nkungi Masewu, is reported to have been informed of his dismissal by the order terminating the employment of managerial level administrative officials in the various ministries (Order No. 16-056 of 3 May 2016), which had been reviewed by the Council of Ministers. The reason for the dismissal was reported to be the use in the two letters of defamatory language concerning the Minister of the Public Service. The Committee urges the Government to provide detailed information on this subject without delay, including on the reasons given to justify the termination of the President of the SYAPE.*
- 347.** *Finally, deeply regretting the Government's lack of response, the Committee finds itself obliged to refer the Government to its conclusions from its last examination of the case [see 376th Report, paras 943–955] and to recall all of its previous recommendations.*

The Committee's recommendations

- 348.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the recommendations made in November 2015 and a meeting with a Government delegation in June 2016, the Government has to date not provided any reply to or observations on the complainant organizations' allegations or the Committee's recommendations, even though it has been requested to do so several times, including through an urgent appeal. In view of its continuing failure to respond to complaints, the Committee invites the Government, by virtue of its authority as set out in*

paragraph 69 of the Procedures for the examination of complaints alleging violations of freedom of association, to come before the Committee at its next session in March 2017 so that it may obtain detailed information on the steps taken by the Government in relation to the pending cases.

- (b) The Committee urges the Government to take without delay the necessary steps to review the contested 2013 decrees of the Ministry of Public Service in consultation with the relevant workers' organizations. The Committee requests the Government to keep it informed in this regard.*
- (c) The Committee must urge the Government once again to undertake, without delay, consultations with all the representative workers' organizations concerned, including the National Inter-union Body for the Public Sector (INSP) and the Independent Trade Unions of the Public Administration (SIAP), on ways of representing workers' interests in collective bargaining in the public administration. The Committee requests the Government to keep it informed in this regard.*
- (d) The Committee requests the Government to provide the founding document of the INAP and the handover document between the former inter-union association INSP and the INAP and to report its observations on the matter.*
- (e) The Committee expects the Government to issue immediate instructions so that trade union members who are exercising their rightful trade union duties in public administration cannot be subjected to prejudice in the workplace and so that those responsible for these acts are punished. Furthermore, the Committee urges the Government to conduct investigations on the aforementioned disciplinary action cases against trade union leaders in order to determine if they were punished for lawfully exercising their trade union activities and, if appropriate, to award compensation that sufficiently discourages further disciplinary action.*
- (f) Noting that Mr Muhimanyi and Mr Endole Yalele filed a complaint before the appeals court for the violation of the legal time limit for concluding a disciplinary case, the Committee urges the Government to keep it informed of the result of this complaint.*
- (g) The Committee urges the Government to conduct without delay an investigation into the circumstances behind the arrest and detention of trade union leaders in July 2013 and November 2014 and to keep it informed of the findings and follow-up action.*
- (h) The Committee urges the Government to keep it informed of the status of the complaint filed by Mr Modeste Kayombo-Rashidi with the Kinshasa/Gombe prosecution authorities against Mr Constant Lueteta, INAP Secretary, for having made death threats.*
- (i) The Committee urges the Government to inform it of the follow-up given to the administrative and judicial appeals brought by the complainants.*
- (j) Firmly recalling that trade union leaders should not be subject to retaliatory measures, in particular arrest and detention, for having exercised their rights*

which derive from the ratification of ILO instruments on freedom of association, in this case for having lodged a complaint with the Committee on Freedom of Association, the Committee urges the Government to provide detailed information without delay on the reasons for and the status of the dismissals and disciplinary action against the following trade union leaders and members: Mr Nkungi Masewu, President of SYAPE; Mr Embusa Endole, President of the Espoir Union; Mr Gongwaka, trade union leader; Mr Kaleba, President of the CCT/Finance union committee; and Mr Kalambay, coordinator of COSSA.

- (k) *The Committee urges the Government to provide without delay detailed information in response to the allegations that trade union leaders in the public service have been subjected to disciplinary measures, including dismissal, for having signed two open letters addressed to the Prime Minister in January and February 2014, and particularly on the reasons given to justify the termination in May 2016 of the President of the SYAPE, Mr NKungi Masewa.*

CASE NO. 3138

DEFINITIVE REPORT

Complaint against the Government of the Republic of Korea presented by

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

Allegations: The complainants allege that the Government promotes the revision of collective agreements in force containing clauses it deems illegal or unreasonable

- 349.** The complaint is contained in a joint communication dated 18 June 2015 from the International Trade Union Confederation (ITUC), the Korean Confederation of Trade Unions (KCTU) and the Federation of Korean Trade Unions (FKTU).
- 350.** The Government sent its observations in a communication dated 3 June 2016.
- 351.** 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. The complainants' allegations

- 352.** In their joint communication dated 18 June 2015, the ICTU, KCTU and FKTU allege that on 15 April 2015, the Minister of Employment and Labour announced an official plan to promote the revision of hundreds of collective bargaining agreements (CBAs) currently in force containing clauses that the Government believes are either “illegal” or “unreasonable”. The complainants point out in this respect that trade unions are not contesting the

Government's efforts to eliminate "illegal" clauses, which concern matters such as the hiring of workers through special recruitment schemes, including relatives of trade unionists, and which are being attacked by the Government as infringing upon equal rights guaranteed by the Constitution.

- 353.** With regard to the clauses deemed to be "unreasonable", however, the complainants indicate that the Government has targeted freely negotiated clauses that provide trade unions with a voice in certain decisions of the management, including lay-offs, reshuffling and recruitment. The complainants indicate that according to the Ministry of Employment and Labour (MOEL), 29.4 per cent of 727 surveyed companies need a consent from a union before making a personnel reshuffle, while 17.2 per cent need it to dismiss workers.
- 354.** The complainants indicate that on 20 April 2015, MOEL officials began collecting CBAs from roughly 3,000 companies employing 100 or more workers nationwide with a view to determine whether they contain illegal or unreasonable clauses. According to the complainants, the MOEL plans to urge the management and the unions to voluntarily revise illegal and/or unreasonable clauses in collective agreements by the end of July 2015 and has promised to provide incentives, such as future labour-management partnership support programmes or other benefits, to those who voluntarily revise illegal or unreasonable clauses. The complainants allege that those who fail to review collective agreements by July 2015, will receive a correction order from the MOEL and those who fail to make appropriate revision of illegal clauses will be charged (although no correction orders will be issued for unreasonable clauses as they are not illegal). The MOEL is also planning to provide guidance on collective bargaining so that future collective agreements do not include illegal or unreasonable clauses.
- 355.** The complainants argue that the Government's position that freely negotiated collective bargaining clauses requiring the management to consult with unions on personnel decisions are unreasonable is contrary to the Korean jurisprudence on collective bargaining. The complainants refer to several cases where the Supreme Court considered, regarding provisions requiring unions' consent on disciplinary measures, that if a collective agreement contains clauses to the effect "that measures of personnel affairs taken for union officials should be agreed by the union", any disciplinary measures taken without such agreement is in principle invalid.
- 356.** The complainants point out that it is a bedrock principle of collective bargaining that governments should not intervene to alter the content of collective agreements and refer in this respect to paragraph 215 of the 2012 General Survey of the Committee of Experts on the Application of Conventions and Recommendations, paragraphs 881, 912, 913 and 1001 of the *Digest of decisions and principles of the Freedom of Association Committee*, fifth (revised) edition, 2006, as well as to the following cases examined by the Committee: Nos 1897 (Japan), 1951 (Canada), 2178 (Denmark), and 2326 (Australia).
- 357.** The complainants conclude by stating that executive or legislative measures to limit the scope of collective bargaining are contrary to Convention No. 98. The complainants consider that in the present case, the Government is engaging in a public campaign to remove clauses that even the courts of the Republic of Korea have found to be legitimate subjects of bargaining. Regarding the so-called unreasonable clauses, the Government is offering incentives to encourage businesses to pressure unions to accept the modifications. The complainant considers that by urging employers not to agree to certain terms, the Government weakens the power of one party in the industrial relations system, which is an unlawful interference in free collective bargaining between the parties. The announced plan will affect upcoming negotiations at workplaces, will destroy the principle of autonomous industrial relations and threaten industrial peace.

B. The Government's reply

- 358.** In its communication dated 3 June 2016, the Government of the Republic of Korea explains that in the Republic of Korea, fundamental labour rights, workers' rights to association, collective bargaining, and collective action are guaranteed under the Constitution and law. Pursuant to article 33.1 of the Constitution, "to enhance working conditions, workers shall have the right to independent association, collective bargaining, and collective action". The law based on this provision, the Trade Union and Labor Relations Adjustment Act (TULRAA), guarantees fundamental labour rights: workers may freely establish trade unions (right to association); trade unions may bargain collectively with the management on workers' working conditions as long as it does not violate the law (right to collective bargaining); and workers may engage in collective action, including strikes, after going through the mediation process, if collective bargaining efforts have failed (right to collective action). Section 30 of the TULRAA guarantees the principle of autonomous bargaining: "a trade union and an employer or employers' association shall bargain and make a collective agreement with each other in good faith and sincerity and shall not abuse their authority".
- 359.** The Government emphasizes that it respects the validity of CBAs and believes that the parties may freely bargain and conclude a collective agreement on any matter they decide, including wages, working hours and other working conditions. However, freely negotiated CBAs should not violate the Constitution and the legislation in force. In this respect, section 31.3 of the TULRAA provides that the administrative authorities may issue a corrective order following the resolution made by the Labour Relations Commission regarding any unlawful provision in the CBA. Regarding the "illegal" clauses, the Government considers, for example, that CBA clauses on the preferential or special recruitment of union members' children are illegal as they are contrary to the "principle of equality" enshrined in the Constitution and violate section 7 of the Framework Act on Employment Policy and the Employment Security Act, which guarantees equal employment opportunity. It further considers that a "single bargaining union clause" is also illegal as it is designed to prohibit the employer from bargaining with unions other than the other party in the CBA, which would be in violation of the guaranteed freedom to establish unions. In addition, any CBA which fails to meet statutory working conditions is illegal. For example, a CBA that provides that workers with a child aged "six or younger" are eligible for childcare leave would be illegal as the relevant law has been revised to include workers with a child aged "eight or younger". Thus, all illegal clauses should be revised and it is the duty of the union and the management to do so and it is the Government's duty, through an appropriate order pursuant to section 31.3 of the TULRAA, to lead the parties to make appropriate corrections. An aggrieved party may file an administrative complaint against a correction order.
- 360.** The Government indicates that in 2014, it commissioned the Korea Labour Institute to conduct a fact-finding survey on CBAs. The survey found that 47.0 per cent of the CBAs studied violated the Constitution by providing for a single bargaining union even after pluralism had been introduced; 30.4 per cent contained clauses on special employment for the children of retirees, violating the provision which guarantees fair employment opportunities under the Framework Act on Employment Policy; and 24.9 per cent of the CBAs surveyed were found to include clauses banning any reassignment and transfer of union members without the consent of their union.
- 361.** The Government indicates that the Supreme Court has ruled that while highly important management decisions are not subject to collective bargaining in principle, the social partners may bargain collectively and conclude collective agreements on any matter at their discretion, including those concerning management rights. The Supreme Court has also ruled that:

- Whether to restructure a company through lay-offs or mergers between business teams, for example, is a matter deemed highly important managerial decisions and, thus, not subject to collective bargaining in principle; however, even a matter within the employer's management rights can be subject to collective bargaining and collective agreement by labour and management at their discretion (Supreme Court Decision 2011DU20406, etc.).
- If there is a clause in a CBA requiring the employer to have an "agreement" with a trade union on matters within management rights and, thus, beyond the scope of collective bargaining, that single clause should not be interpreted as the employer giving up a part of his/her management rights or having them significantly restricted; and the meaning of the "agreement" stated in the clause should be interpreted under a comprehensive examination to see if the trade union also shares management responsibilities, based on the principle that rights come with responsibilities, as well as on all the details and circumstances that led to signing such a CBA and the clause's relationship with other clauses of the CBA (Supreme Court Decision, 2010D011030, etc.).
- In principle, any personnel decisions made without the approval process stipulated in the CBA are invalid. This, however, is to restrict unfair disciplinary measures against union officials, not to deny the employer's right to take disciplinary measures, one of employers' fundamental rights. This, thus, does not mean that the union's approval is required in any case for the employer to exert the right to take disciplinary measures (Supreme Court, delivered on 10 June 2003, 2001Du3136 Decision).

362. The Government believes that the only thing it can do against any CBA infringing on fundamental rights of the management under Korean law is to recommend or persuade the parties to autonomously improve the CBA; it is impossible for the Government to force them. It also points out that while the Committee on Freedom of Association has emphasized the principle of voluntary bargaining, it has also concluded that if the Government wants clauses in a CBA to be consistent with domestic economic policies, it may persuade the parties concerned to voluntarily consider renegotiating the CBA, without forcing them and refers in this respect to paras 933 and 1008 of the *Digest*, op. cit. Furthermore, the Government underlines that the complainants also agree that any illegal clauses, i.e. those that are contrary to the Constitution or law, should be corrected.

363. The Government considers that the complainants describe its position inaccurately and explains in this respect its view that CBAs should be respected, in principle, unless their content is illegal. The Government further explains that it is not accurate to suggest that the Government negates the CBA clauses pursuant to which "any disciplinary measures taken against union officials should be agreed to by the trade union". The Government argues that to the contrary, if an employer who had signed such a CBA takes disciplinary measures against a union official without any prior consent from the union, such disciplinary measures are clearly invalid. However, according to the Government, some Korean unions always oppose and obstruct employers in exercising their personnel administration and business management rights, even legitimate ones. For instance, some unions are prone to oppose any disciplinary measure, even when the employer tries to fully consult with unions and has a clear rationale for taking disciplinary measures, such as the court's confirmation of a penalty levied against a union official for an illegal act he or she had committed. In this case, if the employer had not been allowed to take disciplinary action without unions' consent, there would be no way for the employer to exercise his/her personnel administration rights. This is a matter of concern to the Government, as CBAs with such a clause may not only cause inefficient human resources management but also put companies' survival at risk.

- 364.** The Government points out that trade unions may intervene with the employer's personnel administration and business management rights in a number of ways: unions may require the employer to consult with them on matters of personnel administration (e.g. disciplinary measures, job transfer, and the reassignment of union officials or members) or matters of business management rights (e.g. whether to relocate a factory and whether to adopt a new technology); and unions may block the employer from exercising personnel administration and business management rights without their prior consent. Thus the Government believes that the scope of union intervention can be decided under CBAs without infringing on employers' management rights regarding personnel administration and business. This is because such rights may have to do with the employees' working conditions. For example, if a factory is relocated to another region, the employees need money for relocation and measures to help them settle into the new location. In this case, the Government believes that the employer needs to fully consult with the union or the employees, and exercise its management rights after full consultation with the union so as to build reasonable labour-management relations.
- 365.** To conclude, the Government is of the opinion that the social partners would be well advised to improve CBAs containing unreasonable clauses through voluntary bargaining. This is why the Government has been encouraging and persuading social partners to do so, believing that it would benefit both parties and help them to achieve reasonable industrial relations for their mutual growth. The Government does not consider it illegal to require an employer to have an advance consultation with unions before exercising personnel administration and business management rights; rather the Government promotes consultation in accordance with the Act on the Promotion of Worker Participation and Cooperation. The Government indicates that the national legislation and judicial precedents, as well as ILO Conventions, show that the essence of personnel administration and business management rights cannot be undermined by a CBA clause restricting them. The Government believes that it may advise and persuade social partners to improve their CBAs through voluntary bargaining, not by force, in a mutually beneficial manner. In the Government's opinion, this is not contrary to Convention No. 98.

The Committee's conclusions

- 366.** *The Committee notes that the complainants in this case allege that the Government promotes the revision of collective agreements containing clauses it deems "illegal" or "unreasonable".*
- 367.** *The Committee understands from the explanation provided by the Government and the complainants that "illegal" clauses are clauses which are contrary to the national legislation in force. It further notes the complainants' indication that trade unions are not contesting the Government's efforts to eliminate such clauses.*
- 368.** *Regarding the so-called "unreasonable" clauses, the Committee notes that these are clauses which impact upon certain managerial rights and in particular those which impose an obligation on the employer to consult and obtain an agreement of the union on matters such as disciplinary measures imposed on a worker, dismissals, lay-offs, company relocation, etc. The Committee notes that on the one hand, the Government considers that any freely negotiated collective agreement provisions, even those limiting managerial prerogatives, are binding and must be complied with. On the other hand, the Government considers that such provisions are unreasonable because, in its view, they could lead to situations where the managers cannot duly exercise their managerial rights, for example in a situation where a union evades being consulted or does not give its agreement on a dismissal even in situations where the fault of the worker has been clearly demonstrated. The Government considers that such provisions therefore not only put at risk efficient management of a company but can also put the company's survival at risk.*

369. *Regarding the argument put forward by the Government, the Committee understands that its concern is not the existence of such a provision itself but rather its application in practice and recalls that mutual respect for the commitment undertaken in collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground [see **Digest**, op. cit., para. 940]. That is to say that a union, party to a collective agreement containing a clause requiring its approval of a disciplinary measure to be taken against a trade unionist, should be consulted in accordance with the relevant provisions and in line with the interpretation given by the competent court in the event of disagreement. The Committee notes that, as explained by the Government, the Supreme Court of the Republic of Korea appears to have dealt with several cases by striking a balance between the protection of trade unionists against unfair disciplinary measures and the managers' right to take such measures and that there is an established jurisprudence in this regard.*

370. *The Committee notes the Government's indication that it does not require the social parties to renegotiate the agreement, but rather advises them and tries to persuade them to do so on a voluntarily basis. The Committee notes the complainants' allegation, not refuted by the Government, that the latter uses various incentives to that end. The Committee notes the Government's view that its actions do not infringe upon the principle of free and voluntary bargaining, which the latter justifies by referring to the following paragraphs of the **Digest**, op. cit.:*

933. Certain rules and practices can facilitate negotiations and help to promote collective bargaining and various arrangements may facilitate the parties' access to certain information concerning, for example, the economic position of their bargaining unit, wages and working conditions in closely related units, or the general economic situation; however, all legislation establishing machinery and procedures for arbitration and conciliation designed to facilitate bargaining between both sides of industry must guarantee the autonomy of parties to collective bargaining. Consequently, instead of entrusting the public authorities with powers to assist actively, even to intervene, in order to put forward their point of view, it would be better to convince the parties to collective bargaining to have regard voluntarily in their negotiations to the major reasons put forward by the government for its economic and social policies of general interest.

...

1008. The suspension or derogation by decree – without the agreement of the parties – of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98. If a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force.

371. *The Committee considers that a distinction must be made between on the one hand, the situation where the Government wishes the clauses of a collective agreement to be brought into line with the economic and social policies of the country, i.e. policies of the general interest, and situations where solely the interests of the parties to the collective agreement are involved. In the latter case, the Committee considers that any attempt to influence the social partners regarding issues which should or should not be covered by collective bargaining so as to favour one of the parties thereto, would run counter to the principle of autonomy of the bargaining partners and recalls in this respect 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 regrets that the Government has apparently offered incentives to achieve changes in collective agreements in areas that should rest within the autonomy of the bargaining partners and requests it to abstain from taking any further such actions. The Committee considers, however, that guidelines on collective bargaining, developed and*

adopted in a tripartite setting, would be an appropriate method for ensuring an effective framework within which legitimate concerns relating to the bargaining process can be duly taken into account. The Committee expects that any guidelines would be the result of full tripartite consultation.

The Committee's recommendation

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

The Committee requests the Government to abstain from taking any further actions to achieve changes in collective agreements in areas that should rest within the autonomy of the bargaining partners. It expects that any guidelines on collective bargaining would be the result of full tripartite consultation.

CASE NO. 3130

DEFINITIVE REPORT

Complaint against the Government of Croatia presented by the Association of Croatian Trade Unions (MATICA)

Allegations: The complainant organization alleges that the adoption of the Act on Withdrawal of Right to Salary Increase Based on Years of Service allows the Government to unilaterally suspend rights secured in public service collective agreements in force

- 373.** The complaint is contained in a communication from the Association of Croatian Trade Unions (MATICA) dated 17 March 2015.
- 374.** The Government forwarded its response to the allegations in a communication received on 19 October 2016.
- 375.** Croatia 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

- 376.** In its communication dated 17 March 2015, the complainant organization, one of the representative trade unions in Croatia, which includes a total of 11 unions in public and civil service, alleges that the Act on Withdrawal of Right to Salary Increase Based on Years of Service (OG 41/2014, hereinafter referred to as: the Act) violates the rights to freedom of association and collective bargaining guaranteed by Conventions Nos 87 and 98.
- 377.** The complainant indicates that the legal employment status of public service employees in Croatia is, with the exception of the Croatian Constitution, international sources of labour law including ratified ILO Conventions, the Labour Act and the Act on Wages in the Public

Service, essentially determined by the Basic Collective Agreement for officers and employees in the public service of 12 December 2012 (hereinafter: 2012 BCA) and branch collective agreements as an autonomous source of law in this area. Collective bargaining in Croatia is widespread in the area of public services since the large number of employees enables an effective use of this instrument in order to ensure the balance of interests in the work process. The 2012 BCA was concluded between six representative public service unions and the Government with a period of validity to December 2016. Collective agreements for specific areas of public services (hereinafter: branch collective agreements) have been concluded earlier, for example, the collective agreement for research and institutions of higher education of 22 October 2010 (OG No. 142/2010) valid until 23 October 2014, the collective agreement for secondary school employees of 21 December 2010 (OG No. 7/2011) with a date of validity to 31 December 2014, the collective agreement for elementary school employees of 29 April 2011 (OG No. 66/2011) with an expiry date of 30 April 2015, the collective agreement for the health-care and health insurance sector of 1 December 2013 (OG No. 143/2013) valid until 1 December 2017, etc. The complainant alleges that the Government abruptly cancelled the majority of the aforementioned collective agreements within a short period of time (in the period from December 2013 till February 2014) explaining the cancellation of the same by the significantly changed economic circumstances.

- 378.** The complainant highlights the importance of the right to a percentage increase of salaries based on years of service, a right agreed for employees in public and civil services solely by collective agreements. The 2012 BCA, as well as the 2013 Collective Agreement for state civil servants, establish that the salary of employees in public and civil service consists of the base pay and additional payments. The base pay of employees in public and civil service is calculated as a multiplication of the calculation basis for salaries and the job complexity coefficient of the workplace, increased by 0.5 per cent for every full year of service. Upon the condition of achieving the required years of service, the calculation basis for salary or the job complexity coefficient, and thereby the base pay of employees in public and civil services, is increased for a corresponding percentage. The complainant denounces that the real effect achieved by adopting the Act is not the non-payment of additional payment on salaries for employees in public and civil service, but rather a reduction of their base pay.
- 379.** The complainant organization states that, on 25 March 2014, Parliament adopted the above Act, which deprives public and civil service employees in Croatia of the payment of salary increase based on years of service, a right based on concluded collective agreements or other agreements entered into by the Government. In its view, the Act is a direct attack on the right to collective bargaining in Croatia, which is guaranteed by fundamental ILO Conventions Nos 87 and 98, ratified by Croatia, that are, according to article 140 of the Constitution of the Republic of Croatia, part of the national legal system, having precedence over the law.
- 380.** The complainant quotes the reasons given by the Government, as the proponent of the controversial Act, in a March 2014 draft of the Act (enclosed with the complaint), as follows:

At this point of exceptionally unfavourable trends in the economy, retaining the rights arising from currently valid legal regulations would be a pressure on further growth of budget deficit and public debt. The deepening of fiscal imbalances might lead to further decline in credit rating and further increase of costs of government borrowing as well as the overall economic system. That would be a burden for the overall competitiveness of the country as well as debt sustainability. Taking into consideration that the above indicators of economic trends are showing that the economic progress is secured exactly by the proposed measures, the Government of the Republic of Croatia considers it to be justified and required to adopt the proposed Act. Namely, in times of scarcity and economic crisis, the role of the State is especially emphasized. Its obligation is to regulate the level of economic and social rights by various economic policy measures in line with economic possibilities, respectively to boost economic progress, respectively it is required to implement further measures of fiscal austerity with the goal of reducing public debt. In that sense, the necessity of reviewing the costs of work in civil

service and public service is arising. In order for the public authority, in changed economic and social circumstances, to efficiently protect the well-being of individuals and the social community itself, at the same time securing the achievement of the aforementioned basic values, it is its constitutional authority and duty to adjust the legal framework to these new circumstances, including the redefining of certain rights. At this moment, in the area of civil and public services, a number of collective agreements, respectively agreements and other contracts are applied, concluded at a time of a better economic situation, growth of salaries and other material rights, but which in times of recession and required austerity measures cannot be observed in full any more. With the goal of securing fiscal stability of costs of employees in civil and public services, the perceived problem of lack of funds for observing agreed material rights can be solved either by temporarily restricting some of these agreed rights or by reducing the number of employees thus reducing total costs of the employed. With the goal of securing fiscal stability of civil and public services systems which would also make it possible to maintain the existing employment level, it is required to reduce total funds for labour costs. Since certain material rights and increases of salaries in civil and public services are agreed by a number of collective agreements, of which some are cancelled and still applied in cancellation period of three months, taking into consideration the fact that material rights of the employed in civil and public services are usually financed from identical public and fiscal revenues, it is required to take special care that the scope and level of their rights remains unified. Since a growth of gross domestic product is not expected till the end of this year either, in civil and all public services it is required to withdraw the right to salary increase which is realized based on the number of years of service. ... By withdrawing the right to increase of job complexity coefficient respectively salaries of employees in civil and public services in 2014, and which obligation arises solely from agreed obligations, and not from the law and other regulations, the appropriate part of required savings in State budget will be achieved.

- 381.** According to the complainant, from the point of view of economic justifiability, the Government does not have any relevant reasons for passing the Act. The complainant considers it absurd to claim that economic progress is secured by austerity measures since the very causality of fiscal austerity and economic recovery is not proven in economic theory. On the contrary, according to certain economic standpoints, the aforementioned causality exists solely in the opposite direction, that is, fiscal austerity measures are exacerbating the crisis, and by no means solving it, which is clearly shown by the failure of austerity measures throughout Europe during the past seven years. This standpoint is confirmed by the fact that, notwithstanding numerous withdrawals and reductions in material rights in public and civil services during the past few years, neither the fiscal nor the general economic situation in Croatia improved, despite the fact that the individual price of work in public services during the crisis declined in many cases even more than the cumulative decline in GDP.
- 382.** The complainant adds that one of the key arguments for reducing material rights of employees in public and civil services is the balancing of public finances and stopping further public debt growth. However, the public debt, in accordance with data of the European Commission, instead of further deceleration in 2012 achieved a growth of 3.9 per cent of GDP, and in 2013 a record increase of no less than 9.4 per cent of GDP. In accordance with the aforementioned, it is not possible to claim that solely fiscal austerity will contribute to the improvement of economic or fiscal situation in Croatia. On the contrary, salary cuts and reduction of material rights of workers are additionally reducing the total purchasing power of citizens resulting in reduction of demand, reduction of production and employment and consequentially in decline in GDP. The decline in GDP causes the increase of the deficit and public debt which are expressed as a percentage of GDP. Hence, by any additional cuts in incomes of employees, not only in public and civil services but employees in general, the Government is intensifying the aforementioned negative cycle and is not reducing but increasing further fiscal imbalance. Savings are possible, but it cannot be claimed that austerity measures, withdrawal of rights and reductions of salaries are aimed at economic recovery because that is not confirmed, neither by theory nor by practice.

- 383.** The complainant confirms that the Government has the democratic legitimacy to choose the model of economic development; however, it is not allowed to terminate agreements and thereby violate the basic principles of the functioning of the legal order based on its own questionable interpretation of the economic reality. In its view, the Government's claim that a number of collective agreements in the area of civil and public services are presently applied, which were concluded at a time of a better economic situation, growth of salaries and other material rights, but which in times of recession and required austerity measures cannot be observed in full any more, is unsustainable and incorrect. The complainant states that the economic situation, in comparison with the time of concluding most of the branch collective agreements at the end of 2010, almost did not change at all but rather stagnated due to lack of efficient economic measures aimed at growth. Furthermore, taking into account that the last branch Collective Agreement for the health-care and health insurance sector containing the right on salary increase based on years of service was concluded at the end of 2013, hence only three months before proposing the Act, the thesis of the Government becomes unsustainable.
- 384.** The complainant also states that, from the legal point of view, the reasons which the Government quotes as the justification for adopting this Act, directly derogating certain provisions of collective agreements, are irrelevant. Collective agreements, even though specific by their legal nature, are first and foremost agreements. When the Government, as one of the contracting parties, is concluding the collective agreements in civil and public services, it does it as an employer and not as government authority. Collective agreements are therefore binding for the Government for the entire time they are in force (including the cancellation period). Collective agreements are binding for all the signers until requirements are met under which it is possible to legally cancel or terminate these agreements. In accordance with the provisions of collective agreements and complying with general regulations of mandatory law, an agreement can be cancelled solely in the case of significant changes of economic circumstances, respectively in the case of subsequent occurrence of extraordinary circumstances which could not have been avoided and which, at the time of concluding the collective agreements, could not have been foreseen. The complainant stresses that, unlike the former practice of illegal withdrawal of rights from collective agreements (after the illegal cancellation of basic collective agreements in the area of public and civil services in 2012, the first Act on withdrawal of rights agreed by collective agreements suspending the payment of the Christmas bonus and vacation allowance in 2012 and 2013, and the prolongation of the validity of the aforementioned Act up to 2014 by Government Regulation), this time the Government, in explaining the Act which is suspending the rights from collective agreements, is not even trying to refer to the fact of significant changes of economic circumstances. Under the pretext of savings, avoiding its contractual obligations and using its position of the stronger contracting party, the Government simply, by force of authority, suspended rights from collective agreements. In the complainant's view, the Government is showing by such conduct that it is above the law, thus seriously compromising the principle of rule of law and legal safety in Croatia.
- 385.** With reference to Article 8(3) of Convention No. 87 and Article 4 of Convention No. 98, the complainant considers that the Act is in complete contradiction to these Conventions, the universal values of international law enshrined therein, as well as the principles and values that are part of the Croatian legal order. In its view, the Act deprives the right to organize and collective bargaining of all meaning, because it sends the message that the Government when it is a participant in negotiations for the conclusion of collective agreements, does not consider itself to be bound by these negotiations and the signed collective agreements, hence the results of the negotiations can be arbitrarily annulled and employees can be denied their rights regardless of stipulated conditions and procedures. In such circumstances, any union activity is rendered meaningless, and the right to organize and collective bargaining becomes an empty phrase without any content. The complainant believes that the above is confirmed by the ILO Committee of Experts on the Application of Conventions and Recommendations

(CEACR) in its 2010 individual observation on the application by Croatia of Convention No. 98, which basically states that the law in general cannot derogate a collective agreement and that unilateral interference by the State in matters regulated by a collective agreement amounts to a violation of the Convention.

- 386.** The complainant therefore considers that collective agreements could be derogated by law only if the following conditions were fulfilled: (i) the Government, as a party to the collective agreement, previously negotiated on the possible amendment to the collective agreement; and (ii) the rights have been suspended to a minimum extent, for a definite period of time, equally to all, and with a reasonable cause for such actions due to a significant disruption of the economic system. In its view, the Government failed to fulfil several of these important conditions prior to the adoption of the Act which withdrew the right to salary increase of civil and public service employees previously agreed upon by the collective agreement.
- 387.** As regards the condition of negotiation before suspension of the rights guaranteed by collective agreements, the complainant states that the right to salary increase was agreed in branch collective agreements for individual public services, and the Government did not even try to open negotiations for amending or suspending it but rather abruptly and unilaterally terminated the branch collective agreements on the grounds of significantly changed economic circumstances. Moreover, while collective agreements were still in force, that is during cancellation periods, the Act was adopted thus narrowing the possibility of negotiation about the aforementioned rights: in addition to the firm position of the Government that the right to salary increase based on years of service shall not be agreed, the payment of the same in the next period was made impossible by the Act. According to the complainant, the Government thereby forced most trade unions to conclude the collective agreement without the provision on the right on salary increase based on years of service. For instance, since the wage increase was agreed in the collective agreement for the health sector concluded a few months before adopting the Act, negotiators for the collective agreement in science and higher education institutions, which ceased to be valid almost one year ago, did not want to agree to delete that provision, with the result that negotiations are still ongoing.
- 388.** The complainant also denounces that the Government failed to abide by the condition of an equal approach towards all. In its view, through the adoption of the Act, the Government denied substantive rights to public service employees, but not to the rest of the public sector owned by the State (namely companies and other entities that are majority-owned by the State). Those legal persons are often beneficiaries of the state budget due to their expenses and losses and hence represent a budgetary cost in the same way as public services, meaning that the withdrawal of material rights in those cases would lead to an increase in budgetary revenues. According to the complainant, the Government thus selectively reduced the rights solely of employees in public and civil services.
- 389.** In the complainant's view, the Act abolishes material rights of employees in civil and public services secured by the collective agreement, thereby directly violating the principle "pacta sunt servanda". The complainant therefore considers that the Government, as the employer in the public and civil services, has strengthened its bargaining position through legislation proposed by the Government itself, the adoption of which has been secured by the parliamentary majority, thus de facto imposing its will in collective bargaining. In its view, such conduct is contrary to Conventions Nos 87 and 98, which protect the right to organize and collective bargaining from unauthorized interference by the authorities and prohibit the legal derogation of the rights guaranteed by collective agreements.

B. The Government's reply

- 390.** In a communication received on 19 October 2016, the Government indicates that the global financial and economic crisis had a belated and strong effect on the Croatian economy, which was reflected in a continuous decrease in economic activity, significant and continuous decrease of gross domestic product (GDP) and directly influenced the closing of workplaces and the sudden increase of the rate of unemployment with a subsequent decrease in the citizens' standard of living. At the end of 2011, the share of public debt in GDP amounted to 46.7 per cent, 55.5 per cent in 2012, and 86.7 per cent in 2014. Given that the general budget deficit exceeded the limit of 3 per cent and the public debt was at the level of 60 per cent of GDP, in January 2014 a corrective excessive deficit procedure (EDP) was initiated at the level of the European Union. The average unemployment rate increased from 15.9 per cent in 2012 to 17.2 per cent in 2013. In 2014, economic activity remained at a low level, and labour market trends were characterized by stagnation in the (low) number of employed persons.
- 391.** As to the reasons for the passing of the Act on suspension of the right to salary increase based on years of service, the Government reiterates the reasons given in writing by the Government as the proponent of the Act in March 2014, already quoted by the complainant. In addition, the Government states that the relevant salary increase paid only on the basis of the achieved number of years of service is a double increment (paid on the same basis as the salary increment in the amount of 0.5 per cent for each year of service) that could be contrary to the principle of "equal work for equal pay" and in practice constitutes discrimination based on age. Furthermore, the adoption of the Act was part of the overall public policy measures taken by the Government to meet the criteria set by the European Commission in relation to achieving fiscal balance and sustainability. While the said measure partly impinged on social rights, the Government believes that the objective pursued by the legislator was legitimate and that the adoption of the Act fully met the test of proportionality, as it constituted a reasonable and time-limited measure which did not represent an excessive burden for its recipients and was not more restrictive than necessary to achieve the legitimate aim of reducing public debt and maintaining the existing level of employment in the public and state sector.
- 392.** The Government assures that it is aware and continues to recognize the general principle that agreements should be binding on the parties and that this principle should be respected as a basic rule. It believes however that, in exceptional cases, measures taken by governments, as part of a stabilization policy, which determines the limits of collective bargaining of some of the material rights and even salaries, but which are limited by a reasonable time period, are in accordance with Conventions Nos 87 and 98.
- 393.** As regards the allegation that the suspension of a material right only for public service employees but not for the rest of the public sector owned by the State, is contrary to the equality principle, the Government emphasizes that salaries and other material rights of employees in companies and other legal persons owned by the State are not paid by the state budget, and that the Government is thus not a party to their collective agreements. Last but not least, the Government would like to inform that the Act on suspension of the right to salary increase based on years of service is no longer in force, since 1 January 2016.

The Committee's conclusions

- 394.** *The Committee notes that, in the present case, the complainant alleges the adoption of an Act which allows the Government to unilaterally derogate from the public service collective agreements in force. The Committee notes in particular the following allegations of the complainant organization: (i) the employment status of public service employees in Croatia is essentially determined by the Basic Collective Agreement for officers and employees in*

the public service (BCA) of 12 December 2012, as well as by branch collective agreements for specific areas of the public service; (ii) the Government abruptly cancelled the majority of the aforementioned collective agreements within a short period of time (from December 2013 until February 2014) explaining their cancellation with the significantly changed economic circumstances; (iii) the Act, which deprives public and civil service employees in Croatia of the payment of wage increase based on years of service, a right that had been obtained on the basis of formerly concluded collective agreements, was adopted on 25 March 2014; (iv) the reasons given by the Government when proposing the Act (document enclosed in the complaint) include: exceptionally unfavourable economic trends entail the need to implement further measures of fiscal austerity to reduce public debt and thus the necessity to review the labour costs in the public and civil service; in the public and civil service a number of collective agreements concluded at a time of a better economic situation, can thus no longer be observed in full; the required reduction of labour costs in the public sector can be achieved either through reduction of the number of employees or the temporary restriction of some of the rights agreed by a number of collective agreements, of which some have been cancelled and are still being applied during the cancellation period of three months; since the scope and level of these rights should remain unified, and a growth of gross domestic product is not expected in 2014, it is required to withdraw in the civil and all public services the right to wage increase based on years of service; (v) the above reasons for terminating the collective agreements and adopting the Act are considered unfounded (austerity measures do not lead to economic recovery and resulted in GDP decline in Croatia; the economic situation did not change but rather stagnated) and unfair (last branch agreement containing the right to wage increase was concluded three months before the adoption of the Act; violation of “pacta sunt servanda”) by the complainant; (vi) one of the conditions under which collective agreements may be derogated by law, the condition of prior negotiation on the possible amendment of the collective agreement, was not met since the Government did not even try to open negotiations but rather abruptly and unilaterally terminated the branch collective agreements on the grounds of significantly changed economic circumstances; (vii) the Government only denied substantive rights to public service employees but not to the rest of the public sector owned by the State, which the complainant deems contrary to the condition of equal treatment; (viii) the Act was adopted while the collective agreements were still in force, that is, during the cancellation periods, thus narrowing the possibility of negotiation about wage increase; and (ix) the Act is a direct attack on the right to collective bargaining in Croatia and thus violates the right to freedom of association guaranteed by Conventions Nos 87 and 98.

- 395.** *The Committee notes the Government’s indications that: (i) the global financial and economic crisis had a belated and strong effect on the Croatian economy, which was reflected in a continuous decrease in economic activity, significant and continuous decrease of GDP, and directly influenced the closing of workplaces and the sudden increase of the rate of unemployment with a subsequent decrease in the citizens’ standard of living; (ii) further to the reasons for the passing of the Act on suspension of the right to salary increase based on years of service, given in writing by the Government as the proponent of the Act in March 2014, it is worth noting that the relevant salary increase paid only on the basis of the achieved number of years of service is a double increment that could in practice constitute discrimination based on age; (iii) the adoption of the Act was part of the overall public policy measures taken by the Government to meet the criteria set by the European Commission in relation to achieving fiscal balance and sustainability; (iv) the objective pursued by the legislator was legitimate and the adoption of the Act fully met the test of proportionality, as it constituted a reasonable and time-limited measure which did not represent an excessive burden for its recipients; (v) contrary to public service employees, salaries and other material rights of employees in companies owned by the State are not paid by the state budget; and (vi) the Act on suspension of right to salary increase based on years of service is no longer in force, since 1 January 2016. The Government assures that it continues to recognize the general principle that agreements should be binding on the*

parties but believes that, in exceptional cases, measures taken by governments as part of a stabilization policy, which restrict collective bargaining on some of the material rights or even salaries, but which are limited to a reasonable time period, are in line with Conventions Nos 87 and 98.

396. *As regards the alleged abrupt and unilateral cancellation of the branch collective agreements by the Government on the grounds of significant changes of economic circumstances and without prior amendment negotiations with the public service unions, the Committee notes the complainant's indication that, under the provisions of collective agreements and general regulations of mandatory law, an agreement can be cancelled by one party under certain conditions and in the case of significant changes of economic circumstances (that is, subsequent occurrence of extraordinary circumstances which could not have been avoided and which, at the time of concluding the collective agreements, could not have been foreseen). The Committee notes that, according to the complainant, the national economic situation has not changed since the conclusion of most branch collective agreements at the end of 2010, and observes that one branch agreement containing the right to wage increase was concluded by the Government during the period where the others were being cancelled. While recalling the general principle that agreements should be binding on the parties, and that collective bargaining implies both a give and take process and a reasonable certainty that negotiated commitments will be honoured, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members; if these rights, for which concessions on other points have been made, can be cancelled unilaterally, there could be neither reasonable expectation of industrial relations stability, nor sufficient reliance on negotiated agreements [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 939 and 941], the Committee observes from the outset that the branch collective agreements themselves provided for a procedure for unilateral termination, and, taking due note of the reasons given by the Government for passing the Act on suspension of the right to salary increase based on years of service, considers that it is not its role to express a view on the soundness of economic arguments used by the Government in order to cancel a collective agreement under the procedure stipulated therein, since this competence lies within the remit of national jurisprudence. As to the allegation that the agreements were cancelled without prior amendment negotiations with the public service unions, the Committee considers that, in the absence of the relevant provisions of the branch collective agreements, it is not in a position to pronounce itself whether or not the unilateral cancellation procedure provided in the agreements themselves was followed.*

397. *In this regard, the Committee understands however that, prior to the cancellation of the branch collective agreements (December 2013–February 2014) and the adoption of the Act in March 2014, the Government and several public and civil service unions negotiated and signed on 4 June 2013 amendments to the Annex of the Agreement on Basis for Wages in the Public Service of 13 May 2009, the validity and applicability of which (including all of its subsequent amendments) is reaffirmed in the 2012 Basic Agreement in the provision stipulating that the basic salary is made of the job complexity coefficient and the basis for calculating salaries, increased by 0.5 per cent for each year of service (article 51). In article II of those June 2013 amendments, the Government undertakes to start negotiations on wage increase in the public and civil service based on years of service, as soon as there is a real GDP growth recorded in three consecutive quarters and the deficit of the state budget is lower than 3 per cent.*

398. *In view of the above, and recalling that it has previously considered that if, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and*

*only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards [see **Digest**, op. cit., para. 1024], the Committee, noting the Government's indication that the Act is no longer in force since 1 January 2016, understands that negotiations concerning wage increase between the Government and public and civil service unions have since begun and welcomes these developments. Reiterating that, in the context of economic stabilization, priority should be given to collective bargaining as a means of determining the employment conditions of public servants, rather than adopting legislation to restrain wages in the public sector [see **Digest**, op. cit., para. 1040], the Committee trusts that, for the maintenance of the harmonious development of labour relations, the parties will bargain in good faith and make every effort to reach an agreement.*

The Committee's recommendation

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

Noting the Government's indication that the Act is no longer in force since 1 January 2016 and understanding that negotiations concerning wage increase in the public and civil service have since begun, the Committee welcomes these developments and trusts that, for the maintenance of the harmonious development of labour relations, the parties will bargain in good faith and make every effort to reach an agreement.

CASE NO. 2957

DEFINITIVE REPORT

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

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

- 400.** The Committee last examined this case at its October–November 2015 meeting and, on that occasion, presented a provisional report to the Governing Body [see 376th Report, paras 425–435, approved by the Governing Body at its 325th Session (October–November 2015)].
- 401.** The complainant organization submitted additional information in a communication of 5 February 2016.
- 402.** The Government sent its observations in a communication of 17 December 2015.
- 403.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention,

1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. Previous examination of the case

- 404.** At its October–November 2015 meeting, the Committee made the following recommendation on the matters still pending [see 376th Report, para. 435]:

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

B. Additional information from the complainant union

- 405.** In its communication of 5 February 2016, in response to the Committee's request, the complainant union submits the names of the other unionists that it alleges have been affected by threats of being burnt alive by road transport workers affected by the labour stoppage: Ms Krissia Meny Guadalupe Flores (Women's Secretariat), Ms Odila Dolores Marroquín Cornejo (General Secretary of the Union Governing Body), Mr Daniel Rivas and Mr José Manuel Lima Hernández.

C. The Government's reply

- 406.** In its communication of 17 December 2015, the Government indicates that the National Civil Police provided protection for the persons mentioned by the complainant union, who were inside the Customs Administrator's Office at the time when the crowd of road transport workers was trying to enter and attack them. The Government states that the police kept watch over the unionists until a staff vehicle of the Directorate-General of Customs arrived to evacuate them, which was done by an alternative route, as a security measure for these people. The Government specifies that, according to the National Civil Police, at no time did these people receive threats of being burnt alive.

The Committee's conclusions

- 407.** *The Committee observes that the only matter pending in relation to this case concerns the allegation of death threats against various unionists by road transport workers that are alleged to have been affected by a stoppage of activities in the context of a collective labour dispute. The Committee observes that the Government states that, according to the police, the alleged death threats did not occur but that, in the face of imminent risk of attack by the road transport workers, it protected and kept watch over the above unionists, and also evacuated them so as to ensure their security. Furthermore, the Committee observes that the complainant union does not state that it has made criminal complaints concerning the alleged death threats. In these circumstances and on the understanding that the Government will continue to provide all necessary protection measures, as appropriate and in full collaboration with the complainant organization, the Committee will not pursue its examination of this allegation.*

The Committee's recommendation

408. *In the light of its foregoing conclusions and on the understanding that the Government will continue to provide all necessary protection measures, as appropriate and in full collaboration with the complainant organization, the Committee invites the Governing Body to consider that this case requires no further examination.*

CASE NO. 3154

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

Complaint against the Government of El Salvador presented by the Union of Health Workers (SITRASALUD)

Allegations: Refusal to register a trade union branch, to authorize a reform of a union constitution changing the status of the organization and to register its executive committee; detention of a trade unionist and acts of anti-union discrimination

- 409.** The complaint is contained in communications dated 4 May and 20 July 2015 from the Union of Health Workers (SITRASALUD).
- 410.** The Government sent its observations in a communication dated 26 May 2016.
- 411.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainant's allegations

- 412.** In its communications of 4 May and 20 July 2015, the Union of Health Workers (SITRASALUD) denounces the refusal of the authorities to register a branch of the union, to authorize a reform of the union's constitution changing the status of the organization and to register its executive committee, and also reports the detention of a trade unionist and acts of anti-union discrimination.
- 413.** The complainant organization alleges that on 20 November 2014 it applied for registration of the executive committee of a branch of the trade union at the Dr José Molina Martínez National Psychiatric Hospital, with the aim of establishing a branch of SITRASALUD at the hospital. In reply to the application, the authorities called for the submission of copies of individual identity documents and payslips of the members of the branch. These documents were duly submitted (even though the complainant considered that these were unlawful requirements since they were not laid down in the union constitution or by law). Nevertheless, by a decision of 26 November 2014, the Labour Organizations Department at the Ministry of Labour and Social Welfare rejected the application for registration of the

union branch with the observation that the members were public servants and there was no provision for establishing branches in public service unions or any possibility for unions of private-sector workers to have branches constituted by public servants.

- 414.** The complainant organization explains that, in view of the rejection of the application, the union's general assembly approved a reform of the union constitution, agreeing to change the status of the union – from a union governed by the Labour Code to a union having public status. SITRASALUD adds that such reforms had been approved for other trade unions from 2009 with the entry into force of Conventions Nos 87, 98, 135 and 151 in El Salvador (the complainant supplies detailed information and documentation on the approval of these reforms and changes of status for other trade union organizations). However, the complainant reports that the Labour Organizations Department, by a decision of 23 April 2015, rejected its request to change its status. Further to this decision, the trade union lodged an appeal on 27 April 2015, alleging violations of the principle of equality and of freedom of association. Moreover, the complainant reports that the Ministry of Labour suggested that the complainant organization should dissolve itself and form a new union, whereas SITRASALUD considers it unacceptable that a request to reform its union constitution, which had been granted to other unions, was rejected.
- 415.** Furthermore, the complainant reports that on 14 July 2015 the Labour Organizations Department issued a decision rejecting the application for registration of the new executive committee of SITRASALUD, which had been elected by the general assembly that took place on 30 June 2015.
- 416.** With regard to allegations of anti-union discrimination, the complainant organization denounces the fact that in September 2014, after organizing trade union activity involving a four-hour cut in working hours in the administrative area of the national hospital in Suchitoto, the hospital director filed a complaint for deprivation of freedom against Ms Nora Samayoa, the general secretary of the union branch at the Suchitoto hospital. As a result of this complaint, the national civil police arrested and detained Ms Samayoa, who was subsequently released. The complainant also alleges that despite the fact that the Suchitoto Court of First Instance ordered a stay of proceedings in favour of Ms Samayoa, pay deductions were made on 16 February 2015 for the days when Ms Samayoa was in custody. The complainant further alleges that other illegal deductions were made from Ms Samayoa's salary, with a double deduction for 14 January 2015 – the day when she was summoned by the Public Prosecutor's Office on the grounds that she had failed to provide notification of her absence, though in fact she had done so, according to SITRASALUD.
- 417.** The complainant organization adds that since her release Ms Samayoa has been the victim of workplace harassment by the hospital director, claiming that the director refuses to grant her trade union leave, places notes on her file without bringing them to her attention or discussing them with her, makes the human resources staff draft notes containing untruths with regard to Ms Samayoa and publicly accuses the union and its officers of working against the institution. Furthermore, the complainant denounces the fact that Ms Samayoa was demoted in retaliation for holding trade union office.
- 418.** The complainant organization further alleges that since 13 March 2015 the general secretary of SITRASALUD, Ms Ana Silvia Navarrete de Cantón, has been subjected to workplace harassment on account of her union activity, being threatened with pay cuts and dismissal. The complainant indicates that in May 2015 a pay cut was made – even though she had submitted her work attendance cards and had been duly authorized to undertake union activities since 2009 – in violation of the agreements signed with the union, leaving her with a salary of only US\$1.11.

419. The complainant organization also alleges that officials in various departments of the Ministry of Health refuse to grant union leave to branch officers on the grounds that they lack the relevant credentials, whereas they have been denied these documents by the Ministry of Labour and Social Welfare.
420. Lastly, the complainant organization alleges that on 3 June 2015 it requested the Minister of Health to grant leave to enable its members to attend the general assembly for the election of the executive committee on 30 June 2015 but that this had not been granted as of the date of presentation of the complaint.

B. The Government's reply

421. In its communication of 26 May 2016, the Government sent its observations in response to the allegations of the complainant organization.
422. As regards the allegations of violation of freedom of association and discriminatory treatment in refusing to accept the reform of the union constitution and the change in the status of SITRASALUD, the Government admits that, while the Ministry of Labour and Social Welfare in previous years had allowed other trade unions (the General Union of Health Ministry Employees of El Salvador (SIGESAL), the Union of Nursing Professionals, Technicians and Auxiliaries of El Salvador (SIGPTESS), and the Rural, Urban and Peri-urban Education Teachers' Union of El Salvador (SIMEDUCO)) to reform their rules and modify their class and status, in April 2015 it refused the request made by SITRASALUD to change its status from private to public. The Government explains that this decision was based on the finding that in the legal, institutional and jurisprudential context there was no possibility to modify the status of a trade union. The Government also states that the appeal against the decision was rejected by the Labour Organizations Department. Nevertheless, the Government explains that the rejection of the change in status – since it lay outside the scope of the applicable regulations – did not deprive the complainant of the possibility of satisfying its claim through other channels. Accordingly, the Government states that on 16 October 2015, SITRASALUD composed of public servants was established, and was granted legal personality by a decision of 7 December 2015. The Government also states that SITRASALUD of private status is maintained. The Government therefore considers that the complainant's allegation is unfounded and also denies that the Ministry of Labour and Social Welfare suggested that the union should dissolve itself in order to establish a new union.
423. The Government further indicates, in general terms, that after the reform of the National Constitution in 2009 – which recognized the right of freedom of association for public officials, public employees and municipal employees – the Government had the difficult task of adjusting the respective administrative procedures and, with a view to speeding up claims in the sector, the change of status from private to public was permitted between 2010 and 2014. The Government also states that the decision was taken to establish new institutional guidelines and criteria relating to the approval of reforms of trade union constitutions in order to ensure uniformity of reasoning in decisions issued by the Labour Organizations Department from 2015 onwards, the objective being to achieve consistency with the regulations in force and to uphold trade union rights.
424. As regards the allegation of refusal to register the executive committee of the union branch at the Dr José Molina Martínez National Psychiatric Hospital requested in November 2014, the Government indicates that there is provision for the establishment of branches for private unions in enterprises but not for state institutions, since the collective rights of public servants do not cover this possibility. The Government explains that the registration of executive committees is a regulated function of the administration and not a discretionary act, and that the requirement to submit individual identity documents and payslips is not an

arbitrary or illegal criterion but a mechanism for verifying compliance with the requirements laid down in the Labour Code.

- 425.** As regards the allegation of refusal to renew the executive committee of the complainant organization elected on 30 July 2015, the Government indicates that on 7 August 2015 the union submitted a request that was rejected when it proved to be a case of public servants who were members of a private union. The Government states that the “private” SITRASALUD nevertheless resolved the problem of lack of leadership by holding an extraordinary assembly on 15 December 2015 and submitting the relevant documentation to the Labour Organizations Department, which then registered the executive committee. The “public” SITRASALUD was established on 16 October 2015 and its executive committee was registered on 19 February 2016.
- 426.** As regards the alleged detention of Ms Samayoa, the Government indicates that, as the police record of 29 September 2014 shows, Ms Samayoa’s arrest was due to a complaint that she committed the offence of depriving the director of the national hospital of Suchitoto of her freedom. The Government explains that Ms Samayoa was released on 2 October 2014, four days after she was arrested, with the imposition of non-custodial measures obliging her to appear before the Court of First Instance and forbidding her to change residence during the proceedings or to communicate with certain persons, including the victim, except on work-related matters. The Government adds that a preliminary hearing was held on 16 February 2015, where a stay of proceedings in favour of Ms Samayoa was ordered, as a result of which the non-custodial measures were revoked – reserving for one year the prosecutor’s right to reopen the proceedings if fresh evidence emerged (the Government indicates that it was unaware of the latter scenario, since after one year a definitive acquittal would be issued where possible).
- 427.** As regards the allegations of anti-union discrimination, the Government states that, according to the information supplied by the director of the Suchitoto national hospital: (i) 43 members of SITRASALUD work at this institution and no complaints of any kind have ever been received; Ms Samayoa is the only person who has claimed to be a victim of harassment; (ii) the deductions from Ms Samayoa’s salary were justified and carried out in accordance with the national legislation; (iii) union leave could not be granted to Ms Samayoa since she did not submit any credentials issued by the Ministry of Labour and Social Welfare accrediting her as branch general secretary; (iv) as regards the notes placed on file, it is untrue that Ms Samayoa was not notified; and (v) as regards the allegations accusing the hospital director of drawing up notes containing untruths and publicly denigrating the union, the hospital director indicated that she was unaware of these accusations and claimed that there was no evidence in this respect. Furthermore, as regards the allegation of a double pay deduction imposed on Ms Samayoa – when she was summoned to the Public Prosecutor’s Office – the Government indicates that this was done in accordance with the national legislation since at no time did she report her absence or submit any documentation to justify it.
- 428.** As regards the allegation of pay deductions imposed on Ms Samayoa in relation to her four days in custody, the Government indicates that these were effected in accordance with the regulations in force, including article 203 of the Labour Code, which provides that “where non-attendance at work is due to detention of the worker by order of the authorities followed by legal proceedings in which a penalty is imposed, such non-attendance shall not be considered justified”.
- 429.** As regards the allegations of demotion of Ms Samayoa in retaliation for her trade union activities, the Government states that, by virtue of an inspection record issued by the Medical Profession Board of Control, it was established that Ms Samayoa was not authorized to undertake professional duties in the area of social work to which she was assigned.

Consequently, the Medical Profession Board of Control, at its meeting of 9 November 2015, ordered the hospital management to assign Ms Samayoa to different duties.

- 430.** As regards the allegations of workplace harassment, threats and pay deductions relating to SITRASALUD general secretary, Ms Navarrete de Cantón, the Government indicates that, according to the information supplied by the Ministry of Health, there is no evidence of workplace harassment or threats against Ms Navarrete de Cantón and, since the complainant does not provide any details or identify any person(s) who supposedly carried out such actions, it is difficult to supply precise information in turn. As regards the allegation of unjustified deductions, the Government indicates that Ms Navarrete de Cantón brought a claim in October 2015 before the Civil Service Tribunal alleging unjustified pay deductions and a ruling was issued on 5 October 2015 dismissing the claim on the following grounds: it had been established that the deduction (relating to May 2015) was made on the basis of internal administrative procedures; the employee did not provide any credentials for the trade union office she claimed to occupy; she did not show that she had obtained any leave from the hospital director; and she failed to provide any justification for her absence from work in March, April and May 2015.
- 431.** As regards the allegation that leave was not granted to the officers of union branches, the Government indicates that for such leave to be granted the person concerned must make the relevant application accompanied by the credentials issued by the Ministry of Labour and Social Welfare. It is not possible for trade union leave to be granted without the person concerned formally accrediting his/her position as union officer; otherwise the authorities would risk a reprimand from the Court of Auditors for authorizing unjustified absences.
- 432.** As regards the allegation that leave was not granted for attending the ordinary general assembly for the election of the executive committee on 30 June 2015, the Government points out that the allegation is unfounded since by official communication of 22 June 2015 the Health Minister authorized paid leave for the members of SITRASALUD so that they could attend the general assembly (the Government forwards documents with the respective authorizations issued to the trade union and to the various hospitals concerned).

The Committee's conclusions

- 433.** *The Committee observes that the complaint is concerned with allegations of the Government's refusal to register a branch of a trade union, to authorize a reform of the union constitution modifying its status and to register its executive committee, and also allegations of the detention of a trade union officer, refusal to grant trade union leave and anti-union discrimination against union officers.*
- 434.** *The Committee observes that the complainant organization denounces the Government's refusal to register a trade union branch in November 2014, to approve the change in union status from private to public adopted by reform of its constitution in April 2015 and to register its executive committee in August 2015. While duly noting the difficulties faced by the complainant in this process of change and noting with regret the resulting temporary lack of leadership, the Committee also recognizes the problems indicated by the Government concerning the absence of legal mechanisms for changing organizational forms that are subject to different sets of regulations. The Committee appreciates that, according to the Government's indications, the complainant's wishes could nevertheless be satisfied through the establishment of a new union with the same name composed of public servants and that, also according to the Government's indications, the current executive committees of both unions (public and private) are registered, and so the problem of lack of leadership appears to have been resolved. Moreover, the Committee notes the Government's statement that it decided to adopt new institutional guidelines and criteria for approving reforms of trade union constitutions, with a view to ensuring consistency with current regulations and*

upholding trade union rights. The Committee expects that this process will be completed in consultation with the most representative organizations and will enable the issue of establishing branches in unions of public servants to be addressed, and also trusts that the adopted guidelines and criteria will be in full conformity with the principles of freedom of association. The Committee recalls that the right to official recognition through legal registration is an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately (see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 295).

435. The Committee observes that the complainant organization also denounces the detention of a trade unionist, her exposure to discrimination and harassment, and other acts of anti-union discrimination against union members and officers, including pay deductions and refusals of union leave.
436. As regards the allegation of the detention of Ms Samayoa, the Committee observes that, according to the Government, the trade unionist was released four days after her arrest, on 2 October 2014, with the imposition of non-custodial measures, that on 16 February 2015 a stay of proceedings was ordered in favour of Ms Samayoa, as a result of which the aforementioned measures were revoked, and that since one year has elapsed since the stay of proceedings, a definitive acquittal should be issued.
437. As regards the allegation of pay deductions imposed on Ms Samayoa in relation to her four days in custody, the Committee observes that one of the regulations cited by the Government to justify such deductions applies in the case of "legal proceedings in which a penalty is imposed" on the person concerned. The Committee requests the Government, in the case that the definitive acquittal of Ms Samayoa is confirmed, to provide information on reimbursement of the deduction corresponding to the period she spent in preventive custody.
438. As regards the allegation of the anti-union demotion of Ms Samayoa, the Committee notes the explanations and documents supplied by the Government indicating that, as a result of the inspection proceedings conducted by the Medical Profession Board of Control at the hospital, establishing that this person did not have the necessary qualifications to perform the duties assigned to her, the Board ordered a change in her duties.
439. As regards the other allegations of anti-union discrimination and harassment against Ms Samayoa, the Committee observes that there are discrepancies in the accounts of the facts provided by the complainant and the Government and that most of the declarations made by the Government to deny the allegations are based on information supplied by the hospital director, who was accused of carrying out these acts. The Committee therefore requests the Government to carry out an investigation to examine the allegations, inviting the complainant to provide the Government with any details and evidence at its disposal to facilitate the investigation. The Committee requests the Government to keep it informed in this respect.
440. As regards the allegations of workplace harassment, threats and anti-union discrimination against SITRASALUD general secretary, Ms Navarrete de Cantón, the Committee notes the Government's indications that it has no evidence of the foregoing and that the complainant's allegations do not include precise details that make it possible to provide further information. The Committee invites the complainant organization to provide any details and evidence at its disposal relating to the allegations to enable the Government to conduct an investigation, failing which the Committee will not pursue its examination of this allegation.
441. As regards the allegation of unjustified pay deductions imposed on the general secretary in May 2015, the Committee notes that, according to the information supplied by the

Government, the Civil Service Tribunal considered that internal administrative procedures concerning deductions had been followed; that Ms Navarrete de Cantón did not provide any credentials for the trade union office she claimed to occupy; that she did not show that she had obtained any leave from the hospital director; and that she failed to provide any justification for her absence from work in March, April and May 2015. Should it not receive any specific additional information from the complainant, the Committee will not pursue its examination of this allegation.

- 442.** *As regards the allegation that trade union leave was not granted for attendance at the general assembly of 30 June 2015, the Committee observes that, according to the information and documents supplied by the Government, paid leave was authorized for SITRASALUD members so that they could attend the general assembly.*
- 443.** *As regards the allegation that leave was not granted to branch officers for lack of credentials when the provision of those credentials had been refused by the authorities, the Committee observes that the allegation is related to the non-recognition of branches for public sector unions and trusts that the consultations previously recommended to the Government will make it possible to establish the basis for finding shared solutions to this issue. The Committee also invites the Government to promote social dialogue between the complainant organization and the health service authorities concerned, with a view to addressing the question of trade union leave and promoting harmonious collective relations.*

The Committee's recommendations

- 444.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government, should the definitive acquittal of Ms Samayoa be confirmed, to provide information on reimbursement of the deduction corresponding to the period she spent in preventive custody.*
 - (b) As regards the allegations of anti-union discrimination against Ms Samayoa, the Committee requests the Government to carry out an investigation to examine the allegations, inviting the complainant to provide the Government with any details and evidence at its disposal. The Committee requests the Government to keep it informed in this respect.*
 - (c) As regards the allegations of anti-union discrimination against Ms Navarrete de Cantón, the Committee invites the complainant organization to provide the Government with any details and evidence at its disposal to enable the Government to conduct an investigation, failing which the Committee will not pursue its examination of this allegation.*
 - (d) The Committee invites the Government to promote social dialogue between the complainant organization and the health service authorities concerned, with a view to addressing the question of trade union leave and promoting harmonious collective relations.*

CASE NO. 3093

REPORT IN WHICH THE COMMITTEE REQUESTS
TO BE KEPT INFORMED OF DEVELOPMENTS**Complaint against the Government of Spain
presented by**

- the Trade Union Confederation of Workers' Commissions (CCOO) and
- the General Union of Workers (UGT)

Allegations: The complainant organizations allege that certain provisions of Spanish criminal law, and their application by the public authorities, give rise to excessive criminal sanction which violates the right to strike

- 445.** The complaint is contained in communications dated 25 July and 31 October 2014 from the Trade Union Confederation of Workers' Commissions (CCOO) and the General Union of Workers (UGT).
- 446.** The Government sent its observations in communications dated 19 October 2015, 24 February 2016, and 9 and 24 May 2016.
- 447.** 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), the Workers' Representatives Convention, 1971 (No. 135), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

- 448.** In a communication dated 25 July 2014, the complainants denounce a trend to repress the exercise of the right to strike, based on certain provisions of Spanish criminal law, and also the increasing use of those provisions by the Public Prosecutor's Office and the criminal courts. The complainants allege, firstly, that article 315.3 of the Criminal Code (hereinafter: CC) provides for long prison sentences (from three years to four-and-a-half years) and heavy fines (from 12 months and one day to 18 months) for those who coerce other persons to begin or continue a strike. According to the complainants, this criminal definition is being applied across the board with the aim of criminalizing the exercise of the right to strike, specific cases having occurred in which trade unionists were handed long prison terms because they had taken part in strike picketing.
- 449.** The complainants add that a reading of article 315.3 CC together with other provisions of the Criminal Code reveals that trade union activity constitutes a specific factor which aggravates criminal liability inasmuch as: (i) under article 172.1 CC, any person who commits the basic offence of coercion (consisting of using violence to prevent another from doing something the law does not prohibit or forcing another to do something he/she does not want to do) shall be liable to imprisonment from six months to three years, whereas article 315.3 provides for prison sentences of three to four-and-a-half years for strikers who coerce other persons; (ii) punishment imposed under article 315.3 CC prevents the convicted person from enjoying the benefits provided for in articles 80 and 88 relating, respectively, to suspension or substitution, by alternative penalties, of custodial sentences not exceeding two years; and (iii) the sentence prescribed in article 315.3 CC is much heavier than that

prescribed in article 315.1 CC, which stipulates imprisonment of six months to three years for any person who, by deceit or by abuse of a situation of need, obstructs or limits freedom of association or the exercise of the right to strike.

450. The complainants also state that: (i) article 315.3 CC lacks clear criteria regarding the criminal conduct in question, its purpose and the persons who carry out such acts, with the result that application of this provision by the courts is highly inconsistent; and (ii) charges of committing a crime under article 315.3 have led to several prison sentences of longer than three years, despite the fact that in virtually all the cases no violence occurred. On the basis of the foregoing, the complainants state that the general definition of the crime of coercion would be sufficient to eradicate violent behaviour during the exercise of the right to strike, without the need to incorporate more severe penalties for exercising that right.
451. The complainants also append a communication dated 23 July 2014 from “Judges for Democracy”, a professional association of the judiciary of Spain, in which the association: (i) criticizes the disproportionate nature of the punishment prescribed in article 315.3 CC, the existence and wording of which date back to the period before Spain’s transition to democracy, an era which saw repeated efforts to suppress the right to strike; (ii) calls for the abolition of this provision, arguing that the right not to strike is already sufficiently protected through the criminal offence of coercion; (iii) requests judges to give this provision an especially narrow interpretation which does not deter the exercise of the basic right to strike; and (iv) points out that in the context of the acute social conflict that has followed reform of the labour legislation, 260 trade unionists are now undergoing administrative or criminal proceedings and a number of trade unionists have gone to prison.
452. The complainants allege, secondly, that over and above this deficiency of the criminal legal framework that they denounce, the manner in which the legislation is applied by the Public Prosecutor’s Office and the criminal courts is a factor in the violation of the right to strike. In this regard, the complainants state that: (i) many trade unionists are under threat of long prison terms simply because they take a leading role in labour disputes; (ii) the Public Prosecutor’s Office and the criminal courts do not apply consistent criteria in bringing charges for alleged criminal acts committed during collective disputes, which creates significant legal uncertainty; and (iii) the actions of the prosecuting authority and the judges frequently disregard the position of the Supreme Court and the Constitutional Court, according to which the application of criminal provisions must take account of the need to protect the fundamental right to freedom of association.
453. The complainants further state that, amid increasing social unrest in the wake of the labour legislation reforms introduced in Spain since 2010, their legal departments have been informed of 81 penalty procedures or criminal prosecutions involving the exercise of the right to strike or collective rights. The complainants describe below a number of criminal or administrative proceedings under way in 12 of the Autonomous Communities of Spain.

Andalusia

454. The trade union organizations state that 32 workers are affected by several criminal proceedings arising from their participation in the general strikes of September 2010 and November 2012 and in a company strike. The charges being brought in these proceedings include assault and battery, and coercion to go on strike, covered by article 315.3 CC. The Provincial Court of Granada upheld the sentencing of two persons to three years and one day of imprisonment for coercion to strike under article 315.3 CC. It was found that these two persons, during the general strike of 29 March 2012, had verbally abused the owner of premises in Granada and had defaced the premises with stickers and graffiti, causing damage amounting to €767. In San Fernando (Cadiz) the prosecution has called for prison sentences of nine months, 14 months and two years and three months for three workers from the

Navantia enterprise for major offences of public disorder and dangerous assault and a minor offence of battery. The complainants allege that the violent acts giving rise to criminal proceedings in this case consisted in: (i) for the first worker, throwing a microphone at a police officer but not actually striking him; (ii) for the second worker, striking the forearm of a police officer with an umbrella; and (iii) for the third worker, breaking the shield of a police officer with blows from an umbrella. In Seville, a prison sentence of one year is being requested for a road safety offence.

Aragon

455. The complainants refer to criminal proceedings brought in Zaragoza for assault and battery involving the alleged jostling of police officers during the general strike of 2012.

Asturias

456. The complainants refer to 15 cases under way in various courts, in which prison sentences ranging from six months to four years are being called for in respect of 43 persons. Public disorder is alleged in ten cases, assault in six, criminal damage in five, and in only two cases the offence of battery, which would appear to illustrate that this social upheaval has resulted in very few cases of physical injury.

Balearic Islands

457. In relation to the general strike of March 2012, the complainants state that criminal proceedings are under way against the General Secretary of the Union of Workers' Commissions of the Balearic Islands, in which a prison sentence of more than four years is being requested.

Castile-La Mancha

458. The complainants refer to: (i) the indictment, without any specific charge having been brought, of the General Secretary of the Provincial Union of Ciudad Real and another two trade union leaders for lighting a bonfire at a roundabout and organizing an informational picket during the general strike of 2010; and (ii) charges against four trade unionists from Albacete, who are still awaiting judgment, for causing damage (initially for the crime of coercion to strike); they are accused of throwing tacks and striking a vehicle.

Castile-Leon

459. The complainants refer to six criminal proceedings involving charges of major and minor public order offences, and minor offences of threats and abuse. In Avila and Valladolid, criminal trials have ended in acquittals or the imposition of small fines.

Catalonia

460. The complainants refer to: (i) the indictment, following the 2010 general strike, for a crime against workers' rights, of four trade union officials from Terrassa, for each of whom a four-year prison term had initially been sought, with agreement finally being reached on a conditional six-month sentence; (ii) several proceedings relating to informational pickets formed during the 2012 general strike, without any charges being brought; (iii) the indictment in the Barcelona courts of a member of the Workers' Committee of the Barcelona Metro for criminal damage, in relation to a strike on the Barcelona metropolitan transport

system in November 2012; (iv) charges brought in the magistrates' courts of Valls and Barcelona for coercion in connection with a sectoral strike which took place in Tarragona in May 2013; and (v) the launch of six criminal proceedings, still at the pre-trial stage, deriving from a strike at the Panrico enterprise.

Galicia

461. The complainants refer to: (i) an acquittal by the Provincial Court of Pontevedra concerning an accusation made against three persons in relation to a dispute arising from a strike in November 2009; (ii) the sentencing of two workers, by the same provincial court, to imprisonment of three years and one day, for throwing paint into a swimming pool during a sectoral strike in 2012; and (iii) the imposition of a three-year prison term in connection with the general strike in September 2010.

Rioja

462. The complainants refer to: (i) the acquittal of five workers, among them the General Secretary of the Rioja CCOO, who were accused initially of criminal damage and coercion to strike, and subsequently of the general offence of coercion; and (ii) the pending oral trial of a worker who is facing calls for five years' imprisonment for taking part in the general strike of 29 March 2012.

Murcia

463. The complainants refer to criminal proceedings in the magistrates' courts in Murcia, in which three persons are accused of committing a public order offence after burning tyres and interrupting traffic during the general strike of March 2012.

Madrid

464. The complainants refer, firstly, to proceedings brought before the courts in Getafe against eight trade unionists at the Airbus company, related to the conduct of informational pickets during the general strike of September 2010. They state that the Public Prosecutor's Office called for eight-year prison terms for each of the accused, for offences against workers as well as assault and battery, and that the charge was brought by a group of national security force members who had intervened in the violent breakup of the picket. The complainants also refer to: (i) a call for seven years' imprisonment for two trade unionists from the hotel sector for taking part in the general strike of 29 March 2012; (ii) calls for prison sentences ranging from two to four years for two workers from Alcalá de Henares, the proceedings still being at the pre-trial stage; (iii) criminal proceedings in Magistrates' Court No. 5 in Getafe, involving four members of the strike committee and works council in connection with a strike held in June 2012 at John Deere Iberica SA, the workers being accused of denying senior company managers access to their posts; and (iv) the conviction of a worker by the Madrid Provincial Court (ruling of 31 March 2014) for the offence of coercion under article 620.2 CC, after he had asked the manager of a local branch of MacDonalds to close her premises during the general strike of 14 November 2012.

Valencia

465. The complainants refer to: (i) six legal proceedings, two of which have been terminated, at Magistrates' Court No. 4 in Liria, Criminal Court No. 8 in Alicante and Court No. 4 in Alicante; (ii) proceedings in Elche in which 19 persons are accused of coercion; and (iii) the

situation of seven trade unionists awaiting interim assessment by the Public Prosecutor's Office.

466. The complainants add that the various cases described demonstrate patterns of investigation, prosecution and punishment which constitute an obstacle to the full exercise of the right to strike and union activities as a whole. In this regard, the complainants:

- allege that almost all the actions being prosecuted lack the element of violence or coercion, which is understood as implying a degree of risk to the integrity of persons, property or installations. They state that the demonstrations called by the most representative trade union organizations in Spain do not entail any violence. According to the complainants, in the Airbus case, where eight union leaders are accused of attacking members of the police forces, the acts of which they are accused resulted from a police charge on hundreds of workers, of whom several dozen sustained injuries. The police charge supposedly took place to protect a worker who did not require medical attention. Since those supposedly attacked were law enforcement officers, it is surprising that no attacker has been identified or detained, and this is why the accusation has targeted the trade union leaders. In the case of the conviction in Pontevedra, it is surprising that the staining of swimming pool water and of a company manager's suit should be classed by the provincial court as acts of violence against persons and objects;
- denounce the generalized and unfounded accusations made in police statements of criminal conspiracy and unlawful informational picketing, which can significantly increase the criminal liability of the accused. The complainants assume that this practice reflects criteria established by government agencies or the Ministry of the Interior;
- denounce the consistent focus on bringing charges against trade union leaders whenever it proves impossible to identify the individual perpetrators of alleged acts, and point to the Airbus case and the case in the Balearic Islands as examples;
- emphasize the key role of the Public Prosecutor's Office, whose position can vary significantly according to the local context, thus generating great legal uncertainty. While numerous disputes do not lead to criminal proceedings in many situations, in other cases a criminal charge is brought even though the seriousness of the acts does not account for the conduct of the Public Prosecutor's Office. In this regard, the complainants point out that in only two cases is the charge of coercion to strike accompanied by the existence of any kind of injury. According to the complainants, the foregoing illustrates the lack of consistent criteria applied in prosecutions concerning the crime of coercion to strike, with insufficient consideration being given to the need to protect the legitimate exercise of the right to strike. At times, the Public Prosecutor's Office initiates criminal proceedings merely on the grounds of words spoken, even when no threat is uttered, as in the case of the conviction in Pontevedra; and
- allege that the courts of first instance and, at times, the provincial (second-level) courts, attach insufficient weight to the legal rights in dispute, failing to safeguard the right to strike and freedom of association and setting aside the Supreme Court criteria which lead to a narrow interpretation of the crime of coercion to strike. Lastly, they state that, despite their restrictive nature, the Supreme Court criteria do not prevent article 315.3 CC from continuing to classify strike action as an aggravating factor in criminal liability.

467. The UGT provided additional information in a communication dated 31 October 2014. The complainant firstly states in general that the practices used to criminalize trade union activity are not confined to the application of the Criminal Code provisions concerning the crime of coercion to strike, but include the crimes of assault, unruly behaviour and public disorder. It

also alleges that the justice system frequently moves very slowly, with some cases still unresolved after more than four years. The complainant contends that the lengthy uncertainty of a case carrying the threat of imprisonment affects the exercise of freedom of association and the right to strike.

- 468.** Turning to the subject of article 315.3 CC, the complainant asserts that: (i) coercion to promote a strike was classified as a criminal offence in 1976 to intimidate the still clandestine trade union organizations and the workers more actively involved in organizing and carrying out strike picketing; (ii) this provision has remained unaltered despite the progress achieved in the fundamental freedoms and rights enshrined in the 1978 Constitution; (iii) for many years article 315.3 was not implemented; and (iv) nevertheless, in order to curb the protests expressing public discontent, the freedom of many trade unionists and union leaders is being endangered by the application of a definition of crime which infringes the actual exercise of the right to strike.
- 469.** The complainant then provides details of specific cases of criminal proceedings following on from strikes, in which article 315.3 CC was applied or where other offences were involved. The complainant refers, firstly, to the case of Mr Carlos Rivas Martínez and Mr Serafín Rodríguez Martínez, convicted for a crime against workers' rights under article 315.3 CC, stating that: (i) the convicted workers took part in a transport sector strike held in Vigo in April 2008 together with 70 other workers; (ii) according to the indictment, the workers in question prevented the passage of several lorries driven by workers who did not support the strike and threw objects and stones which broke the window of one lorry; (iii) on the basis of article 315.3 CC both workers were sentenced to three years' imprisonment and a 12-month fine of €5 per day, a sentence upheld by the Provincial Court of Pontevedra in a ruling of 4 December 2012; and (iv) following the filing of a petition for clemency, in 2014 the courts granted suspension of imprisonment pending decision on the petition.
- 470.** Secondly, the complainant refers to the case of a trade union leader, Ms María Jesús Cedrún Gutierrez, stating that: (i) during a strike called by national trade unions on 29 March 2012, the trade union leader took part in an informational picket at the entrance to the MercaSantander enterprise; (ii) according to the indictment, she threw nails on the ground in front of vehicles that had stopped at the informational picket; and (iii) she was sentenced on 27 March 2014 to a ten-day fine for coercion under article 620.2 CC.
- 471.** Thirdly, the complainant refers to the case of Mr José Manuel Nogales Barroso and Mr Rubén Sanz Martín, stating that: (i) during the general strike of 30 March 2012, the two trade union representatives took part in an informational picket; (ii) according to the charge, two members of the police verified that the members of the informational picket, who had approached a bar to ask it to close, began to attack and abuse workers in the bar, striking them with the banners they were carrying; (iii) two bar workers and a police officer sustained injuries, recovery from which took four, three and six days, respectively, although none of them was unable to carry out his usual activities; and (iv) the two strikers were charged with coercion against the rights of workers under article 315.3 CC, assault under articles 550, 551 and 552 CC, and battery under article 617.1 CC; and (v) in 2012, each worker was sentenced to three years and nine months' imprisonment and a 15-month fine of €15 per day for coercion, three years and three months' imprisonment for assault, and a 50-day fine of €15 per day for battery. In the light of the above factors, the complainant states that the report of the Public Prosecutor's Office contained no examination of the circumstances in which the events took place and started from the preconception that the informational picket was an unruly group of people using force and intimidation to threaten others' freedom to work, without taking into account the constitutional dimension of the picketing.

472. Fourthly, the complainant refers to the case of Mr Juan Carlos Martínez Barros and Ms Rosario María Alonso Rodríguez, stating that: (i) during the general strike of 28 September 2012, the two workers formed part of an informational picket in the Cantabrian town of Reinososa; (ii) according to the wording of the judgment, the workers padlocked the tax office so that its glass door had to be broken to allow access, with services to the public interrupted for a whole morning; and (iii) the workers were handed a 15-day fine for coercion.

B. The Government's reply

473. The Government indicates in its communications that although the ILO Conventions referred to in the complaint - Conventions Nos 87, 98 and 154 - protect the right to strike, this right is not absolute and it cannot be interpreted without restrictions. The Government states that, in this respect, article 315.3 CC does not penalize the free exercise of the right to strike but punishes the use of force or violence to compel workers to take part in a strike. Thus this provision, which, as in other countries, penalizes the obstacles to the freedom to work arising from strike picketing, complies with the jurisprudence of the Spanish Constitutional Court and with the doctrine of the Committee on Freedom of Association, both of which recognize that the right to strike does not constitute an absolute right and that it should not give rise to acts of violence or intimidation.

474. In this respect, the Government emphasizes that: (i) the Spanish legal system fully respects the right to strike, which the Spanish Constitution considers to be a fundamental human right (article 28); (ii) article 6 of Royal Decree-Law No. 17/1977 on labour relations provides that workers on strike may publicize it peacefully but that the freedom to work of those who do not wish to join the strike must be respected; (iii) the Constitutional Court recognizes that the right to strike involves requesting others to support it and to take part, within the legal framework, in joint activities to that end and that the activity of so-called picketing by strikers, entailing the provision of information and propaganda for other workers and persuading them to join a strike or dissuading those who have chosen to continue a strike, is an expression of the right recognized in article 28 of the Spanish Constitution; (iv) the Constitutional Court is, however, adamant in asserting that the right to strike and the activity of picketing have limits and that the abovementioned right does not include the possibility of exercising moral violence of an intimidating or coercive nature against others; and (v) the Constitutional Court has taken the opportunity to clarify that conduct such as aggression, verbal abuse and the obstruction of free access to an enterprise fall outside the scope of exercise of the right to strike.

475. The Government states further that article 315.3 CC originates from Act No. 23/1976 of 19 July 1976 which introduced former article 496 CC. Although the Criminal Code underwent significant reform in 1995, the authors of the reform considered that the actions regulated by former article 496 CC were sufficiently serious to be retained in the Criminal Code. The intention of the legislature in 1995, reflected in the three paragraphs of article 315, was to ensure a balance between the protection provided for those opting to exercise their right to strike and that provided for those deciding not to do so or not to do so any longer, by imposing identical penalties in all cases involving coercion, whether aimed at preventing the exercise of the right to strike or at forcing participation in a strike. The Government also points out that the acts addressed by article 315.3 CC constitute a subtype of article 172 CC, which criminalizes acts of coercion, imposing penalties ranging from six months' to three years' imprisonment or a 12–24 month fine. In the Government's view, the criminal subtype in article 315.3 CC is justified inasmuch as coercion aimed at forcing workers to go on strike jeopardizes the freedom to work, human dignity and the right to moral integrity, which are rights and values protected by the Spanish Constitution (articles 10, 15 and 35). The Government emphasizes, however, that since the right to strike is fundamental, a judge must, in line with the doctrine of the Constitutional Court, not only

verify that all the factors described in article 315.3 CC are in place but also, if there is doubt as to the interpretation of that provision, give it a narrow interpretation to avoid unduly limiting the right to strike.

476. The Government states further that Organic Act No. 1/2015 of 30 March 2015 has mitigated the sentences applicable to the offence described. Whereas the previous legislation prescribed a prison sentence of at least three years and a maximum of four-and-a-half years, the reform reduced these penalties to a minimum prison term of one year and nine months and a maximum of three years. In addition, as a result of the reform, the judicial authority has the possibility to replace custodial sentences with fines. The penalty for this offence is thus mitigated, while at the same time the judge can decide between imprisonment or a fine, depending on the gravity of the offences and, in particular, on whether or not violence was exercised in committing them.
477. Concerning the specific criminal proceedings referred to in the complaint, after indicating that, owing to a lack of information from the complainants, it was unable to conduct a detailed analysis of police actions in respect of all the cases mentioned, the Government states that: (i) the armed forces and state security forces are required under the Spanish Constitution to protect the free exercise of rights and freedoms and guarantee public safety, a task assigned to them under Organic Act No. 2/1986; (ii) although the majority of labour demonstrations relating to the economic crisis that has affected the country in recent years have been peaceful, exceptions have occurred in which the armed forces and state security forces were obliged to intervene in order to eliminate violence and ensure the peaceful use of public roads and spaces; and (iii) in all the cases cited in the complaint, criminal proceedings were begun against specific individuals for failing to exercise the right to strike in a peaceful manner, thus necessitating intervention by the law enforcement bodies in order to protect, as appropriate, the right to free movement, the right to work, the moral or physical integrity of individuals, or property.
478. With respect to the incidents that occurred at the Airbus company in Getafe during the general strike of 29 September 2010, the Government states that: (i) the national police force had to intervene to enable an employee to reach his place of work and 11 police officers were injured during the operation, three having to be taken to hospital; and (ii) the violence against the police reached such a pitch that two officers surrounded by strikers had to fire warning shots into the air to drive away their attackers.
479. Concerning the events that occurred in San Fernando (Cadiz) in 2012 during a workers' protest at the Navantia enterprise, the Government states that: (i) the demonstrators changed the itinerary provided to the authorities and headed off to the local headquarters of the People's Party of Spain; (ii) the demonstrators then forced the entrance gate to the headquarters, making it necessary for the police to intervene to prevent further damage; and (iii) the demonstrators responded to that intervention with attacks on police officers and the chairman of the works committee threw a microphone at a police officer, which led to his arrest.
480. The Government emphatically denies the existence of any criteria set by the executive bodies of the Interior Ministry for the purpose of incriminating workers and trade union representatives. The Government states that the trade union organizations are fully recognized under the Spanish Constitution, and that therefore the armed forces and state security forces are not governed by orders that a priori regard trade union activity or informational picketing as illegal; rather, they are merely performing their constitutional duties of defending the law and the rights and freedoms of the people.
481. Likewise, the Government states that all the actions of the Public Prosecutor's Office are subject to the principle of legality, that it is obliged to bring a criminal prosecution in all

cases where it is established that criminal acts have been committed, and that it acts objectively and with impartiality, subject only to the rule of law.

- 482.** Concerning the allegation contained in the complaint that criminal proceedings target union officials on the sole grounds that they take the lead in labour disputes, the Government states that: (i) it is at times difficult to determine who is responsible for unlawful damage caused during a strike, and thus the trade union organization to which the strikers belong, through its leaders, is required to answer for the individual acts of its members, subject to the terms of article 5.2 of Organic Act No. 11/1985 on freedom of association, which provides that a trade union is not responsible for individual acts by its members, unless those acts are performed as a regular part of representative duties or if it is proved that the members were acting on behalf of the union; and (ii) trade union representatives are the persons who generally lead informational pickets or demonstrations, which at times can entail violence, and it is thus appropriate that those representatives are named in legal proceedings dealing with violence, without prejudice to any further liability for such acts, which is determined by judicial or administrative decision, as appropriate.
- 483.** The Government also states that the application of article 315.3 CC has not caused any problems for several decades and that the presentation of this complaint results from a specific personal situation involving the sentencing of Ms Carmen Bajo and Mr Carlos Cano to imprisonment of three years and one day, for ordering an owner to close her premises during the general strike of March 2012. The Government asserts that the two complainant organizations have made repeated efforts to prevent these two individuals from going to prison, which, in the opinion of the Government, limits the scope of the present complaint to a personal matter.
- 484.** The Government denies the allegation concerning the non-application of criminal legislation to strike movements prior to the current economic crisis and its supposed use on a greater scale in recent years. By way of illustration, the Government refers in its various communications to a non-exhaustive list of 11 judgments from 1997 (one), 1998 (one), 1999 (one), 2002 (one), 2004 (two), 2005 (one), 2006 (three) and 2009 (one) which involved the application of article 315.3 CC.
- 485.** The Government also refers, again by way of illustration, to seven judgments handed down between 2011 and 2015 in which the courts issued acquittals or at least showed leniency with regard to the acts judged under article 315.3 CC. The Government states that the examples both before and after 2010 demonstrate that the judicial bodies are applying a restrictive interpretation of article 315.3 CC and that that interpretation has not changed in recent years.
- 486.** Lastly, the Government states that Spanish criminal law complies fully with the Conventions and principles concerning freedom of association and that, under the existing legal system in Spain, the basic right to strike is protected by effective mechanisms, both in the regular courts and in the Constitutional Court through the remedy of *amparo*. On the basis of the above, and since all the facts set out by the complainants are awaiting judicial rulings, it is reasonable to request that the examination of the present complaint be deferred until those rulings are given.
- 487.** In its communications of 24 February and 9 May 2016, the Government provides a copy of Judgment No. 57/2016 of 16 February 2016 of the Getafe Criminal Court, concerning charges of offences against workers' rights and offences of assault and battery, brought against eight trade union leaders following incidents at the Airbus company in Getafe during the general strike of 29 September 2010. The Government emphasizes that the judgment: (i) declared the existence of acts of coercion by the workers in support of the strike and the existence of acts of aggression to be proven; (ii) acquitted two of the union leaders after the

Public Prosecutor's Office withdrew the charges against them; and (iii) acquitted the other six on the grounds of presumption of innocence, since no accusation against any of them for committing specific acts was substantiated.

- 488.** In its communication of 24 May 2016, the Government transmits the position of the Spanish Confederation of Business Organizations (CEOE), the leading employers' organization in the country, on the content of the complaint. In its communication, the CEOE relays a position similar to the one submitted by the Government in relation to article 315.3 CC and its application by the Spanish courts, noting that such provision is in full conformity with the comments of the Committee on Freedom of Association and with the international Conventions ratified by Spain on the matter. The CEOE states in particular that: (i) the revision of article 351.3 CC by Organic Act No. 1/2015, lowering the prison penalties applicable to those who coerce non-striking workers, ensures that the penalties imposed are proportionate to the gravity of the offences committed; (ii) it being a more favourable law, Organic Act No. 1/2015 is applied to pending judicial proceedings, even if the acts committed took place before its entry into force; (iii) the current regulation does not lead to any kind of legal uncertainty and, in case it was, it is the courts that should undertake such assessment; (iv) the number of sentences of the Spanish courts judging these matters are almost inexistent, which demonstrates that there is no legal problem in this regard; and (v) as to the alleged delay of the criminal proceedings concerning acts committed during strike action, the CEOE notes the adoption on 5 October 2015 of Act No. 41/2015 on Criminal Procedure to Streamline Criminal Justice and Strengthen Procedural Guarantees, which sets out time limits for the judicial enquiry phase, so that the enquiry will not lead to delays, contrary to what may have occurred in the past before the entry into force of such Act.
- 489.** The CEOE's communication also contains information on the situation of four persons that had been convicted to a three-year prison sentence as well as a fine for the commission of a crime against the rights of workers pursuant to article 315.3 CC and who had requested a petition for clemency in 2014 (Ms María del Carmen Bajo Crémer and Mr Carlos Cano Navarro, on the one hand, sentenced on 24 May 2013, and Mr Carlos Rivas Martínez and Mr Serafín Rodríguez Martínez, on the other hand, sentenced on 9 May 2011). In this regard, the CEOE informs that: (i) the clemency petition files are complete and pending resolution; (ii) while awaiting the clemency decision the persons concerned are free; and (iii) in all cases, the convicted may request, in the execution phase, the application of the more favourable Act.

The Committee's conclusions

- 490.** *The Committee observes that the present case refers to allegations of the suppression of the right to strike through criminal legislation and its increasing use in recent years by the Spanish public authorities. In this regard, the Committee notes in particular that the complainant organizations firstly allege that: (i) article 315.3 CC provides for heavy prison sentences (from three years to four years and six months) for those who, acting in a group or individually but in collusion with others, coerce other persons to begin or continue a strike; (ii) given that there is a general offence of coercion in the Criminal Code (article 172.1 CC) imposing much lighter prison terms (six months to three years), Spanish criminal legislation, far from protecting the fundamental nature of the right to strike, considers its exercise as an aggravating factor in criminal liability; and (iii) the definition of the criminal offence in article 315.3 CC is imprecise, resulting in its highly inconsistent application and generating legal uncertainty.*
- 491.** *The Committee notes that the complainants also allege that: (i) recent years have seen a rise in labour and social movements opposing regressive labour reforms. Article 315.3 CC and other provisions of criminal law (concerning offences including assault, unruly behaviour and public disorder) are being used very broadly by the public authorities to criminalize the*

exercise of the right to strike; (ii) in 2014, a total of 81 penalty procedures or criminal prosecutions of this type had been identified, a number of them resulting in sentences of several years' imprisonment; (iii) most of the strike movements that were, or are, the subject of criminal charges or proceedings lacked any element of violence, with the Public Prosecutor's Office and the courts failing to attach sufficient weight to ensuring that the fundamental right to strike is safeguarded; (iv) in most cases, the criminal charges target trade union leaders, regardless of their actual conduct during the strike; and (v) many of the criminal investigations are characterized by long delays, which have a deterrent effect on the exercise of collective rights. Lastly, the Committee notes that, apart from the 81 cases reported in general, the complainants also refer in more detail to a series of specific cases that they claim are characterized by heavy and disproportionate sentences imposed by the courts or sought by the prosecution.

492. *The Committee also notes the observations of the Government, which state that: (i) although the ILO Conventions referred to in the complaint – Conventions Nos 87, 98 and 154 – protect the right to strike, this right is not absolute and it cannot be interpreted without restrictions; (ii) the Spanish legal system fully respects the right to strike, which the Spanish Constitution considers to be a fundamental human right; (iii) in line with the Committee on Freedom of Association's positions, the recognition of the fundamental nature of the right to strike does not mean that it constitutes an absolute right, which is why protection of it does not extend to the use of violence or coercion, or to the violation of other fundamental rights; (iv) article 315.3 CC fully reflects this position because, far from restricting the exercise of the right to strike, it punishes the violation of highly important rights and freedoms, such as the freedom to work and human dignity, that results from coercion; (v) the Spanish courts interpret the provisions of article 315.3 CC in a restrictive manner; (vi) the legislative reform of 30 March 2015 has resulted in the reduction of prison sentences provided for in article 315.3 CC, from the pre-reform minimum of three years and maximum of four and a half years to the current minimum of one year and nine months and maximum of three years, with the alternative possibility of imposing a fine, thus preventing any risk of disproportionate penalties for the abovementioned offence; (vii) there is no widespread practice of criminalization of strike movements by the public authorities, whether these be the law enforcement bodies, the Ministry of the Interior or the Public Prosecutor's Office; (viii) there are no grounds for stating that article 315.3 has not been applied for decades and that the decision to use it systematically was taken in recent years; (ix) in the specific cases highlighted in sufficient detail by the complainants, acts of violence clearly occurred; and (x) there are actually circumstantial and personal reasons behind the filing of the present complaint, namely to prevent Ms Bajo and Mr Cano from serving the prison sentences handed to them after they had ordered an owner to close her premises during the March 2012 general strike.*

493. *In the light of the above factors, the Committee observes that the main object of the complaint is article 315.3 CC concerning the crime of coercion to begin or continue a strike. The Committee notes that, according to the complainants, this provision stipulates excessively harsh penalties and its definition of punishable conduct is imprecise, causing legal uncertainty and giving rise to disproportionate sentences that fail to take into account either the particular characteristics of the right to strike or the need to protect this fundamental right. The Committee also notes the Government's statements that the Spanish legal system recognizes that the right to strike includes the possibility of organizing peaceful informational picketing, that article 315.3 CC merely prohibits unlawful acts that infringe highly important rights such as the freedom to work and human dignity, that the new version of the article following a reform in 2015 has significantly reduced applicable prison sentences and that, in compliance with the jurisprudence of the Constitutional Court concerning fundamental rights, the courts must interpret and apply article 315.3 CC restrictively in order to avoid undue limitations on the right to strike.*

494. *The Committee observes that, in its revised version, article 315.3 CC provides that any persons who, acting in a group or individually but in collusion with others, coerce other persons to begin or continue a strike shall be liable to imprisonment of one year and nine months to three years, or to a fine of 18–24 months. The Committee also observes that the offence categorized under article 315.3 CC is a subtype of the generic offence of coercion provided for in article 172.1 CC, which states that any person who, without being lawfully authorized, uses violence to prevent another from doing something that the law does not prohibit or to force another to do something, whether just or unjust, that he/she does not want to do, shall be liable to imprisonment of six months to three years or to a fine of 12–24 months, according to the severity of the coercion or the means used.*
495. *The Committee notes that article 315.3 CC is applied primarily in the case of picketing action. The Committee underlines that it is important for criminal provisions applicable to collective labour disputes to clearly define unlawful conduct so as to ensure the legal certainty needed for stable collective labour relations. In this regard, while noting the Government's statement that the courts, in line with the jurisprudence of the Constitutional Court concerning fundamental rights, interpret and apply article 315.3 CC restrictively, the Committee observes that the amended version of article 315.3 CC, despite being applicable only in the case of a strike and apart from specific reference to the coordinated nature of the unlawful act, still fails to include elements to define conduct constituting coercion in that context. Noting that the complainants allege that the application of this provision is highly inconsistent, the Committee requests the Government to invite the competent authority to review the impact of the 2015 reform of article 315.3 of the CC and to inform the social partners of the outcome of the review. The Committee requests the Government to keep it informed in this respect.*
496. *With regard to the allegedly disproportionate prison sentences stipulated in the abovementioned provision, the Committee recalls the principle 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**, op. cit., para. 668].*
497. *In this respect, the Committee notes, firstly, that a number of judgments handed down between 2011 and 2015 are communicated by the Government in order to demonstrate that the application of article 315.3 CC by the courts makes for an appropriate response to the aggression and unlawful acts classified by this provision. The Committee also observes that, since the submission of the complaint, a reform of article 315.3 in March 2015 has led to the prison sentences stipulated under the provision being reduced from a pre-reform minimum of three years and maximum of four years and six months to a current minimum of one year and nine months and maximum of three years. The Committee also notes that the fines provided for have also increased from a minimum of 12 months and maximum of 24 months to a minimum of 18 months and maximum of 24 months. The Committee takes special note of the Government's assertion that the revised version of the provision allows the judge to decide between a sentence of a fine or imprisonment, depending on the seriousness of the offence and, in particular, whether or not violence was used in committing the offence.*
498. *The Committee notes at the same time that: (i) the minimum prison sentences and fines provided for in article 315.3 CC for the offence of coercion during a strike (imprisonment of one year and nine months to three years or a fine of 18-24 months) remain heavier than the sentences imposed for the general offence of coercion under article 172.1 CC (imprisonment of six months to three years or a fine of 12–24 months) and also longer than the minimum sentences for the general offence of coercion when the exercise of a fundamental right is impeded (imprisonment of 18 months and one day to three years),*

despite the fact that the complainants emphasize that the Spanish Constitution does not include the freedom to work in the category of fundamental rights (article 35 of the Constitution); (ii) the text of the provision fails to provide criteria to distinguish offences punishable by imprisonment from those subject to a fine; and (iii) although the Committee notes, in most of the specific cases referred to by the complainants and the Government, that the prison sentences imposed by the courts were for acts of coercion accompanied by physical violence, it observes that in at least one case (the sentencing of Ms Carmen Bajo and Mr Carlos Cano to imprisonment of three years and one day) no mention is made of the convicted persons committing acts of physical violence.

499. *In the light of the above factors, the Committee requests the Government to invite the competent authority to also review these issues.*

500. *With regard to the allegation that, in recent years, the public authorities have been making extensive use of criminal law to criminalize the exercise of the right to strike, the Committee notes the complainants' statement that they have identified 81 penalty procedures or criminal prosecutions under way in 2014 which, in most cases, do not involve acts of violence. The Committee also notes that the Government, after referring to judgments predating 2010 that applied article 315.3 CC, denies that there is any widespread practice of criminalization of strike movements by the public authorities, whether these be the law enforcement bodies, the Ministry of the Interior or the Public Prosecutor's Office. While emphasizing that it lacks the necessary information to be able to ascertain whether the alleged practice exists, the Committee notes that the Government does not deny the existence of a large number of prosecutions and criminal proceedings under way relating to the exercise of the right to strike. In this regard, the Committee, while recalling that the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike [see **Digest**, op. cit., para. 667], trusts that full consideration will be given to the fact that the frequent recourse to criminal proceedings in the area of collective labour relations does not help maintain a stable and harmonious system of labour relations.*

501. *Concerning the allegation that neither the Public Prosecutor's Office nor the courts are subject to binding criteria for taking account of the impact on freedom of association when formulating charges and prosecuting offences arising from informational picketing, the Committee observes that both the complainants and the Government recognize the contribution of the jurisprudence of the Constitutional Court and the Supreme Court in this regard. In the light of the numerous cases involving informational picketing pending in the courts, the Committee trusts that the position of both courts will be widely disseminated.*

502. *With respect to the allegation of the arbitrary targeting of trade union representatives when formulating charges and issuing convictions for disputes arising from altercations or incidents during a strike, the Committee notes the Government's statements that: (i) trade union representatives generally lead informational pickets or demonstrations, and it is thus appropriate that they are named in legal proceedings dealing with violence, without prejudice to any further liability for such acts; and (ii) it is at times difficult to determine who is responsible for unlawful damage caused during a strike, and thus the trade union organization is required to answer for the individual acts of its members, subject to the terms of Organic Act No. 11/1985 on freedom of association, which provides that a trade union is not responsible for individual acts by its members, unless those acts are performed as a regular part of representative duties or if it is proved that the members were acting on behalf of the union.*

503. *In the light of the Government's response, and since bringing charges for an offence solely on the basis of a person's trade union office could result in a situation of anti-union discrimination, the Committee emphasizes that criminal charges brought against any*

worker, whether a union representative or not, for an offence committed during a strike, should be based on specific evidence pointing to the involvement of that person in the alleged offence. Noting that the complainants claim the existence of numerous cases of trade union leaders being charged for alleged offences committed during strike movements, the Committee trusts that the aforementioned principle will be fully respected.

- 504.** *As regards the alleged delays in many ongoing criminal proceedings, which could have a deterrent effect on the exercise of freedom of association and the right to strike, while noting the absence of comments from the Government in this regard, the Committee takes note that the comments of the CEOE transmitted by the Government indicate that the adoption of Act No. 41/2015 on Criminal Procedure to Streamline Criminal Justice and Strengthen Procedural Guarantees, which sets out time limits for the judicial enquiry phase, will allow to avoid delays in the criminal proceedings relating to acts committed during strike actions. Recalling that respect for due process of law should not preclude the possibility of a fair and rapid trial and, on the contrary, an excessive delay may intimidate the employers' leaders concerned, thus having repercussions on the exercise of their activities [see **Digest**, op. cit., para. 103], the Committee trusts that the criminal proceedings under way relating to the exercise of the right to strike and referred to in the present complaint will be settled as quickly as possible. The Committee requests the Government to keep it informed in this regard.*
- 505.** *As regards the allegations made in the complaint concerning specific cases of supposed criminalization of the right to strike, the Committee observes firstly that a significant number of cases referred to by the complainants did not contain sufficient detail to allow their individual identification and analysis. The Committee will therefore not pursue its examination of these allegations.*
- 506.** *With respect to the charges of offences against workers' rights and offences of assault and battery brought against eight trade union leaders following incidents that occurred at the Airbus company in Getafe during the general strike of 29 September 2010, the Committee notes the Government's statement that the Getafe Criminal Court, in its judgment of 16 February 2016, after establishing that acts of coercion and aggression had occurred, acquitted the accused on the grounds of presumption of innocence, since no accusation against any of them for committing specific acts had been substantiated.*
- 507.** *With regard to the call for prison sentences of nine months, 14 months and two years and three months for three workers from the Navantia enterprise for major offences of public disorder and dangerous assault and a minor offence of battery during a strike in San Fernando (Cadiz), the Committee notes the Government's statement that the demonstrators forced the entrance gate to the headquarters of a political party, necessitating police intervention to prevent further damage, and that the demonstrators responded to that intervention with attacks on police officers, with the chairperson of the works committee throwing a microphone at one of the police officers, which led to his arrest.*
- 508.** *Regarding the sentencing of Ms Carmen Bajo and Mr Carlos Cano, on the basis of article 315.3 CC, to imprisonment of three years and one day for ordering an owner to close her premises during a general strike, the Committee notes the complainants' claim that the two individuals did not commit any violent acts and that the courts merely found that they had verbally abused the owner of the premises and had defaced the premises with stickers and graffiti, causing damage amounting to €767. The Committee also notes that the Government merely states that the two complainant organizations have made repeated efforts to prevent these two individuals from going to prison, which, in the Government's opinion, limits the scope of the present complaint to a personal matter. Observing that, unlike in previous cases, the Government does not refer to acts of physical violence committed by Ms Carmen Bajo and Mr Carlos Cano, and noting that both were sentenced*

to long prison terms, the Committee requests the Government to indicate the specific grounds that led to the imposition of the sentences concerned. Taking note of the CEOE's communication, indicating that both persons are currently free as they await a decision on their clemency petition, the Committee requests the Government to keep it informed of the evolution of the situation of Ms Carmen Bajo and Mr Carlos Cano.

509. *As to the situation of Mr Carlos Rivas Martínez and Mr Serafín Rodríguez Martínez, the Committee takes note of the information provided in the CEOE's communication, noting that both workers, sentenced to three years of prison in 2011 pursuant to article 315.3 CC, are currently free, awaiting a decision on their clemency petition. In these conditions, the Committee requests the Government to keep it informed of the evolution of the situation of Mr Carlos Rivas Martínez and Mr Serafín Rodríguez Martínez.*

510. *The Committee notes that the Government has not provided observations on the situation of Ms María Jesús Cedrún Gutierrez, Mr José Manuel Nogales Barroso, Mr Rubén Sanz Martín, Mr Juan Carlos Martínez Barros, Ms Rosario María and Mr Alonso Rodríguez, referred to in the UGT communication of 31 October 2014, who received varying sentences under article 315.3 CC. The Committee requests the Government to send its observations on this matter as soon as possible.*

The Committee's recommendations

511. *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 invite the competent authority to review the impact of the 2015 reform of article 315.3 of the CC and to inform the social partners of the outcome of the review. The Committee requests the Government to keep it informed in this respect.*
- (b) The Committee requests the Government to indicate the specific grounds that led to the sentencing of Ms Bajo and Mr Cano to imprisonment of three years and one day and, noting that they are currently free, awaiting a decision on their petitions for clemency, the Committee requests the Government to keep it informed of the evolution of their situation.*
- (c) Noting that Mr Carlos Rivas Martínez and Mr Serafín Rodríguez Martínez are currently free, awaiting a decision on their petitions for clemency, the Committee requests the Government to keep it informed of the evolution of their situation.*
- (d) The Committee requests the Government to send its observations on the situation of Ms María Jesús Cedrún Gutierrez, Mr José Manuel Nogales Barroso, Mr Rubén Sanz Martín, Mr Juan Carlos Martínez Barros, Ms Rosario María and Mr Alonso Rodríguez. The Committee trusts that the ongoing criminal proceedings relating to the exercise of the right to strike referred to in the present complaint will be settled as quickly as possible. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 2203

DEFINITIVE REPORT

Complaint against the Government of Guatemala

presented by

- **the Trade Union of Workers of Guatemala (UNSITRAGUA) and**
- **the Indigenous and Rural Workers' Trade Union Movement of Guatemala (MSICG)**

Allegations: The complainant organizations allege assaults and acts of intimidation against trade unionists in a number of enterprises and public institutions; destruction of the headquarters of the trade union at the General Property Registry; raiding and ransacking of the headquarters of the trade union at the enterprise Industrias Acrílicas de Centroamérica SA (ACRILASA) and burning of documents; anti-union dismissals, and the employers' refusal to comply with judicial orders for the reinstatement of dismissed trade union members

- 512.** The Committee last examined this case at its March 2014 meeting, and on that occasion presented an interim report to the Governing Body [see 371st Report, approved by the Governing Body at its 318th Session (March 2014), paras 523–537].
- 513.** The Government sent its observations in communications dated 20 and 26 May, 9 September and 12 November 2015, and 3 August 2016.
- 514.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

- 515.** At its October 2014 meeting, the Committee made the following recommendations [see 371st Report, para. 537]:
- (a) The Committee again regrets that the Government's reply remains incomplete, despite the fact that the pending allegations refer to events which took place several years ago and include serious acts of violence against union members, and acts of anti-union discrimination and interference. The Committee urges the Government to provide information on all the pending issues in the very near future.
 - (b) With regard to the allegations concerning assaults, death threats and acts of intimidation against union members, as well as attacks on union headquarters, the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent observations since the Committee's last examination of the case. The Committee firmly expects that the commitments undertaken by the Government in the Memorandum of Understanding signed in March 2013 will be translated into actions and tangible results with respect to the allegations of violence and threats contained in this case, and urges the

Government to refer these allegations as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard.

- (c) The Committee again invites the Government to enter into contact with UNSITRAGUA with a view to providing a detailed reply regarding the case relating to the alleged raid in 2002 involving the burning of documents at the headquarters of the trade union operating at the enterprise ACRILASA.
- (d) With regard to the obstacles and significant delays to the collective bargaining process between the Supreme Electoral Tribunal and UNSITRAGUA, as well as the obstacles to the union's exercise of the right to strike, the Committee urges the Government to take all the necessary measures to significantly expedite the judicial procedures to determine the lawfulness of strikes and, in general, to settle collective disputes involving public officials exercising authority in the name of the State.
- (e) As regards the allegations in relation to the municipality of El Tumbador concerning the reinstatement proceedings for dismissed workers ordered by the judicial authority and the dismissal of several union officials, the Committee notes with regret that the Government has not provided information in relation to the dismissal of Mr César Augusto León Reyes, Mr José Marcos Cabrera, Mr Víctor Hugo López Martínez, Mr Cornelio Cipriano Salic Orozco and Mr Romeo Rafael Bartolón Martínez. The Committee deplores these excessive delays and firmly expects that proceedings to reinstate the dismissed workers will be completed in the very near future. The Committee requests the Government to keep it informed of future rulings on this matter and to provide evidence of the reinstatement of the aforementioned workers, or, if reinstatement is not possible due to the time elapsed, the payment of adequate compensation which would constitute a sufficiently dissuasive sanction.
- (f) As regards the remaining allegations, in the absence of observations from the Government, the Committee yet again reiterates its previous recommendations, which are reproduced below, and urges the Government to send the information and take the actions requested without delay:
 - noting that the Government has not provided any information concerning wages owed to the union leader Mr Gramajo, the Committee urges the Government once again to take steps to ensure that all outstanding wages are paid without delay and to keep it informed in this regard; and
 - with regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the labour inspectorate, the Committee once again requests the Government to take the necessary measures without delay to sanction the entity responsible, to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard.

B. The Government's reply

516. Concerning the alleged raid in 2002 of the headquarters of the trade union operating in Industrias Acrílicas de Centroamérica SA (ACRILASA), in respect of which the Committee had again requested the Government to contact the Trade Union of Workers of Guatemala (UNSITRAGUA) to enable it to provide a detailed reply, the Government states that: (i) on 17 April 2015, the Ministry of Labour and Social Welfare organized a meeting with UNSITRAGUA to obtain more details on the allegation; (ii) UNSITRAGUA representatives failed to attend the meeting and, despite agreeing to telephone to reschedule it, they did not contact the Ministry of Labour and Social Welfare again; (iii) the mediator for the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining (hereinafter the Committee for the Settlement of Disputes) informed the Ministry of Labour and Social Welfare that it had been in contact with the union officials at ACRILASA trade union and UNSITRAGUA regarding this allegation, but that neither of the two organizations appeared before the Committee for the Settlement of Disputes; and (v) it is clear from the above that the complainants have shown

no interest to date in resuming dialogue with the Ministry's authorities in order to shed light on the facts presented in this allegation.

517. Regarding the alleged dismissal of union officials by the municipality of El Tumbador, in respect of which the Committee had requested the Government to provide information on the situation of Mr César Augusto León Reyes, Mr José Marcos Cabrera, Mr Víctor Hugo López Martínez, Mr Cornelio Cipriano Salic Orozco and Mr Romeo Rafael Bartolón Martínez, the Government states that: (i) on 24 July 2015, the mediator for the Committee for the Settlement of Disputes met in the municipality of El Tumbador with representatives of the United Municipal Employees Union of El Tumbador and the Workers' Union of the Municipality of El Tumbador; (ii) those representatives reported that the reasons for filing the complaint had already been resolved in the ordinary courts; (iii) in November 2015, the municipality of El Tumbador reported that Mr Víctor Hugo López Martínez, Mr Cornelio Cipriano Salic Orozco and Mr Romeo Rafael Bartolón Martínez were currently working in the municipality; and (iv) the municipality further reported that the employment of Mr César Augusto León Reyes and Mr José Marcos Cabrera had been terminated in November 2004 for reasons unrelated to their union membership, and payment of their employee entitlements and compensation had been made as required under the law.
518. With respect to the payment of wages owed to union leader Mr Gramajo, a former worker in the municipality of El Tumbador, the Government states that: (i) the mediator from the Committee for the Settlement of Disputes made a second visit to the municipality of El Tumbador in August 2015, during which he met with Mr Gramajo; and (ii) Mr Gramajo confirmed both orally and in writing that he had received payment of the unpaid wages and that he was still working in the municipality.
519. With regard to employer interference in union elections at the General Property Registry, the Government submits a communication from the Head of the General Property Registry, in which she states that: (i) the alleged events occurred under a different management team; (ii) the current General Property Registry management team fully respects trade union rights; (iii) there are no conflicts with the two unions operating in the institution, both of which are able to conduct their electoral processes freely; and (iv) a collective agreement on working conditions concluded between the parties is in force in the institution. In its communication of August 2016, the Government submits a letter from the mediator of the Committee for the Settlement of Disputes requesting that the examination of this allegation not be pursued.

The Committee's conclusions

520. *The Committee recalls that, in this case, the complainant organizations report a series of anti-union acts, including assaults, death threats and acts of intimidation against trade unionists, as well as interference in union elections and anti-union dismissals, and the employers' refusal to comply with judicial orders for reinstatement.*
521. *The Committee further recalls that, since the presentation of this complaint in 2002, the Committee has examined this case on eight occasions (March 2003, March 2005, June 2006, November 2007, November 2008, March 2011, June 2012 and March 2014). In each of its interim reports, it urged the Government to provide its observations on the numerous allegations of assaults, death threats and acts of intimidation against trade unionists contained in the complaint and requested it on six occasions to refer the cases as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists. While noting the Government's efforts since the last examination of the case in 2014 to provide information on several allegations in this case, the Committee regrets to note once again that the Government has failed to send its observations concerning the following allegations of anti-union violence and threats in this complaint: (i) destruction of the headquarters of the trade union at the General Property Registry; (ii) death threats against Mr Baudilio Reyes,*

leader of the trade union operating in the enterprise Agrícola Industrial Santa Cecilia SA; (iii) death threats against the general secretary of the trade union operating in the municipality of El Tumbador; (iv) death threats against the general secretary and the head of finance of the union operating in ACRILASA, as well as against union officials Ms Castillo and Ms Alcántara and union members; (v) acts of intimidation against the general secretary; (vi) assaults on two members of the executive board and on union members; (vii) death threats against union officials operating in Finca La Torre; (viii) intimidation of union member of the municipality of El Tumbador, Ms Nora Luz Echeverría Nowel; and (ix) intimidatory surveillance of UNSITRAGUA headquarters.

522. *In the absence of information from the Government, the Committee can only conclude that, 14 years after the allegations, the reported assaults and threats have not led to investigations by the public authorities, which is a matter of deep concern, particularly in a context of frequent and serious acts of anti-union violence. In this regard, the Committee emphasizes that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 44]. The Committee also emphasizes that a climate of violence, such as that surrounding the murder or disappearance of trade union leaders, or one in which the premises and property of workers and employers are attacked, constitutes a serious obstacle to the exercise of trade union rights; such acts require severe measures to be taken by the authorities [see **Digest**, op. cit., para. 46]. The Committee recalls, in addition, the adoption in October 2013, as part of the follow-up to the complaint concerning non-observance by Guatemala of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made by delegates to the 101st Session (2012) of the International Labour Conference under article 26 of the ILO Constitution, of a roadmap whereby the Government undertakes to ensure the timely trial and conviction of the perpetrators and instigators of the crimes against trade union officials and members and to strengthen prevention and protection mechanisms in respect of threats and attacks against trade union officials and members. The Committee therefore urges the Government in the strongest possible terms to ensure that, in future, any reports of acts of anti-union violence or threats against members of the trade union movement in the future, trigger immediate and effective investigations by the competent public authorities and the implementation of adequate protection measures. The Committee emphasizes that the taking of such measures is an essential element in upholding the rule of law.*

523. *With regard to the alleged raid in 2002 of the headquarters of the trade union operating in ACRILASA, recalling that it had requested the Government on a number of occasions to contact UNSITRAGUA to enable it to provide a detailed reply, the Committee notes the Government's response to the effect that both the Ministry of Labour and Social Welfare and the independent mediator of the Committee for the Settlement of Disputes invited representatives of UNSITRAGUA and trade unions operating in the enterprise, but that the union representatives failed to attend the proposed meetings. While noting recent initiatives, the Committee regrets that the proposal of a meeting by the Government came 13 years after the allegations. The Committee therefore urges the Government to ensure, in future, rapid and effective follow-up to the Committee's requests in order to guarantee adequate protection of freedom of association.*

524. *As regards employer interference in union elections at the General Property Registry, and in respect of which the Committee had requested that adequate sanctions be imposed, the Committee notes that the Government submitted the comments of the current Head of the General Property Registry, who states that: (i) the current management team of the General Property Registry fully respects trade union rights; (ii) there are no conflicts between the General Property Registry management and the two unions operating in the institution, both*

of whom are able to conduct their electoral processes freely; and (iii) a collective agreement on working conditions concluded between the parties is in force. While noting these facts, the Committee observes with deep concern that, despite the Committee's repeated recommendations, the acts of interference by the General Property Registry management in 2002 have gone unpunished. Recalling that freedom of association implies the right of workers and employers to elect and designate their representatives in full freedom [see *Digest*, op. cit., para. 388], the Committee urges the Government to take the necessary steps to ensure that employers, whether public or private, fully respect the freedom of trade union organizations to hold independent elections, and that any infringements of this principle should lead to swift and enforced sanctions.

- 525.** Concerning the alleged dismissal of union officials by the municipality of El Tumbador, in respect of which the Committee had requested the Government to provide information on the situation of Mr César Augusto León Reyes, Mr José Marcos Cabrera, Mr Víctor Hugo López Martínez, Mr Cornelio Cipriano Salic Orozco and Mr Romeo Rafael Bartolón Martínez, the Committee notes the Government's observations to the effect that: (i) on 24 July 2015, representatives of the United Municipal Employees Union of El Tumbador and the Workers' Union of the Municipality of El Tumbador received a visit from the mediator for the Committee for the Settlement of Disputes and they informed him that the reasons for filing the complaint had already been resolved in the ordinary courts; (ii) in November 2015, the municipality of El Tumbador reported that Mr Víctor Hugo López Martínez, Mr Cornelio Cipriano Salic Orozco and Mr Romeo Rafael Bartolón Martínez were currently working in the municipality and that, furthermore, the employment of Mr César Augusto León Reyes and Mr José Marcos Cabrera had been terminated in November 2004 for reasons unrelated to their union membership, and payment of their employee entitlements and compensation had been made as required under the law.
- 526.** With respect to the payment of wages owed to union leader Mr Gramajo, a former worker in the municipality of El Tumbador, the Committee notes the information provided by the Government to the effect that Mr Gramajo confirmed both orally and in writing to the mediator of the Committee for the Settlement of Disputes that he had received payment of the unpaid wages and that he was still working in the municipality.

The Committee's recommendations

- 527.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Observing with deep concern that the alleged acts of violence in this case date back to 2002 without investigations having been conducted on the part of the public authorities, the Committee urges the Government, in the strongest possible terms, to ensure that, in future, any reports of acts of anti-union violence or threats against members of the trade union movement in the future trigger immediate and effective investigations by the competent authorities and the implementation of adequate protection measures.*
 - (b) *The Committee urges the Government to take the necessary steps to ensure that employers, whether public or private, fully respect the freedom of trade union organizations to hold independent elections and that any infringements of this principle should lead to swift and enforced sanctions.*
 - (c) *The Committee strongly urges the Government to ensure, in future, rapid and effective follow-up to the Committee's requests in order to guarantee adequate protection of freedom of association.*

CASE NO. 3035

REPORT IN WHICH THE COMMITTEE REQUESTS
TO BE KEPT INFORMED OF DEVELOPMENTS**Complaint against the Government of Guatemala
presented by
the Trade Union of Workers of Guatemala (UNSITRAGUA)**

Allegations: The complainant organization condemns the refusal by the authorities of the Ministry of Labour and Social Welfare to register a firefighters' trade union, and the fact that the establishment of the union led to dismissals, transfers and pressure on members to resign their membership

- 528.** The Committee examined this case at its October 2014 meeting and on that occasion presented an interim report to the Governing Body [see 373rd Report, approved by the Governing Body at its 320th Session (October 2014), paras 369 to 381].
- 529.** The Government sent its observations in communications dated 19 January 2015, 3 August and 30 September 2016.
- 530.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

- 531.** At its October 2014 meeting, the Committee made the following recommendations [see 373rd Report, para. 381]:
- (a) The Committee regrets to note that, despite several requests and an urgent appeal, the Government has failed to provide any information on the allegations and requests it to be more cooperative in the future.
 - (b) The Committee urges the Government to examine without delay the appeal for annulment lodged by the candidate trade union with regard to the refusal of its registration and to ensure that its decision fully complies with the principles of freedom of association with regard to the establishment and registration of trade unions mentioned in the conclusions. The Committee requests the Government to keep it informed without delay in this regard.
 - (c) The Committee urges the Government to conduct immediately an inquiry into the alleged pressure on SGTBCVGB members to resign their membership and, where appropriate, that the outcome of the inquiry be taken into account in the decision by the labour authorities regarding the registration of that organization. The Committee requests the Government to keep it informed without delay in this regard.
 - (d) The Committee urges the Government to institute immediately an inquiry into the dismissals and transfers of founding union members and, if they are found to be of an anti-union nature, to proceed without delay to the reinstatement of the corresponding workers in their positions. The Committee requests the Government to keep it informed without delay in this regard.

B. The Government's reply

- 532.** With regard to the alleged refusal to register the Union of Workers of the Voluntary Fire Brigade of Guatemala (SGTBCVBG), the Government states in a communication dated 3 August 2016 that: (i) following the suggestion of the Committee for the Settlement of Disputes before the ILO in the area of Freedom of Association and Collective Bargaining (hereinafter the Committee for the Settlement of Disputes), union members made a fresh application for registration to the Ministry of Labour and Social Welfare; (ii) in a decision taken on 9 December 2015, the organization was registered under the new name of the "Firefighters Union of Guatemala (SGTBG)"; and (iii) the trade union changed its name purely for registration purposes.
- 533.** Concerning the alleged pressure on SGTBCVBG members to leave the trade union and the alleged dismissals and transfers of the founding members of the union, in a communication dated January 2015, the Government first refers to the comments of the president of the Voluntary Fire Brigade of Guatemala (hereinafter the fire brigade), according to which: (i) no pressure was put on SGTBCVBG members to leave the trade union, but fire brigade management did institute criminal proceedings in connection with the irregularities surrounding the establishment of the trade union, especially the fact that documents and signatures were falsified to make it look as though persons who had not joined the union were founding members; (ii) fire brigade management has not sent emissaries to different firefighting departments, either to encourage them to leave the trade union or to sign a petition against the establishment of the trade union; (iii) the departments that were against the establishment of the trade union had declared their disagreement autonomously; (iv) Ms Teresa Rivas was not subjected to pressure or intimidation – she was removed from the fire brigade for failure to turn up for shifts; (v) on 17 September 2012, Ms Lesbia Corina Queme Roma, Mr Adolfo Martín Enríquez Suchite, Mr Jonathan Raúl Girón Kunse, Mr Luis Alberto Pérez Soberanis and Mr Raúl Heriberto Gonzales were dismissed for restructuring reasons, in line with the Fundamental Act on the Voluntary Fire Brigade of Guatemala; (vi) at the time of their dismissal, the workers in question did not enjoy trade union immunity because, contrary to the statements made by the complainant organization, notice of the establishment of the trade union was only given to the Ministry of Labour and Social Welfare on 15 March 2013 and not on 5 September 2012; (vii) this is why fire brigade management did not reinstate the workers after the labour inspectorate's visit; and (viii) the transfers of Mr René Galicia, Mr Félix Montenegro and Mr Fernando Esquivel are due to the institution constantly rotating staff to meet needs as they arise in the different fire departments.
- 534.** Second, the Government refers to information provided by the Special Investigation Unit for Crimes against Trade Unionists (hereinafter the Special Investigation Unit), which states that: (i) Mr Luis Alberto Pérez Soberanis, Mr Raúl Heriberto Gonzales, Ms Lesbia Corina Queme Roma, Mr René Galicia, Mr Félix Montenegro, Mr Fernando Esquivel and Mr Adolfo Martín Enríquez Suchite filed criminal charges in connection with the dismissals and alleged pressure to resign membership of the trade union referred to in this complaint; (ii) the Special Investigation Unit obtained witness statements from the complainants; (iii) an investigation was carried out by the unit dealing with attacks against human rights activists of the National Civil Police's Specialized Criminal Investigation Division; (iv) the alleged perpetrators have been identified; (v) the information collected is being analysed to determine whether the fire brigade authorities interfered in the attempt to establish a trade union; (vi) one of the persons accused drew the Public Prosecutor's attention to the existence of criminal proceedings against the founding members of the trade union for falsifying documents and signatures to make it look as though persons who had not joined the union were founding members; (vii) on 23 July 2016, the Fourth Court of First Instance in Criminal Matters, Drug Trafficking and Crimes against the Environment declared that the criminal proceedings initiated by several founding members of the trade union and the proceedings

instituted by the fire brigade against the same persons for document falsification were related actions.

- 535.** In its communication of 30 September 2016, the Government provides information on the labour inspectorate's and labour courts' examination of the dismissal of five founding members of the trade union. With regard to the labour inspectorate intervention, the Government reports that: (i) having observed the anti-union nature of the dismissals on 28 September 2012, the labour inspector initiated an action against the Voluntary Fire Brigade of Guatemala on 13 January 2013 for violating the labour legislation; (ii) as the labour inspection's power to levy sanctions is not recognized under Guatemalan law, the case was transferred to the labour court on 24 April 2016; and (iii) in a ruling dated 8 May 2013, the Second Labour and Social Welfare Court accepted the statute of limitations invoked by the fire brigade, given that the action had not been filed within the time limit. With regard to the court proceedings concerning the dismissal of the five founding members, the Government states that: (i) on 2 October 2012, the First Labour Court for Claims Admission ordered the immediate reinstatement of Mr Raúl Heriberto González Archila, which was upheld by the Court of Appeal on 12 November 2014; (ii) Mr González Archila has been reinstated, which is why the case was closed; (iii) after several procedural steps, the court made a final ruling on the reinstatement of Mr Jonathan Raúl Girón Kunse and, on 24 May 2016, the court confirmed that the reinstatement had been put into effect; (iv) the courts also ordered the reinstatement of Ms Lesbia Corina Queme Roma, but the auxiliary services centre of the courts was unable to execute the reinstatement because the worker was absent; and (v) information on the reinstatement of Mr Luis Alberto Pérez Soberanis and Mr Adolfo Martín Enríquez Suchite has yet to be provided by the labour courts.
- 536.** The Government states that: (i) in its regular contacts with representatives of the firefighters' union, it appears that they consider that their organization is still being subjected to acts of anti-union repression; (ii) it is awaiting the decision of the union's general assembly on whether or not to submit the case for mediation to the Committee for the Settlement of Disputes; and (iii) the Committee will be provided with information on progress achieved within the Committee for the Settlement of Disputes.

The Committee's conclusions

- 537.** *The Committee recalls that, in the complaint presented in 2012, the complainant condemns the refusal by the authorities of the Ministry of Labour and Social Welfare to register a firefighters' trade union, and the fact that the establishment of the union led to dismissals, transfers and pressure on members to resign their membership.*
- 538.** *Regarding the allegation of failure to register the trade union, the Committee notes with satisfaction that the Government reports that, at the suggestion of the Committee for the Settlement of Disputes, union members made a fresh application for registration to the Ministry of Labour and Social Welfare, which resulted in the trade union being registered through a decision of 9 December 2015, under the name of the Firefighters Union of Guatemala (SGTBG).*
- 539.** *With respect to the allegations of anti-union dismissals (Ms Lesbia Corina Queme Roma, Mr Adolfo Martín Enríquez Suchite, Mr Jonathan Raúl Girón Kunse, Mr Luis Alberto Pérez Soberanis and Mr Raúl Heriberto Gonzales) and transfers, and pressure on members to leave the trade union, the Committee notes that it appears from the Government's observations that: (i) the founding members of SGTBCVBG initiated criminal proceedings against the fire brigade for alleged pressure on trade union members to resign their membership, while the fire brigade initiated its own proceedings against the founding members for alleged falsification of documents during the establishment of the union; (ii) on 23 July 2016, the court declared that both legal proceedings were related actions, and the*

conclusions of the corresponding investigations are still awaited; (iii) the labour inspectorate, having observed the anti-union nature of the dismissal of five founding members, initiated a legal action against the Voluntary Fire Brigade of Guatemala; (iv) the labour courts rejected the complaint because it had not been filed within the time limit; (v) as a result of the legal challenge to the dismissals, the courts ordered the reinstatement of Mr González Archila and Mr Girón Kunse, and these workers were reinstated in their positions; (vi) the courts also ordered the reinstatement of Ms Queme Roma, but this could not be carried out due to the worker's absence on the day set for reinstatement; (vii) information from the judiciary is still awaited with regard to the dismissal of Mr Luis Alberto Pérez Soberanis and Mr Adolfo Martín Enríquez Suchite.

540. *In light of the foregoing and recalling that justice delayed is justice denied [see **Digest of decisions and principles of the Committee on Freedom of Association**, fifth (revised) edition, 2006, para. 105], the Committee firmly expects that the criminal charges filed in connection with this case will be concluded without further delay. The Committee requests the Government to keep it informed in this regard. In relation to the dismissal of Ms Queme Roma, who was not reinstated due to her absence on the day of the execution of the reinstatement order, the Committee, recalling that, if the judicial authority determines that reinstatement of workers dismissed in violation of freedom of association is not possible, measures should be taken so that they are fully compensated [see **Digest**, op. cit., para. 843], requests the Government to provide further information on the situation of the aforementioned worker. The Committee also requests the Government to inform it without delay of the outcome of the legal challenge to the dismissal of Mr Luis Alberto Pérez Soberanis and Mr Adolfo Martín Enríquez Suchite.*

541. *The Committee notes the Government's statements to the effect that the SGTBG is reportedly still being subjected to acts of anti-union repression and is considering referral to the Committee for the Settlement of Disputes. In this regard, the Committee notes that the Government does not specify whether this recourse to mediation would focus on acts of anti-union repression subsequent to this complaint, or whether it also covers the allegations made in the complaint. The Committee requests the Government and the complainant organization to inform it of any possible developments before the Committee for the Settlement of Disputes.*

The Committee's recommendations

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

- (a) The Committee firmly expects that the criminal charges filed in connection with this case will be concluded without delay. The Committee requests the Government to inform it in this regard.*
- (b) The Committee requests the Government to provide further information on the situation of Ms Queme Roma and to inform it without delay of the outcome of the legal challenge to the dismissal of Mr Luis Alberto Pérez Soberanis and Mr Adolfo Martín Enríquez Suchite.*
- (c) With regard to possible further acts of anti-union repression in the fire brigade, the Committee requests the Government and the complainant organization to inform it of any possible developments before the Committee for the Settlement of Disputes.*

CASE NO. 3125

INTERIM REPORT

**Complaint against the Government of India
presented by
the Modelama Workers Union (MWU)
supported by
the Garment and Allied Workers Union of India**

Allegations: The complainant organization alleges forced transfer of union leaders, illegal termination, intimidation and physical threats against union members by the company Modelama Exports in retaliation for union activities. The complainant further alleges unjust denial of registration by the Registrar of trade unions in the Haryana State.

- 543.** The complaint is contained in a communication from the Modelama Workers Union, Gurgaon (MWU) dated 27 February 2015.
- 544.** The Government sent its partial observations in a communication dated 4 July 2016.
- 545.** India has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 546.** In its communication dated 27 February 2015, the MWU alleges forced transfer of union leaders, illegal termination, intimidation and physical threats against union members by the company Modelama Exports in retaliation for union activities, as well as denial of registration by the Registrar of trade unions in the Haryana State.
- 547.** The complainant indicates that the MWU was created at the factory which produces and exports garment products to multinational brands in Europe and the United States and has many units in the Gurgaon district of Haryana, Noida and New Delhi. According to the complainant, the MWU is a trade union as per the definition provided under section 2(h) of the Trade Unions Act, 1926 with elected representatives and a membership of over 250 workers from various units of the company who pay a membership fee. On 19 December 2012, in line with sections 4 and 5 of the Trade Unions Act, the union submitted an application for registration and furnished all the necessary documents to the Registrar of trade unions in Chandigarh, the capital of the Haryana State.
- 548.** The complainant states that a few days after the application for union registration, the factory management was informed by the Labour Department about the union formation and started retaliation against its office-bearers; according to the report from the United Workers Congress provided by the complainant, workers at the factory reported extreme retaliation, including termination, transfers, physical threats, attempted bribes, verbal harassment, abuse and surveillance. In particular, the complainant informs that on 8 January 2013, Ashok Kumar, General Secretary of the union, was transferred to another unit of the factory around

20 kilometres away, whereas he had been continuously working in the same unit for more than seven years and had been a very popular leader in that unit. Following his transfer, a series of illegal and forceful terminations and transfers of other office-bearers and active members of the union took place in the following months: Grijesh Kumar was dismissed on 12 January 2013; Pramod Kumar was dismissed on 18 January 2013; Brijesh Prasad and Rajendra Prasad were dismissed on 24 January 2013; Ramnath, Shishu Pal and Ashutosh Yadav were dismissed on 25 January 2013; Bramhanand Bhuyan (Organizing Secretary), Manju Devi and Ranjeet Kumar were dismissed on 28 January 2013; Manoj Kumar Singh (Joint Secretary), Murari Prasad and Sharwan Kumar (Vice-President) were dismissed on 12 February 2013; and Vinod Kumar (Treasurer) and Hem Narayan Jha (Publicity Secretary) were transferred to a different unit on 15 January 2013. The dismissed workers were individually called to the office of the human resources manager where they were surrounded by ten to 12 people, including security forces, and were forced to sign documents and provide their fingerprints, while being told that they were dismissed because they were union leaders. They were also provided with large amounts of money. The complainant affirms that each termination and transfer was done with malicious intent and constitutes an act of unfair labour practices under schedule V of the Industrial Disputes Act, 1947 and is prohibited under section 25-U of the same Act. The union filed several complaints to the Office of Labour-cum-Conciliation Officer, Circle-1, Gurgaon dated 9 January 2013 and 28 February 2013 but no action was taken by the Labour Department on the continuous complaints of illegal and forced termination and unfair labour practices. Furthermore, the management did not reply to any notice from the union and provided fabricated facts about the status of workers to the Labour Department.

549. In February and March 2013, the complainant organized protests in front of the factory gate where the dismissed and transferred workers demonstrated against their dismissal or transfer. Although the protesters were peaceful, the management disturbed, intimidated and provoked them by making negative comments and filming them. The complainant affirms that the management had a clear intention to threaten the workers with physical harm and it, therefore, lodged a complaint in the Udyog Vihar police station, following which the Sub-Inspector deleted the photos and videos and the management promised that the materials would not be misused. The complainant further indicates that the management blocked the protesters by parking trucks and other vehicles in front of them, even when they moved some metres away and changed their place for the protest, thus hiding the protesting workers from the public and other workers. The union repeatedly sent complaints to the Udyog Vihar police station against the illegal parking of trucks. Furthermore, the protest was also disturbed by female bouncers, working on instructions of the management, who threatened union members sitting in front of the factory, tried to convince them to leave the union, pushed them physically and abused them. On one of the days, a female bouncer snatched a camera of a media person who was at the venue reporting about the protest and the camera was kept inside the factory premises; it was returned only after another police intervention. According to the complainant, the management became wary of the protest's popularity and support received from workers of the company and other garment workers and, therefore, stopped them from coming outside the premises and for the first time provided lunch to them in the factory canteen. It was understood among the workers that they had been getting tea and biscuits in the factory free of charge because of the protest.

550. The complainant further states that workers reported extreme retaliation for the protests, which, according to the report of the United Workers Congress provided by the complainant, included surveillance of workers and their families by the management, attempts at bribery and intimidation through visits at home and at the workplace. These allegations concern the following workers:

- Sharwan Kumar, the Vice-President of the union, received a phone call at 8 p.m. on 19 February 2013 asking when he would be getting home, after which he went to a

colleague's house. The senior manager of the factory, Arvind Rai, and in-charge, Munna, then called his wife and asked about Mr Kumar's whereabouts, while offering her large amounts of money if she convinced her husband to leave the union and the protest. After she refused, they threatened her with dire consequences.

- Ashutosh Yadav's uncle, Vijay Kumar, was approached by the senior manager telling him to tell Yadav to leave the protest under the threat of dire consequences. Yadav also received numerous calls on 20 and 21 February 2013 and was asked to come to a specific room in the factory, where he was threatened to be accused of smuggling. Since then, Yadav has been living with a friend but the company's officials continue to threaten them.
- Manju Devi was approached on 19 February 2013 by the senior manager, Arvind Rai, her supervisor, Upendra, and the personnel manager, Sanjay Yadav, who offered her money and asked her to either take it and join the company or leave the protest. When she replied that she would join the factory if all her colleagues were taken back, she was told to worry about herself and not her colleagues and Ms Devi refused the offer. Later on, the senior manager came to her house, repeated the offer and proposed further benefits, which the worker again refused. The senior manager also tried to convince Ms Devi's husband but he did not want to intervene on the issue. Ms Devi then called her colleague Ashok Kumar who came and talked to the senior manager. On 20 February 2013, the senior manager called the factory where Ms Devi's husband worked and told them to dismiss her husband because of her trade union affiliation. On the same day, her supervisor approached the worker at her home to pressure her to leave the protest.
- Ashok Kumar, the General Secretary of the union, received a call on 19 February 2013 from his colleague Manju who said that the senior manager, the supervisor and the personnel manager were at her home and asked him to come, after which the senior manager also tried to convince Mr Kumar to leave. Later on, the driver and Mr Kumar's relative came to his house and talked to the senior manager on the phone. Mr Kumar was told to return to his hometown after which the workers could resume their duties one by one but Mr Kumar refused. The next day, the personnel manager again visited Mr Kumar's house at night and Mr Kumar requested that all of his colleagues be reinstated which the personnel manager said he would do if the protests did not resume for three days. However, when Mr Kumar asked to have a written agreement on this by the next morning, the personnel manager added that he would prepare the document if Mr Kumar could promise that the workers would leave the union. To this, Mr Kumar replied that he would do it if during one year the management treated the workers fairly but he had not received any written document from the management.

551. The complainant further claims that while intimidating and harassing trade union members, the management was simultaneously engaged in negotiation with union representatives and agreed to let the workers resume duty and pay the increased conveyance expenses and rent for two office-bearers. However, such agreement was only made verbally and after a few months, the management stopped providing the promised facilities to the union's office-bearers. Furthermore, although the management was supposedly negotiating with the union, they also obtained an ex parte stay order against the union blocking workers' rights to peacefully gather and protest, which, according to the complainant, was made on the basis of fictitious grounds and on submissions by the management without giving the union the opportunity to respond and defend their rights. As a result, the complainant called a mass gathering and a protest march against the management from 17 February to 12 March 2013 near the factory gate, while respecting the distance of 300 metres imposed by the stay order, and various trade union leaders and workers expressed solidarity with the struggle. Even at that distance, the management used various disruptive methods to disturb the protest but the workers continued to put pressure on the management to settle this issue. The complainant

states that the union and the management held further negotiations and after several meetings, the management provided a written agreement to have 14 workers resume their duty. As part of the deal, Ashok Kumar and Sharwan Kumar agreed to be transferred 20 km away if the management paid for their rent incurred as a result of the transfer and two other active members of the union, Hem Narayan Jha and Vinod Kumar, were transferred to Okhla in April 2013 and were promised conveyance as the workplace was far from their homes. However, the complainant indicates that since then the management went back on its promises: it stopped paying these costs as of April 2014; Ashok Kumar was denied his salary for the month of June 2014 and around 200 trade union leaders and members were either forced to resign or were illegally terminated by the management in the following months. The complainant states that it also sent complaints about the disruption of protests and anti-union discrimination to the brands buying from the factory, but most of them either did not respond or shared the management's position, while one considered that there were violations of its code of conduct and eventually exited the factory. According to the complainant, the Government, in collusion with the factory management, has denied workers their freedom of association through a variety of means and the brands have done the same.

- 552.** With regard to the application for registration, the complainant indicates that the Office of the Registrar-cum-Labour Commissioner of the Haryana State rejected the application of the MWU by letter No. IR-2/2013/20846 dated 8 July 2013 because the union did not fulfil the requirement under section 4 of the Trade Unions Act as more than 50 per cent of its applicants ceased to be members of the trade union. However, the complainant points out that the rejection was based on fabricated and imaginary reasons, was made without due-diligence and without proper investigation of the factory. The complainant further states that the Registrar clearly denied having received the relevant documents from the union and although section 7 of the Trade Unions Act gives the Registrar the power to call for further required particulars from trade unions in the process of registration, the union had not received any communication from the office of the Registrar. On 19 July 2013, the office-bearers of the union submitted a petition to the Registrar-cum-Labour Commissioner to review the denial of registration claiming that the reasons for refusal were factually wrong and indicating that Vinod Kumar was the treasurer and active member of the union and that the management had forcefully terminated the concerned union leaders but that these had since been re-employed. However, the petition was refused stating that the Office had no power to review its own order and the petitioners were instructed to approach the Labour Court of the concerned district. The complainant claims that the Registrar-cum-Labour Commissioner had not performed his legal duty under the Trade Unions Act and victimized the MWU, especially considering that the Labour Department was aware of the unfair labour practices by the management and was involved in the conciliation process. It further affirms that the rejection of registration was based on wrong assumptions, wilful ignorance of relevant documentary and other evidence, prejudice, inaction and non-performance of statutory duties and obligations by the State of Haryana. According to the complainant, the refusal to register the union is thus in violation of the Trade Unions Act as well as of section 2 of article 3 of the ILO Constitution and section 2 of Article 8 of Convention No. 87 and is a blatant case of negligence and a deliberate attempt to deny workers of the factory their right to organize and bargain collectively. The complainant urges the Committee to direct the Government of India, Ministry of Labour and Employment to inquire into the matter of non-registration of the MWU by the Labour Department of the State of Haryana and adopt the necessary measures to register the trade union and reinstate all the workers dismissed for their trade union activities.
- 553.** The complainant further indicates that although there are numerous garment factories in Gurgaon that manufacture for export, garment workers are not given secure conditions of employment, are exploited, do not benefit from the welfare measures to which they are statutorily entitled under the Factories Act, 1948, and are made to work for long hours but live below subsistence level. Therefore, the workers always aspire to form trade unions but

when they exercise their freedom of association guaranteed under article 91(1)C of the Constitution of India they are terminated from service and victimized, making their life worse than before. According to the report of the United Workers Congress, the General Secretary of the New Trade Union Initiative – a national independent trade union federation – explained that employers in India often use retaliation, intimidation and threats to maintain an artificial sense of industrial peace rooted in human and labour rights violations and added that unions also face barriers to recognition, registration and collective bargaining.

B. The Government's reply

554. In its communication dated 4 July 2016 the Government indicates that: (i) on the basis of a decision dated 15 August 2012 made in the meeting of the general body of the trade union, ten applicants, namely Retu Singh, Ashok, Sharwan Kumar, Hem Narayan Jha, Bramhanand Bhuyan, Murari, Shakuntala Devi, Ramraj, Manoj Kumar Singh and Vinod Kumar, submitted an application for registration of the trade union; (ii) out of the ten applicants, six were no longer employed in the company at the time of considering the application: Sharwan Kumar, Bramhanand Bhuyan, Murari and Manoj Kumar Singh submitted resignations after accepting full and final dues, Retu Singh is considered as an outsider and Vinod Kumar submitted in writing that he was not interested in the formation of the trade union; only four out of ten applicants thus remained; (iii) although section 4(2) of the Trade Unions Act provides that an application for registration shall not be rendered invalid by reason of the fact that after submission of the application but before registration of the union, some applicants have ceased to be members, it also states that in case more than half of its total applicants who made the application for registration have ceased to be members of the union then such application becomes invalid and the union does not remain entitled for its registration; (iv) since more than half of the applicants were no longer employed at the factory, the application for registration became invalid in line with section 4(2) of the Trade Unions Act; and (v) the Labour Commissioner in the Haryana State informed that the registration was declined and passed an order rejecting the application, which is legal and in line with provisions of the Trade Unions Act.

The Committee's conclusions

555. *The Committee notes that in the present case the complainant alleges acts of anti-union discrimination, in particular forced transfer and dismissal of union leaders and members, harassment, intimidation and physical threats by the company Modelama Exports in retaliation for union activities, as well as denial of registration by the Registrar of trade unions in the State of Haryana.*

556. *While observing that the specific issues raised in this case concern the State of Haryana, the Committee is bound to remind the federal Government that the principles of freedom of association should be fully respected throughout its territory. The Committee invites the Government to bring its conclusions and recommendations to the attention of the competent authorities in the State of Haryana with a view to resolving the issues of the case and to obtain full particulars from the State of Haryana for the Committee's next examination.*

557. *With regard to the alleged acts of anti-union dismissals, forced resignations and transfers, the Committee notes that a few days after the union submitted an application for registration, the factory management started retaliation against the union's office-bearers and members mainly by means of dismissals, forced resignations and transfers to different units. The Committee observes that all dismissals, resignations and transfers of trade union leaders and members, as described by the complainant, were coupled with harassment, intimidation and threats, in that workers were called by the management, surrounded by a group of people, including security forces, told to provide fingerprints, threatened with accusations*

of criminal charges, forced to sign resignation letters and bribed. The Committee further notes with concern the allegations that even though an agreement had been reached on the reinstatement of 14 trade union leaders, the management went back on the deal in April 2014 and 16 office-bearers and around 200 union members were dismissed or forced to resign in the following months. The Committee considers that the situation described above raises serious concerns of anti-union discrimination and regrets that the Government did not provide any observations on this point. In this regard, the Committee wishes to emphasize that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions. The dismissal of workers on grounds of membership of an organization or trade union activities violates the principle of freedom of association. The necessary measures should be taken so that trade unionists who have been dismissed for activities related to the establishment of a union are reinstated in their functions, if they so wish. In a case involving a large number of dismissals of trade union leaders and other trade unionists, the Committee considered that it would be particularly desirable for the Government to carry out an inquiry in order to establish the true reason for the measures taken [see **Digest of decisions and principles of the Freedom of Association Committee**, 5th (revised) edition, 2006, paras 769, 789, 852 and 812]. As regards the 16 office-bearers, namely Bramhanand Bhiuyan, Brijesh Prasad, Manoj Kumar Singh, Murari Prasad, Rajendra Prasad, Ramnath, Manju Devi, Ashok Kumar, Vinod Kumar, Hem Narayan Jha, Shishu Pal, Ashutosh Yadav, Sharwan Kumar, Pramod Kumar, Ranjeet Kumar, and Grijesh Kumar, who had been dismissed or forced to resign, the Committee regrets that the Government did not provide any comments on this allegation and requests it to ensure that the State of Haryana carries out an independent inquiry to determine whether their dismissals or forced resignations were due to their trade union activity, with due attention being paid to their role in the union and the abovementioned principles, and should it be found that their dismissals or forced resignations were motivated by trade union membership or legitimate trade union activities, takes the necessary measures for the reinstatement of workers in their functions without loss of seniority or the payment of adequate compensation. The Committee further requests the Government to ensure that the State of Haryana conducts an independent inquiry into the allegations of large-scale dismissals and forced resignations of around 200 trade union members in order to determine the real motives behind these measures and, should it be found that they were motivated by trade union membership or legitimate trade union activities, takes the necessary measures to reinstate the concerned workers in their functions without loss of seniority, if they so wish, or pay them adequate compensation. The Committee requests the Government to keep it informed of any developments in this regard.

- 558.** The Committee further notes that, according to the complainant, all dismissals and forced resignations of workers were accompanied by harassment and intimidation and that on several occasions, the management disrupted peaceful protests of the dismissed, resigned and transferred workers and intimidated and harassed their participants both during the protests and after, including by surveillance, threatening them with physical harm, visiting their homes and attempting to bribe them. The Committee notes with concern the allegation that despite the fact that the trade union had submitted several complaints to the Office of Labour-cum-Conciliator alleging illegal and forceful termination of union members and unfair labour practices, no action was taken by the authorities to address the complaints. In this regard, the Committee also notes the general affirmation of the complainant stating that when workers in the garment sector in India form trade unions and exercise their freedom of association they are terminated from service and victimized, thus making their situation worse than before. It further observes that the documents provided by the complainant refer to regular practices of retaliation, intimidation and threats used by employers. The Committee considers that the environment described by the complainant raises serious concerns as to the climate for forming trade unions and freely exercising trade union activity and wishes to point out that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against

*the leaders and members of these organizations, and it is for the governments to ensure that this principle is respected. Acts of harassment and intimidation carried out against workers by reason of trade union membership or legitimate trade union activities, while not necessarily prejudicing workers in their employment, may discourage them from joining organizations of their own choosing, thereby violating their right to organize. 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 [see **Digest**, op. cit., paras 44, 786 and 817]. In light of these principles, the Committee requests the Government to respond to the complainant's allegations indicating why the Labour-cum-Conciliation Officer did not take any action in response to the complaints of illegal dismissals and unfair labour practices. The Committee further requests the Government to take the necessary measures to encourage a climate where trade union rights can be freely and safely exercised, by effectively ensuring that trade union members and leaders are not subjected to anti-union discrimination or harassment, including dismissal, transfers, threats and other acts prejudicial to the workers based on their trade union membership or activities and that any complaints of anti-union discrimination or harassment are examined by prompt and impartial procedures.*

- 559.** *With regard to the alleged refusal to register the MWU, the Committee notes that on 19 December 2012 an application for registration was submitted to the Registrar in Chandigarh but was refused by letter dated 8 July 2013 because the trade union did not fulfil the requirement under section 4 of the Trade Unions Act as more than 50 per cent of its applicants ceased to be members of the union. The Committee also notes that, as alleged by the complainant, a petition to review the denial of registration dated 19 July 2013 was refused stating the Office of the Registrar had no power to review its own order. The Committee notes that while the complainant alleges that the Registrar had not performed his legal duty, ignored relevant documents, did not investigate the situation in the factory and acted without due-diligence thus victimizing the MWU workers, especially considering that the Labour Department was aware of the allegations of acts of anti-union discrimination, the Government asserts that the rejection of the registration was in line with the Trade Unions Act as six out of ten applicants were no longer employed at the factory (hence, no longer union members) when the Registrar considered the application. The Committee is concerned that although the trade union submitted several complaints of anti-union dismissals and unfair labour practices to the Ministry of Labour claiming that its leaders and members were dismissed or forced to resign due to their union membership and activities, the Registrar rejected the application without conducting any further investigation into the conditions at the factory, especially considering that this would be within the Registrar's power in line with section 7 of the Trade Unions Act. In this regard, the Committee wishes to point out that the right to official recognition through legal registration is an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members. 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., paras 295 and 411]. The Committee requests the Government to ensure that the State of Haryana re-examines the application for registration fully taking into account all the documents submitted to the Registrar and duly bearing in mind the allegations of anti-union discrimination only weeks after the request for registration and to inform it of any developments in this regard. The Committee trusts that the Government will ensure that situations where there are serious allegations of anti-union dismissals, which may have an impact on the union's registration, are carefully examined by the Registrar in order to avoid anti-union practices further penalizing trade unions in their application for registration.*

560. *The Committee regrets that it had to examine this case without being able to take account of the observations of the enterprise concerned and requests the Government to obtain, through the relevant employers' organization, information from the enterprise on the questions under examination.*

The Committee's recommendations

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

- (a) *While observing that the specific issues raised in this case concern the State of Haryana, the Committee is bound to remind the federal Government that the principles of freedom of association should be fully respected throughout its territory. The Committee invites the Government to bring its conclusions and recommendations to the attention of the competent authorities in the State of Haryana with a view to resolving the issues of the case and to obtain full particulars from the State of Haryana for the Committee's next examination.*
- (b) *As regards the 16 office-bearers, namely Bramhanand Bhiuyan, Brijesh Prasad, Manoj Kumar Singh, Murari Prasad, Rajendra Prasad, Ramnath, Manju Devi, Ashok Kumar, Vinod Kumar, Hem Narayan Jha, Shishu Pal, Ashutosh Yadav, Sharwan Kumar, Pramod Kumar, Ranjeet Kumar and Grijesh Kumar, who had been dismissed or forced to resign, the Committee regrets that the Government did not provide any comments on this allegation and requests it to ensure that the State of Haryana carries out an independent inquiry to determine whether their dismissals or forced resignations were due to their trade union activity, with due attention being paid to their role in the union and the abovementioned principles, and should it be found that their dismissals or forced resignations were motivated by trade union membership or legitimate trade union activities, takes the necessary measures for the reinstatement of workers in their functions without loss of seniority or the payment of adequate compensation. The Committee further requests the Government to ensure that the State of Haryana conducts an independent inquiry into the allegations of large-scale dismissals and forced resignations of around 200 trade union members in order to determine the real motives behind these measures and, should it be found that they were motivated by trade union membership or legitimate trade union activities, takes the necessary measures to reinstate the concerned workers in their functions without loss of seniority, if they so wish, or pay them adequate compensation. The Committee requests the Government to keep it informed of any developments in this regard.*
- (c) *The Committee requests the Government to respond to the complainant's allegations indicating why the Labour-cum-Conciliation Officer did not take any action in response to the complaints of illegal dismissals and unfair labour practices. The Committee further requests the Government to take the necessary measures to encourage a climate where trade union rights can be freely and safely exercised, by effectively ensuring that trade union members and leaders are not subjected to anti-union discrimination or harassment, including dismissal, transfers, threats and other acts prejudicial to the workers based on their trade union membership or activities and that any*

complaints of anti-union discrimination or harassment are examined by prompt and impartial procedures.

- (d) *The Committee requests the Government to ensure that the State of Haryana re-examines the application for registration fully taking into account all the documents submitted to the Registrar and duly bearing in mind the allegations of anti-union discrimination only weeks after the request for registration and to inform it of any developments in this regard. The Committee trusts that the Government will ensure that situations where there are serious allegations of anti-union dismissals which may have an impact on the union's registration are carefully examined by the Registrar in order to avoid anti-union practices further penalizing trade unions in their application for registration.*
- (e) *The Committee regrets that it had to examine this case without being able to take account of the observations of the enterprise concerned and requests the Government to obtain, through the relevant employers' organization, information from the enterprise on the questions under examination.*

CASE NO. 3124

INTERIM REPORT

**Complaint against the Government of Indonesia
presented by
the Federation of Independent Trade Unions (GSBI)**

Allegations: The complainant organization alleges dismissal by the company PT Panarub Dwi Karya of trade union leaders, restriction on the exercise of the right to strike by using police and paramilitary forces on striking workers, dismissal of trade union members and other workers for having participated in a strike and the employer's interference in trade union affairs by intimidating workers to change their trade union affiliation in favour of a union supported by the management

- 562.** The complaint is contained in a communication from the Federation of Independent Trade Unions (GSBI) dated 27 February 2015.
- 563.** The Government sent its observations in a communication dated 4 March 2016.
- 564.** 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

565. In its communication dated 27 February 2015, the GSBI alleges dismissal by the company PT Panarub Dwi Karya of trade union leaders, restriction on the right to strike by using police and paramilitary forces on striking workers, dismissal of trade union members and other workers for having participated in a strike and the employer's interference in trade union affairs by intimidating workers to change their trade union affiliation in favour of a union supported by the management. The complainant indicates that the allegations concern the Textile and Footwear Union on Company level of PT Panarub Dwi Karya (Pimpinan Tingkat Perusahaan Serikat Buruh Garmen Tekstil dan Sepatu – PTP SBGTS-GSBI PT PDK), which is affiliated with the complainant, produces footwear in Tangerang City, Province of Banten, and in 2012 employed 2,650 workers, 90 per cent of whom were women.

566. In particular, the complainant states that the PTP SBGTS-GSBI PT PDK was established on 24 February 2012 and registered on 14 March 2012 with 610 members. Shortly after its registration, the management of the company laid off nine union leaders: the workers were individually called by the management and told that in order to improve the company's efficiency they would be laid off, even though in line with section 164(3) of the Act of Manpower No. 13 of 2003 and Constitutional Ruling No. 19/PUU-IX/2011, one of the requirements for a company to lay off a worker on grounds of rationalization (efficiency) is that the company should be in temporary or definitive shutdown, which, according to the complainant, was not the case in the present situation. Out of the nine union leaders, five accepted the lay-off and four rejected it: Kokom Komalawati (Chairperson of the union), Harta, Jamal Fikri and Dedi Sutomo. Harta and Dedi Sutomo accepted the lay-off after mediation with the Regional Office of Manpower and Transmigration Department in Tangerang City and Jamal Fikri accepted it in August 2013. Kokom Komalawati has not accepted the lay-off and her case is currently at the Supreme Court.

567. The complainant indicates that on 15 February 2012, the Director of Production at the company, who is also a former ad hoc judge at the Supreme Court, called Kokom Komalawati and offered to transfer her to a better division, which, according to the complainant, was an attempt to influence her to reject the PTP SBGTS-GSBI PT PDK. The Director of Production told the worker that he did not approve the establishment of the trade union because of GSBI's politics, added that he would only allow the All-Indonesia Workers' Union (SPSI) and the National Labour Union (SPN) at the factory and also mentioned a plan to establish a different trade union. The complainant informs that on 23 February 2012, Kokom Komalawati was asked to join the SPN contrary to section 28 of Act No. 21 of 2000 on Trade Union/Workers' Union, which stipulates:

Everybody is prohibited from preventing or forcing a worker/labourer from forming or not forming a trade union/labour union, becoming a union official or not becoming a union official, becoming a union member or not becoming a union member and/or carrying out or not carrying out trade/labour union activities by:

- (a) terminating his employment, temporarily suspending his employment, demoting him, or transferring him to another post, another division or another place in order to discourage or prevent him from carrying out union activities or make such activities virtually impossible;
- (b) not paying or reducing the amount of the worker's/labourer's wage;
- (c) intimidating him or subjecting him to any other forms of intimidation;
- (d) campaigning against the establishment of trade unions/labour unions.

568. The complainant further states that there was a wage deficiency in the factory for the period of January to March 2012 and the working conditions had worsened since early 2012 when the company imposed a new production system – one piece flow – to boost production by

gradually reducing the number of labourers. In one case, the number of labourers in the sewing line was 48 for a target of 140 pairs of footwear per hour, it was then reduced to 40 and later to 34 workers who had to attain an identical production target. The complainant states that this production system put more pressure on the workers, tortured and terrified them, as it reduced the workers' time to leave their line; any worker who tried to take a break for prayer, to drink or go to the toilet would increase the workload. The production target was also accompanied by tighter discipline enforced by foremen and supervisors; workers considered to be working too slow were punished with yelling, swearing or dismissal and those who missed work for sickness or other reasons were made to stand in front of the line for an hour. In addition, every worker was forced to attend 10- to 20-minute meetings before and after work, which required them to get to work earlier than usual but was not remunerated. On the proposal of the representatives of the union, management agreed to negotiate on the worsening working conditions and the wage deficiency but then unilaterally cancelled the agreed time of negotiation by a text message. This unilateral cancellation of negotiations by management combined with the deteriorating working conditions triggered a strike from 12 to 23 July 2012 in which around 2,000 factory workers participated, demanding the payment of wage deficiency and the improvement of working conditions.

569. During the strike, the workers, who were mostly women, some of whom were pregnant, were confronted by security and police officers and paramilitary groups from the Board of Trustees of the Family Potential (Badan Pembina Potensi Keluarga Besar – (BPPKB) Banten, Banser (Barisan Serbaguna), Pabuaran People and from Surabaya. The complainant alleges that these forces tried to stop the strike by force and sprayed tear gas on the striking workers, pushed, hit and pelted them with blunt objects, as a consequence of which two women fainted and another 32 workers were injured. On 19 July 2012, when the worker representatives were in a hearing with the brand's representatives in Jakarta, 75 workers who had joined the strike were herded into the yard by management and forced to stand in the sun and make a statement not to participate in any protest action and to resign from both their membership in the trade union and the company. Furthermore, on the fifth day of the strike, management did not allow workers to work, announced that the strike was illegal and forcefully declared 1,300 striking workers to have resigned although it later re-employed some of them as new workers. On 20 July 2012, the management established the Independent Workers' Union (Serikat Pekerja Independent (SPI)) and every worker still employed in the factory was obliged to become its member and resign from his or her membership in the SBGTS-GSBI PT PDK or the SPN. The complainant indicates that the management hired paramilitary rangers to make workers join the new union and to force them to hand over their original membership cards. In October 2012, the SBGTS-GSBI PT PDK held a protest demanding the reinstatement of the 1,300 workers but it was dismissed by other workers, suspected to be mobilized by management, who used blunt weapons like wood and rocks, injuring 11 workers. The complainant further affirms that the termination of 1,300 workers had important consequences on their lives: some workers' children had to leave school as they could not pay the tuition fee, some workers were evicted from their homes as they could not pay the rent and others got divorced due to economic reasons. In July 2014, the workers concerned were still contesting their termination and demanding their rights to associate and negotiate. According to the complainant, some of them work as contract workers or casual labourers in the formal and informal economies on a daily basis or on temporary contracts, some are in debt and others are rejected by companies because they are considered as PT Panarub Dwi Karya's workers.

570. In the complainant's view, the factory violated the workers' right to freedom of association by dismissing the union leaders and members, preventing them from exercising their right to strike, dismissing the workers who participated in the strike and forcing workers to leave their union and join another union favoured by the company. The complainant asks the Committee to urge the Government and the Ministry of Manpower and Transmigration, as well as the Department of Manpower and Transmigration of Tangerang City, Banten

Province, to adopt the necessary measures to guarantee freedom of association rights, including the re-employment of all the workers dismissed for anti-union reasons.

B. The Government's reply

- 571.** In its communication dated 4 March 2016, the Government provides its observations as well as those of the employer, represented by the management of another company from the Panarub Group, since the company in question has been closed.

Observations from the employer representative

- 572.** With regard to the termination of employment of trade union leaders, the employer representative indicates that: (i) the factory was in operation from 2007 but had to close due to financial difficulties in January 2014; (ii) the termination of employment of Kokom Komolawati and other workers in 2012 was a step taken by management to reduce its costs due to the financial losses of the factory; (iii) the termination of employment was done in three stages: 69 employees were terminated in February 2012, all of whom except Kokom Komalawati accepted the lay-off and their respective compensation in accordance with section 156(2)–(4) of Act No. 13 of 2003, 45 employees were dismissed in April 2012 and 80 employees in July 2012, which resulted in a total of 190 workers affected by the lay-off; (iv) as Kokom Komalawati refused the lay-off, the company suspended the worker on 24 February 2012 and fully paid her wages and the termination of employment dispute was addressed by the Industrial Relations Court; and (v) the SGBTS-GSBI PT PDK was registered in the Office of Department of Manpower RI on 14 March 2012, which was after the process of labour efficiency.

- 573.** With regard to the right to strike, the employer representative indicates that the strike of July 2012 was triggered because the company suspended the minimum wage but specifies that such suspension was approved by the District/City Minimum Wages (UMK) from the Governor of Banten Province, where the suspension was valid for three months. They further provide the following chronology of the strike:

- On 10 July 2012, bipartite negotiations were held between management and the union representatives to discuss the payment of wages and other allowances but no settlement was reached in the meeting.
- On 12 July 2012, the Field Coordinator of the union blew a whistle to simulate a fire drill and made most of the employees move to the football field. The Field Coordinator then made a speech while some workers tried to force other workers to exit the work area. The employees were later directed to the exit gate where Kokom Komalawati made another speech asking for further negotiations with management, who agreed to such negotiations on the condition that the employees would return to work, but the request was denied and a total of 1,745 employees remained on strike until 7 p.m.
- On 13 July 2012, Kokom Komalawati and her colleagues obstructed and intimidated employees who wanted to come to work and requested negotiations with the company, which were granted on the condition that the discussion would be attended by representatives from the Department of Manpower. However, the negotiations were halted because the situation was not conducive at that time.
- On 16 July 2012, Kokom Komalawati and her colleagues again obstructed and intimidated employees who wanted to come to work and almost started a fight with them. Kokom Komalawati made another speech in which she misrepresented the situation at the factory. Further discussions were attended by three representatives from the Department of Manpower, three representatives of the company and Kokom

Komalawati and her colleagues who formulated several demands, including her reinstatement as well as that of Jamal Fikri. The management stated that both cases were being addressed as industrial disputes before the relevant entities and the meeting failed to hail any agreement. At a later stage, the company issued a final appeal to the employees on strike to return to their working unit but the strike lasted until 10 p.m. and most employees spent the night at the company, holding its leader and some members of management as hostages. There were 150 employees on strike while 818 employees worked.

- On 17 July 2012, Kokom Komalawati and 100 of her colleagues returned to rally and requested to negotiate, to which the company agreed on the condition that the employees would return to work. Since this was refused, the negotiations were cancelled and the factory re-issued calls for protesters to return to work. Later on, the Alliance party of Tangerang City and the DPC SBGTS invited management to negotiate outside the plant site, which the factory hoped would result in a final agreement instructing the protesters to return to work according to the normal schedule. There were 100 employees on strike while 929 employees worked. The company once again issued an appeal to striking workers to return to work.
- On 18 July 2012, Kokom Komalawati and her colleagues obstructed employees who wanted to come to work and almost started a fight between them. In response to the incident, the factory asked the Department of Manpower in Tangerang City for mediation which was requested by Kokom Komalawati and her colleagues but representatives from the Department of Manpower were unable to attend and the negotiations failed to take place. There were 100 employees on strike and the factory made another appeal to them to return to their work units.
- On 19 July 2012, Kokom Komalawati and her colleagues returned to obstruct and force employees to absent themselves from work and almost started clashes between them. The factory recorded that there were 155 employees absent from work for five working days, who were considered to have resigned in line with section 140 of Act No. 13 of 2003. With regard to the industrial dispute at issue, further mediation was performed by the National Mediation Centre (PMN) which submitted its report on 21 May 2013.
- On 20 July 2012, Kokom Komalawati and her colleagues returned to obstruct, coerce and intimidate employees who wanted to come to work. As the company recorded that there were 21 employees absent from work for five days, they considered that they had resigned in line with the applicable legislation.
- On 23 July 2012, there were 500 employees who had been absent from work for seven days and were considered as having resigned in line with the applicable rules and legislation. Since Kokom Komalawati and her colleagues coerced and intimidated the workers who were sent home by the company, only some of them left using the employee bus while others followed Kokom Komolawati and her colleagues.

574. Concerning the strike action in October 2012, the employer representative indicates that the SBGTS-GSBI PT PDK and community organizations (Agency for Potential Development of Banten Big Family (BPPKB)) made an attack on the employees and destroyed facilities of the company. In September 2012, one worker who had been involved in the strike spread a bomb alert to several employees of the factory and was subsequently reported to Tangerang City Police and arrested, but in November 2012, the management of the factory requested the Tangerang City Police to suspend the investigation of the suspect and excused his actions.

Observations from the Government

- 575.** The Government provides information on the establishment and activities of the SBGTS-GSBI PT PDK, the allegations of intimidation of Kokom Komolawati, and termination of trade union leaders, members and other workers both for efficiency reasons and following their participation in the strike.
- 576.** With regard to the allegations of intimidation, the Government indicates that on 22 November 2012, Kokom Komalawati submitted a report to the Police Resort Metro, Tangerang City, alleging a criminal offence of obstructing freedom of association by intimidating her not to establish the SBGTS-GSBI PT PDK. In her report, she explained the chronological violations of freedom of association and claimed that management prevented her from establishing the trade union by intimidating her and offering her promotions. In particular, the worker indicated that, on 10 February 2012, she was summoned by the company management, informed that she would be promoted to a better position if she did not establish the trade union and was requested to join the existing SPN. The Government states that these allegations of violations of freedom of association were handled by the police, who conducted an investigation and found evidence of the establishment, registration and activities of the SBGTS-GSBI PT PDK. The police report indicates that the trade union was established on 25 February 2012 and registered on 14 March 2012 in the Department of Manpower, Tangerang City. The report also found that the union carried out various activities as evidenced by letters addressing various issues which were communicated to the company management from March to July 2012. The Government further indicates that on 31 December 2015, the police issued a letter regarding its investigation into the alleged acts of intimidation stating that the results of the investigation as well as testimonies of witnesses concluded that conditions in section 28 of Act No. 21 on Trade Unions, 2000, were not met.
- 577.** Concerning the allegations of dismissals of trade union leaders, the Government states that since the company was in financial difficulties, as evidenced by the financial audit reports dated 31 December 2009, 2010 and 2011 made by the independent auditor Kokasih, Nurdiyaman, Tjahjo & Partners, the termination of employment was an efficiency measure undertaken by the factory management to maintain its business activity. The Government states that in February 2012, 69 workers, including Kokom Komalawati, were dismissed for reasons of efficiency, out of which 68 workers claimed their rights and obtained compensation as stipulated in section 164(3) of Act No. 13 of 2003, while the dismissal process of Kokom Komalawati was conducted through the Industrial Relations Court because the worker refused the termination of her employment. In a decision dated 10 July 2013, the Industrial Relations Court declared the termination of employment between the factory and Kokom Komalawati for efficiency reasons with effect from 10 July 2013 and ordered the factory to pay her compensation of Indonesian rupiahs (IDR) 37,240,910. The worker appealed the decision to the Supreme Court on 19 August 2014 but, in a decision dated 19 February 2015, the Supreme Court declared the appeal not eligible due to its late submission exceeding 14 days from the enactment of the Industrial Relations Court decision, which thus became binding.
- 578.** With regard to the allegations of dismissals for having participated in a strike, the Government states that in line with section 137 of Act No. 13 on Employment, 2003, strike, which results from failed negotiation, is a fundamental right of workers/labourers and trade/labour unions that shall be staged legally, orderly and peacefully. It further indicates that section 140 of Act No. 13 of 2003 stipulates:
- (1) Within a period of no less than 7 (seven) days prior to the actual realization of a strike, workers/labourers and trade/labour unions intending to stage a strike are under an obligation to give a written notification of the intention to the entrepreneur and the local government agency responsible for labour/manpower affairs.

- (2) The notification as referred to under subsection (1) shall at least contain:
 - (a) the day and the date on which, and the hour at which they will start the strike;
 - (b) the venue of the strike;
 - (c) their reason for the strike and/or their demand;
 - (d) the signatures of the chairperson and secretary of the striking union and/or the signature of each of the chairpersons and secretaries of the unions participating in the strike, who shall be held responsible for the strike.
- (3) If the strike is staged by workers/labourers who are not members of any trade/labour union, the notification as referred to under subsection (2) shall be signed by workers/labourers' representatives who have been appointed to coordinate and/or be held accountable for the strike.
- (4) If a strike is performed not as referred to under subsection (1), then, in order to save production equipment and enterprise assets, the entrepreneur may take temporary action by:
 - (a) prohibiting striking workers/labourers from being present at locations where production processes normally take place; or
 - (b) prohibiting striking workers/labourers from being present at the enterprise's premise if necessary.

The Government states that the strike undertaken by Kokom Komolawati and other employees can be considered as illegal because it did not correspond to the procedure of strike implementation as stipulated in section 140 of Act No. 13 of 2003. It further indicates that the employees who were on strike from 12 to 23 July 2012 were encouraged by the factory to return to work on 12, 13, 16, 17 and 18 July 2012. Since they ignored the company's appeal to return to work, they were later qualified as resigned employees in line with section 168 of Act No. 13 of 2003, which stipulates that:

- (1) An entrepreneur may terminate the employment of a worker/labourer if the worker/labourer has been absent from work for no less than 5 (five) workdays consecutively without submitting to the entrepreneur a written account [explaining why he/she is absent from work] supplemented with valid evidence [to support the truth of the explanation] and the entrepreneur has properly summoned him or her twice in writing because such absenteeism may disqualify the worker/labourer in question from continuing their employment.
- (2) The written explanation supplemented with valid evidence as referred to under subsection (1) must be submitted [to the management] at the latest on the first day on which the worker/labourer in question comes back to the workplace to resume work.
- (3) In the event of the termination of employment as referred to under subsection (1), the affected worker/labourer shall be entitled to compensation pay for her/his entitlements that he/she has not used according to what is stipulated under subsection (4) of article 156 and they shall be given detachment money whose amount and the procedures and methods associated with its payment shall be regulated in work agreements, enterprise rules and regulations, or collective work agreements.

579. The Government concludes by stating that as an ILO member State it remains committed to the fulfilment of the rights of workers and it has guaranteed the freedom of association in Indonesia, especially in the PT PDK company by ensuring the establishment of trade unions – the SPN, the SPSI and the Trade Union of Textile and Footwear Garment – the Association of Independent Trade Unions (SGBTS–GSBI), and by allowing the trade unions to carry out their activities in line with national procedures and regulations.

The Committee's conclusions

580. *The Committee notes that the present case concerns allegations of dismissal by the PT PDK of PTP SBGTS-GSBI PT PDK trade union leaders, restriction on the right to strike by using police and paramilitary forces on striking workers, dismissal of trade union members and other workers for having participated in a strike and interference in trade union affairs by intimidating workers to change their trade union affiliation in favour of a union supported by management.*
581. *With regard to the dismissal of nine trade union leaders in February 2012, the Committee notes that while the complainant alleges that these dismissals took place shortly after the registration of the PTP SBGTS-GSBI PT PDK demonstrating their anti-union character and were contrary to section 164(3) of the Act of Manpower since they were apparently done for rationalization (efficiency) reasons although the company continued its production, both the Government and the employer representative claim that the dismissal of trade union leaders preceded the registration of the trade union which only took place on 14 March 2012 and that a total of 190 workers were dismissed with full compensation from February to July 2012 for reasons of rationalization (efficiency) so as to address the factory's financial difficulties; despite these efforts, the factory had to close down in January 2014. The Committee further notes the complainant's statement that it is common practice in Indonesia to lay off trade union leaders for efficiency reasons and that with the exception of Kokom Komolawati, the remaining eight union leaders accepted their dismissal in the following months. The Committee notes the Government's indication that since Kokom Komolawati had not accepted her dismissal the case was referred to the Industrial Relations Court, which declared the termination of employment between the worker and the factory due to efficiency reasons effective from 10 July 2013 and that the worker's appeal to the Supreme Court was declared non-eligible due to its late submission.*
582. *While taking due note of the financial difficulties faced by the factory which may under certain circumstances justify staff reduction programmes, the Committee notes with concern that the dismissal of nine trade union leaders, including Kokom Komolawati, took place during the period when the trade union was being established and that the trade union leaders were among the first to be terminated in February 2012, despite the continuation of the factory's activities until January 2014. The Committee further finds that should the complainant's indication that, a few days prior to her dismissal, Kokom Komolawati was offered a promotion and pressured by management not to establish the trade union and join the existing union, be founded, it would support the allegation that the dismissal of nine trade union leaders was not motivated by purely economic reasons. In this regard, the Committee wishes to point out that the application of staff reduction programmes must not be used to carry out acts of anti-union discrimination [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 796] and that the Committee has emphasized the advisability of giving priority to worker representatives with regard to their retention in employment in case of reduction of the workforce to ensure their effective protection [see **Digest**, op. cit., para. 833]. Furthermore, the Committee has drawn attention to the Workers' Representatives Convention, 1971 (No. 135), and Recommendation, 1971 (No. 143), in which it is expressly established that worker representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as worker representatives or on union membership, or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements [see **Digest**, op. cit., para. 800]. The Committee therefore considers that efforts should have been made in these circumstances to giving priority to retaining the trade union leaders in employment, which would have enabled consultations to take place between the trade union and the company on the rationalization and staff reduction process. The Committee urges the Government to ensure respect for these principles.*

583. *Concerning the alleged restriction on the right to strike by using police and paramilitary intervention on striking workers, the Committee notes the complainant's allegations that: (i) a strike took place at the factory from 12 to 23 July 2012 with more than 1,300 workers participating; (ii) the striking workers were confronted with a violent intervention from the security, police and paramilitary groups who tried to disperse the strike by force and used tear gas against the workers as well as pushed, hit and pelted them with blunt objects; (iii) as a result of the intervention, two women fainted and another 32 workers were injured; and (iv) 75 workers were forced by management to stand in the yard and make statements not to participate in protests and to resign from both the trade union and the company. The Committee expresses its concern at the high number of injured workers reported and regrets that neither the employer representative nor the Government provide any observations on these specific allegations, but takes due note of the detailed information provided on the evolution of the strike and the numerous, albeit failed, attempts at negotiation and mediation, one of which could not proceed due to the Government's absence. The Committee further notes that, according to the employer representative, some union members forced other employees to join the strike, obstructed them from working and intimidated them, almost causing clashes among the workers, and that at one point they stayed at the factory at night, keeping the factory leader and some members of management as hostages. Noting that the Government and the employer representative, while invoking actions such as intimidation of workers and prevention of the management to leave the factory, do not refer to specific acts of violence or disruption of public order and, at the same time, do not deny the allegation that the police and other forces of intervention were used for strike-breaking purposes, the Committee recalls that, while the exercise of the right to strike should respect the freedom to work of non-strikers, as established by the legislation, as well as the right of management to enter the premises of the enterprise [see **Digest**, op. cit., para. 652], the authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order. The use of police for strike-breaking purposes is an infringement of trade union rights [see **Digest**, op. cit., paras 643 and 647]. The Committee also wishes to emphasize that in the event of assaults on the physical or moral integrity of individuals, the Committee has considered that an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts [see **Digest**, op. cit., para. 50]. In light of these principles, the Committee requests the Government to take the necessary measures to conduct an independent investigation into the allegations of the use of police and other forces on striking workers and trusts that the abovementioned principles will be fully respected. It requests the Government to inform it of the outcome of the investigation, including any measures taken as a result, and trusts that the Government will take the necessary measures to ensure that police, security and other forces are not used for strike-breaking purposes and that any intervention during strikes or industrial actions is strictly limited to situations where law and order are seriously threatened.*

584. *Furthermore, the Committee notes the complainant's indication that its protest of October 2012 was interrupted by workers, mobilized by management, who used blunt weapons injuring 11 protesting workers, as well as the employer representative's statement that during the protest trade union members and communities' organizations attacked the company's employees and destroyed its facilities, and that, a month earlier, one worker issued a bomb alert at the factory. The Committee notes with concern the acts of violence raised by both sides and wishes to point out that the principle of freedom of association does not protect abuses consisting of criminal acts while exercising the right to strike [see **Digest**, op. cit., para. 667].*

585. *With regard to the allegations of dismissals of striking workers for anti-union purposes, the Committee notes the complainant's indication that: (i) on the fifth day of the strike, management did not allow the striking workers to work and 1,300 workers were forcefully declared to have resigned; (ii) a protest was organized in October 2012 asking for the reinstatement of the workers; and (iii) although some of the workers were later re-employed as new workers or found work on a daily or temporary basis, many suffer from important socio-economic consequences resulting from the loss of stable income and continue to contest their termination. The Committee notes that the Government and the employer representative do not contest the fact that a high number of workers lost their jobs following their participation in the strike of July 2012, but observes that there are divergent views between the complainant, on the one hand, and the Government and the employer representative, on the other hand, as to the exact number of workers concerned (the complainant refers to 1,300 and the employer representative to around 600) and to the legality of the measures taken. While the complainant asserts that the workers were dismissed for anti-union purposes and asks for their reinstatement, the Government and the employer representative indicate that management had issued repeated appeals to the striking workers to return to their work units but since they had ignored the company's appeals and had been absent from work for five or more consecutive working days they were considered as having resigned as a result of work stoppage in line with section 168 of Act No. 13 of 2003. The Committee recalls that the relevant legislation provides that workers who have been absent from work for five consecutive working days without any written notification and valid evidence and who have been summoned twice by the employer in a written manner can be terminated from employment and qualified as resigned employees. The Committee also notes the Government's and the employer representative's view that the strike undertaken can be considered as illegal because it did not comply with the requirements stipulated in section 140 of Act No. 13 of 2003, but observes that they do not provide details as to the precise requirements that were not met. While noting that it does not have at its disposal sufficient information to assess whether the prerequisites for declaring a strike were met in the present case, the Committee wishes to point out that the responsibility for declaring a strike illegal should lie with an independent and impartial body, such as an independent court. Bearing in mind the circumstances of this case and recalling that, as was acknowledged by the Government and the employer representative, the company had not paid several months of wages, the Committee considers that calling a strike if necessary to protest against the non-payment of part of all of the workers' wages and to demand better working conditions constitutes a legitimate trade union activity and would thus not give rise to considerations of justified or unjustified absence pursuant to section 168 of Act No. 13 of 2003. Expressing its serious concern at the large number of workers who were considered to have resigned after having participated in the strike of July 2012, the Committee recalls that arrests and dismissals of strikers on a large scale involve a serious risk of abuse and place freedom of association in grave jeopardy. The competent authorities should be given appropriate instruction so as to obviate the dangers to freedom of association that such arrests and dismissals involve [see **Digest**, op. cit., para. 674]. In light of these principles and the large-scale termination of striking workers, the Committee requests the Government to take the necessary measures to initiate an independent inquiry to address the allegations of anti-union termination of 1,300 workers and to determine the real motives behind these measures and, should it be found that they were terminated for legitimate trade union activities, take the necessary measures to ensure that the workers are fully compensated, if indeed reinstatement is not possible due to the company's closure. The Committee requests the Government to keep it informed of any developments in this regard.*
586. *Concerning the allegations of interference in trade union activities, the Committee notes, on the one hand, the complainant's allegation that, a few days prior to her dismissal, Kokom Komolawati was pressured by management not to establish the PTP S BGTS-GSBI PT PDK and to join the existing union and was offered a promotion in return, and, on the other hand, the Government's statement that, in response to these allegations, an investigation was*

conducted by the police which concluded that the PTP SBGTS-GSBI PT PDK had been successfully established and was functioning, and that, in relation to the alleged intimidation, a police letter dated 31 December 2015 found that the conditions referred to in section 28 of Act No. 21 of 2000 were not met. The Committee requests the Government to provide a copy of the report of the investigation into the alleged acts of intimidation (in English, if possible).

587. *The Committee further observes that the complainant indicates that, on 20 July 2012, management established a new trade union at the factory and obliged every worker, including through the use of paramilitary rangers, to resign from their previous trade union membership and to join the newly created trade union supported by management, and regrets that neither the Government nor the employer representative provide observations on these specific allegations of interference. The Committee expresses its concern over the alleged acts of interference in trade union affairs and wishes to emphasize that Article 2 of Convention No. 98 establishes the total independence of workers' organizations from employers in exercising their activities. 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., paras 855 and 861]. The Committee has also previously stated that 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 considers 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., para. 858]. The Committee urges the Government to provide its observations on these allegations. The Committee expects that the Government will take the necessary measures to ensure that any acts of employer interference in trade union affairs are properly identified and remedied and, where appropriate, that sufficiently dissuasive sanctions are imposed so that such acts do not reoccur in the future.*

588. *Bearing in mind the complex nature of the case and the multitude of interconnected allegations (deficiency in wage payment, dismissal of trade union leaders following the establishment of a union, restriction on the exercise of the right to strike, termination of employment after having participated in a strike and interference in trade union affairs), the Committee trusts that the investigations to be conducted will look at these incidents as a whole with a view to properly reflecting the circumstances of this case.*

The Committee's recommendations

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

- (a) Welcoming the Government's detailed response, the Committee requests it to take the necessary measures to conduct an independent investigation into the allegations of the use of police and other forces on striking workers. It requests the Government to inform it of the outcome of the investigation, including any measures taken as a result, and trusts that the Government will take the necessary measures to ensure that police, security and other forces are not used for strike-breaking purposes and that any intervention during strikes or industrial actions is strictly limited to situations where law and order are seriously threatened, in line with the principles set out in its conclusions.*

- (b) *In light of the above-mentioned principles and the large-scale termination of striking workers, the Committee requests the Government to take the necessary measures to initiate an independent inquiry to address the allegations of anti-union termination of 1,300 workers and to determine the real motives behind these measures and, should it be found that they were terminated for legitimate trade union activities, take the necessary measures to ensure that the workers are fully compensated, if indeed reinstatement is not possible due to the company's closure. The Committee requests the Government to keep it informed of any developments in this regard.*
- (c) *The Committee requests the Government to provide a copy of the reports of the investigation into the alleged acts of intimidation of Kokom Komalawati. The Committee urges the Government to provide its observations on the specific allegations of interference in trade union affairs by forcing workers to change their trade union affiliation in favour of a trade union supported by management. The Committee expects that the Government will take the necessary measures to ensure that any acts of employer interference in trade union affairs are properly identified and remedied and, where appropriate, that sufficiently dissuasive sanctions are imposed so that such acts do not reoccur in the future.*
- (d) *Bearing in mind the complex nature of the case and the multitude of interconnected allegations (deficiency in wage payment, dismissal of trade union leaders following the establishment of a union, restriction on the exercise of the right to strike, termination of employment after having participated in a strike and interference in trade union affairs), the Committee trusts that the investigations to be conducted will look at these incidents as a whole with a view to properly reflecting the circumstances of this case.*

CASE NO. 3176

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

**Complaint against the Government of Indonesia
presented by
the International Trade Union Federation (ITUC)**

***Allegations: Violation of the right to organize
peaceful public demonstrations and industrial
action***

- 590.** The complaint is contained in a communication dated 8 December 2015 from the International Trade Union Confederation (ITUC).
- 591.** The Government sent partial observations in a communication dated 4 August 2016.
- 592.** 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

- 593.** In its communication dated 8 December 2015, the ITUC alleges repeated acts of violence against workers protesting against new regulations on wage setting. The ITUC explains that the Confederation of Indonesian Trade Unions (KSPI), among other unions, has recently established a forum (the Gerakan Buruh Indonesia – Komite Aksi Upah) calling for a living wage. The ITUC alleges that several trade union activities planned as part of the campaign were targets of violent attacks by police and local authorities.
- 594.** The ITUC explains that on 30 October 2015, trade unions organized a lawful and peaceful protest in front of the Presidential Palace, which was attended by more than 35,000 workers. The complainant alleges that despite its peaceful nature, police used water cannons and tear gas to disperse the protesters. It then arrested 23 workers and detained them for 30 hours, accusing them of organizing the demonstration. These workers continue to face criminal charges under articles 216(1) and 218 of the Criminal Code and are required to report to the regional police in Poldo Metro Jaya on a weekly basis.
- 595.** According to the ITUC, on the same day, peaceful demonstrations in other parts of the country were similarly disrupted. It alleges that heavily armed thugs wearing uniforms of the Organisasi Kepemudaan, hired by employers' organizations, were used to intimidate workers in the Medan North Sumatra region. Seven labour activists from the North Sumatra Workers Alliance were attacked by thugs as they marched towards a government building in the Medan Industrial area to protest Government Regulation No. 78/2015 on wages. As a result, the workers suffered serious injuries and were transferred to hospitals for medical treatment. In Jawa Timur, a member of the Federation of Indonesian Metal Workers Union (FSPMI) was severely beaten by the police and fainted.
- 596.** The ITUC alleges that in the days leading up to the nationwide strike planned for 24–27 November 2015, the police occupied the branch office of the KSPI in North Jakarta; put the KSPI and FSPMI branch office under surveillance for about one week; and summoned, on 30 October 2015, Muhamad Rusdi, the KSPI union leader.
- 597.** The ITUC explains that the industrial action planned for 24–27 November 2015 included stopping production in industrial areas and pickets in front of factories and local authorities (districts and provinces). Hundreds of thousands of workers from a broad range of trade unions followed the call for the strike in the following regions: Batam, East Java (Mojokerto, Sidoarjo, Surabaya and Gresik), Central Java (Semarang), West Java (Bekasi, Karawang, Purwakarta, Depok, Bogor, Cimahi and Bandung) and Medan North Sumatra. More than 5 million workers were expected to participate in the strike on the first day. However, threats and intimidation by the police, Government and thugs led to a lower participation (over 2 million workers from 22 provinces participated in the strike).
- 598.** According to the ITUC, on 24 November 2015, the police physically attacked two picketing workers and seized their cameras. The ITUC alleges that local authorities and employers in the Bekasi, Karawang and Batam regions attempted to intimidate workers and refers to the following examples. The Indonesian Employers Association (Apindo) in the Bekasi area sent a written letter to workers falsely stating that the national strike was illegal and that consequently, all workers participating in the strike would face sanctions, including under the criminal law. Factory management in the PT. DMCTI Jababeka Industrial area in Bekasi coerced workers into signing statements declaring that they would not be participating in the strike. About 75 workers, including regional union leaders and coordinators, were dismissed for not signing the statements and participating in the national strike. The local authorities in Bekasi and Batam issued written statements arguing that national strikes were not permitted under the legislation, that the 24–27 November 2015 strike was therefore unlawful and that employers were allowed to prevent workers from picketing near factories and not

pay workers on strike. Local police had made similar statements and threatened workers with criminal punishments. The notices were placed on factory walls and handed directly to workers in the industrial areas.

599. On 25 November 2015, arguing that it was prohibited to demonstrate in the industrial areas as they were part of the “National Vital Object Area”, the police arrested the following five union leaders in the Bekasi Industrial Estates, West Java: Nurdin Muhidin (labour activist and member of local parliament), Ruhiyat (NAMICOH plant level union), Udin Wahyudin (HIKARI plant level union), Amo Sutarmo (EPINDO plant level union), and Adika Yadi (NGK plant level union). These workers were detained for about eight hours before they were released.
600. The ITUC also alleges that a Korean company in Bekasi hired dozens of thugs who attacked workers using water cannons.
601. The ITUC expresses its serious concern over the large scale interference in workers’ right to organize peaceful public meetings and industrial actions through excessive police violence, intimidation and arbitrary arrests. It considers that these acts constitute a flagrant violation of freedom of association and the right to organize in Indonesia.

B. The Government’s reply

602. In its communication dated 4 August 2016, the Government indicates that freedom of association and the right to organize are protected under Law No. 21 of 2000 on Trade Unions and Law No. 13 of 2003 on Manpower. Furthermore, the right to express opinions in public (through demonstrations/rallies), both orally and in writing, is protected by the 1945 Constitution and Law No. 9 of 1998 on Freedom of Expression in Public. However, participants in demonstrations and rallies must respect the legislation in force. The Government provides the following information on the allegations raised in this case.
603. Regarding the allegation of police interference in the demonstration on 30 October 2015 in front of the Presidential Palace, the use of water cannons and tear gas to disperse the crowd and detention of 23 workers, the Government indicates that pursuant to section 7(1) of Head of National Police Regulation No. 7 of 2012 on procedures for organizing service, security and case management of expressing opinion in public and section 5 of the Governor of Jakarta Regulation No. 228 of 2015 on controlling the implementation of freedom of expression in public, any expression of opinion in public (demonstration) in open spaces shall be conducted in the period from 6 a.m. to 18 p.m. The Government explains that as the demonstration held by workers in front of the Palace exceeded the permitted duration, the police took crowd dispersion measures. In particular, it arranged for negotiation with Mr Rusdi, Secretary General of the KSPI, and the field coordinators. Despite the fact that the police allowed some leeway (deadline tolerance until 19 p.m.), the crowd deliberately persisted and refused to disperse. To maintain public order, the police tried to disperse the crowd by force, using water cannons. However, the use of water cannon turned out to have no effect as the crowd remained in front of the Palace. In these circumstances, the Indonesian National Police (INP) took further steps by using tear gas. The Government explains that the INP actions comply with the national legislation and regulations, in particular, Police Regulation No. 7 of 2012, Police Regulation No. 16 of 2006 on guidelines and procedures of mass control, and procedure of the head of the INP No. PROTAP/1/X/2010 on handling anarchy.
604. The Government indicates that 26 people (23 workers, two persons from the Legal Aid Institute (LBH) and one university student) were arrested for having allegedly committed acts of provocation, that is to say persuading other protesters not to disperse, thereby ignoring orders or requests from the authorities, in violation of articles 216(1) and 218 of the

Criminal Code. They were released after questioning. The Government points out that the arrest complied with article 19, paragraph 1 of the Code of Criminal Procedure, according to which, the arrest shall not exceed one 24-hour period.

- 605.** With regard to the demonstration in Medan, North Sumatra, and the allegation of beating of workers participating in a long march, the Government indicates that the march participants did not follow the route initially proposed by the field coordinator of the North Sumatra Workers Alliance to the local police. The workers have not only changed the route but also forced other workers to participate in the rally. The Government indicates that the sweeping action and coercion to rally has caused tension and resistance from workers and security guards of PT. BIA, but that there were no attacks against marching workers. At 17 p.m. the marching action came to an end and the workers dispersed in an orderly manner.
- 606.** Regarding the demonstration in East Java and the allegation of beatings of a FSPMI member, the Government explains that pursuant to Police Regulation No. 16 of 2006 and Procedure No. PROTAP/1/X/2010, the police is prohibited from committing acts of violence in handling protests and demonstrations. The Government indicates that according to the information provided by the INP, no worker or member of the FSPMI was beaten by the police. Moreover, there were no complaints submitted or reported by workers to the police alleging beatings by the police officers.
- 607.** With regard to the alleged police intervention prior to the national strike on 24–27 November 2015, the Government indicates that the INP liaised with the North Jakarta Police and KSPI officials and determined that there is no branch office of the KSPI located in the North Jakarta area. As for the allegation concerning Mr Rusdi, the Government indicates that he continues to carry out his activities as the Secretary General of the KSPI and that legal proceedings in relation to the alleged violation of articles 216(1) and 218 of the Criminal Code by 26 demonstrators, including Mr Rusdi, are pending before the court.
- 608.** Regarding the alleged violence against workers during the national strike, the Government indicates that it has been coordinating with different stakeholders such as Apindo Bekasi and the manpower local office in Bekasi and Batam district to make clarifications in relation to these complaints. It indicates, in particular, that by a letter dated 12 March 2016, the Governing Board of Apindo Bekasi explained that the proposed national strike staged by workers as an effort to resist and urge the Government to revoke its Regulation No. 78 of 2015 created anxiety for employers. The Governing Board of Apindo Bekasi district confirmed that it had issued a “Position Statement” regarding the planned nationwide strike to be held on 24–27 November 2015. The statement conveyed to its members that whereas Law No. 13 of 2003 on Manpower contains no “national strike” terminology, rallies are regulated by Law No. 9 of 1998 on rallies. Thus, in the organization’s view, the “national strike” was an illegal activity. Therefore, employers (Apindo members) could enforce the “no work no pay” principle or impose sanctions that are “measurable”, pursuant to the company regulations or collective labour agreements in force, on employees participating in the strike and/or on those who “persuaded, instigated, ordered” to conduct the national strike. Apindo Bekasi pointed out that notwithstanding this statement, criminal offenses committed by workers, both inside and outside the company, may be subject to criminal sanctions in accordance with the applicable legislation (the Criminal Code).
- 609.** By way of response to the above communication, the Government argues that “strikes” and “protests/demonstrations” are different activities and provides the following explanation on the differences in the definition as set out in the national legislation:

Strike is regulated by Law No. 13 of 2003 on Manpower. Pursuant to its section 1, paragraph 23, strike is an action of workers/labourers who planned and carried out jointly or by the Workers/Labour Union to cease or slow down work. The implementation of the strike must comply with the requirements set out in sections 137 and 140. Pursuant to section 137, strike is

a fundamental right of workers/labourers, must be carried out legally orderly, and peacefully and be a result of a failed negotiation. Section 140 stipulates that workers/employees and trade/labour unions shall notify in writing the employers concerned and the government agency responsible for manpower affairs at least seven working days before the strike takes place.

Rallies/demonstrations are regulated by Law No. 9 of 1998. Pursuant to its section 1, paragraph 3, “rally/demonstration” is an activity carried out by an individual or a group to express their opinion orally, in writing or in other manner in public (i.e. in front of a crowd, or any other person, or a place that can be visited or seen by anyone). Pursuant to section 10 of the Law, a rally or demonstration shall be notified in writing by an individual, leader, or a group coordinator at least 72 hours in advance to the local INP.

- 610.** Based on the above, the Government concludes that the national strike undertaken by workers on 24 November 2015 is in fact a demonstration. Demonstrators or protesters violating public order may be subject to sanctions pursuant to the Criminal Code and related legislation.
- 611.** Regarding the allegation that the management of PT. DMCTI in Jababeka, Bekasi, forced workers to sign a statement declaring that they would not participate in the strike, the Government informs that it is currently seeking clarification from the management.
- 612.** Regarding the allegation that the district government of Bekasi and the Department of Manpower Batam have issued written statements to the effect that the national strike was illegal and therefore the employers were entitled to prevent workers from joining the demonstrations around the factory and not pay the wages to the strike participants, the Government transmits the following clarification obtained from the manpower local offices in Bekasi and Batam.
- 613.** In a letter dated 29 March 2016, the Head of the Bekasi office explained that following the enactment of Government Regulation No. 78 of 2015 various trade unions opposed to it, requested the Bekasi district Government to submit a Recommendation to the Central Government to reject the Regulation, and demanded Bekasi district government to ignore it in the process of establishment of minimum wages for 2016, and further demanded a 50 per cent wage increase for 2016. In this respect, the Government of Bekasi suggested using applicable mechanisms and to file a judicial review against the Regulation. The police, civil police and the department of transportation in Bekasi district were requested to take measures to maintain security and order and to prevent anarchy during the activity.
- 614.** In a letter dated 14 March 2016, the head of the manpower local office Batam explained that that while the office’s letter dated 13 November 2015 concerned the national strike, it was not a notice of its prohibition. The letter was written in response to the plan to organize a national strike or rally, which caused anxiety amongst the business community and the municipal community of Batam, based on the experiences of the previous years when the nationwide protests were accompanied by sweeping actions against companies and the blockade of some roads in the city of Batam, causing severe congestion and anarchic acts, such as burning several police stations and vehicles as well as damaging the Batam Mayor’s office. In light of its experience, the manpower local office in Batam wrote to the employers and trade unions in Batam city bringing their attention to the relevant legislative provisions according to which the organization of a national strike has to follow certain steps. First of all, a strike should be a result of a failed negotiation of a bipartite agreement; if this step is not fulfilled, the strike is illegal and workers are not entitled to receive wages. The department of manpower in Batam claimed that there is nothing improper with the letter it sent to the employers and trade union as it did not prohibit the union to go on strike and no freedom of association rights have been violated by its publication.
- 615.** In the light of the above letters, the Government concludes that the measures taken by the local governments in Bekasi and Batam intended to urge the strikers and demonstrators to

comply with the legislation in force; such an appeal is not a ban on strike action or protests per se.

- 616.** With regard to the allegation that local police also made a similar statement and threatened the workers with criminal sanctions, the Government indicates that according to the information received from the INP, there was no police statement or notice either placed on the factories' walls or distributed in the industrial area.
- 617.** Regarding the strike rally on 25 November 2015, the Government considers that the action taken by workers in the industrial area is not a strike action, but a rally/demonstration. The industrial area of Bekasi is one of the national vital objects that should be free of rallies and demonstrations. The determination of Bekasi industrial area as a national vital object is based on the consideration that Bekasi industrial area is an area/location, construction/installation and/or business area which has an impact on the livelihood of the people, the state interest and/or its strategic sources of state revenue. As Bekasi industrial zone is a national vital object, the following matters must be borne in mind: its capacity to generate daily basic needs and the fact that threats and harassment against it would bring disaster to the development and cause national transportation and communications difficulties. The Government points out that the demonstration in the industrial area of Bekasi was not carried out in accordance with the procedures and provisions of Law No. 9 of 1998, as no advance notice regarding the organization of the demonstration was sent to the police, and the demonstration disrupted the public order as protesters closed public roads. These actions are in breach of sections 6 and 10 (referred to above) of Law No. 9 of 1998.

Section 6: Citizens who express their opinions in public are obliged and shall be responsible:

- to respect the rights and freedoms of others;
- to respect the moral rules that are generally recognized;
- to obey the applicable laws and regulations;
- to maintain and respect the security and public order; and
- to maintain the integrity of national unity.

- 618.** The Government points out that as the workers had violated the above provisions, the police dispersed demonstrators and arrested five workers, although released them after questioning.

The Committee's conclusions

- 619.** *The Committee notes that in the present case the complainant alleges the violation of the right to organize peaceful public demonstrations and a national strike. In particular, the ITUC alleges: (1) police interference in peaceful demonstrations on 30 October 2015, as well as serious injuries suffered by labour activists as a result of an attack by thugs during the protest; (2) police interference ahead of the national strike by occupying the branch offices of the KSPI in North Jakarta, putting FSPMI branch offices under surveillance and the summoning of Mr Rusdi, leader of the KSPI; and (3) violations committed by the authorities and employers during the national strike in November 2015.*
- 620.** *The Committee notes the Government's general observation that freedom of association, the right to organize and freedom to express opinions in public, including through demonstrations and protests, are protected in Indonesia by various pieces of legislation, including the Constitution, Law No. 9 of 1998 on Freedom of Expression in Public, Law No. 21 of 2000 on Trade Unions and Law No. 13 of 2003 on Manpower. The Government points out that at the same time, participants in demonstrations and protests must respect the legislation in force.*

- 621.** *As a general point, the Committee has always considered that in exercising their freedoms and rights, workers and their respective organizations shall respect the law of the land, but further recalls that the law of the land shall not be such as to impair, nor shall it be so applied as to impair, trade union rights and civil liberties, such as the right to undertake industrial actions and hold public meetings, protests and demonstrations. The Committee further recalls the conclusions of the 2016 International Labour Conference Committee on the Application of Standards which calls upon the Government to ensure that workers are able to engage freely in peaceful actions in law and practice without sanctions (Provisional Record No. 16, Part 2, 105th Session of the ILC, May–June 2016).*
- 622.** *With respect to the events of 30 October 2015, the Committee notes that according to the ITUC, a lawful and peaceful protest in front of the Presidential Palace, attended by more than 35,000 workers, was dispersed by the police, which used water cannons and tear gas. According to the ITUC, the police arrested 23 workers and detained them for 30 hours, accusing them of organizing the demonstration. These workers continue to face criminal charges under articles 216(1) and 218 of the Criminal Law and are required to report to the regional police in Poldo Metro Jaya on a weekly basis. Peaceful demonstrations in other parts of the country were similarly disrupted. The ITUC alleges that heavily armed thugs wearing uniforms of the Organisasi Kepemudaan, hired by employers' organizations, were used to intimidate workers in the Medan North Sumatra region and that seven labour activists from the North Sumatra Workers Alliance were attacked by thugs as they marched towards a government building in the Medan Industrial area to protest Government Regulation No. 78/2015 on wages. As a result, the workers suffered serious injuries and were transferred to hospitals for medical treatment. In Jawa Timur, a member of the FSPMI was severely beaten by the police and fainted.*
- 623.** *The Committee notes the Government's explanation that according to the national legislation in force, public demonstrations should take place between 6 a.m. and 18 p.m. and that the protest in front of the Presidential Palace had exceeded the allowed duration. Thus, the police were required to take crowd dispersion measures, which included the use of water cannons and when these produced no result, tear gas. The Government points out that the INP actions comply with the national legislation and regulations. It further confirms that 26 people were arrested (23 workers among them) on the grounds of committing acts of provocation, that is to say persuading other protesters not to disperse, thereby ignoring orders or requests from the authorities, in violation of articles 216(1) and 218 of the Criminal Code. The Government indicates that they were released after questioning and points out that the arrest complied with article 19, paragraph 1 of the Code of Criminal Procedure, according to which, the arrest shall not exceed one 24-hour period. Regarding the demonstration in Medan, North Sumatra, and the allegation of the beating of workers participating in a long march, the Government indicates that the march participants did not follow the route initially agreed on and forced other workers to participate in the rally, which caused tension and resistance from workers and security guards of PT. BIA. The Government denies that there were attacks against marching workers and indicates that at 17.00 p.m. the marching action came to an end and the workers dispersed in an orderly manner. The Government also indicates that according to the information provided by the INP, no worker or member of the FSPMI was beaten by the police, which is illegal. Moreover, there were no complaints submitted or reported by workers to the police alleging beatings by the police officers.*
- 624.** *The Committee wishes to recall that trade unions should respect legal provisions which are intended to ensure the maintenance of public order; the public authorities should, for their part, refrain from any interference which would restrict the right of trade unions to organize the holding and proceedings of their meetings in full freedom. The obligation on a procession to follow a predetermined itinerary does not constitute a violation of trade union rights. In general, the use of the forces of order during trade union demonstrations should be limited*

to cases of genuine necessity [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth (revised) edition, 2006, paras 147, 148 and 150].

- 625.** *The Committee notes that the Government does not indicate that order was seriously threatened by the demonstration in front of the Presidential Palace and reports of no incident that would suggest that the protest was not peaceful. The Committee is therefore deeply concerned by the excessive force used to disperse it and the arrests that followed. It further recalls that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace. The police authorities should be given precise instructions so that, in cases where public order is not seriously threatened, people are not arrested simply for having organized or participated in a demonstration [see *Digest*, op. cit., paras 140 and 151]. The Committee therefore expects that the Government will take the necessary measures to ensure that these principles are fully respected. It requests the Government to review the situation of the 23 workers in light of these principles with a view to dropping any remaining charges and to keep it informed of any developments in this respect.*
- 626.** *Noting the contradicting information regarding the allegation of a beating of a FSPMI member and, in particular that no formal complaints have apparently been submitted to the authorities in this regard, the Committee invites the FSPMI, should it so desire, to transmit any relevant information in this regard to the Government so that it may fully examine these allegations within the framework of existing national procedures.*
- 627.** *Regarding the alleged interference prior to the national strike, the Committee notes that according to the complainant, the police occupied the branch office of the KSPI in North Jakarta; put the KSPI and FSPMI branch office under surveillance for about one week; and summoned, on 30 October 2015, Muhamad Rusdi, the KSPI union leader.*
- 628.** *The Committee notes the Government's indication that the INP authorities have communicated with the KSPI regarding this allegation and determined that there is no KSPI branch office located in North Jakarta. In these circumstances and in the absence of further details, the Committee requests the complainant to provide further information in this regard. The Committee understands from the information provided by the Government that Mr Rusdi, while he continues to exercise his duties as the KSPI Secretary General, was charged with violating articles 216(1) and 218 of the Criminal Code in relation to his arrest on 30 October 2015 together with other 22 workers, and refers in this respect to its recommendation to review this situation.*
- 629.** *With regard to the third set of allegations, that is to say Government's and employers' interference during the national strike on 24–27 November 2015, the Committee notes that the ITUC alleges that: (i) on 24 November 2015, the police physically attacked two picketing workers and seized their cameras; (ii) Apindo (Bekasi) sent a written letter to workers falsely stating that the national strike was illegal and that consequently, all workers participating in the strike would face sanctions, including under the criminal law; following this communication, the factory management from one enterprise in the Jababeka Industrial area coerced workers into signing statements declaring that they would not be participating in the strike; and about 75 workers, including regional union leaders and coordinators, were dismissed for not signing the statements and participating in the national strike; (iii) local authorities in Bekasi and Batam issued written statements arguing that national strikes were not permitted under the legislation, that the 24–27 November 2015 strike was therefore unlawful and that employers were allowed to prevent workers from picketing near factories*

and not pay workers on strike; (iv) local police made similar statements and threatened workers with criminal punishments; such notices were placed on factory walls and handed directly to workers in the industrial areas; (v) on 25 November 2015, arguing that it was prohibited to demonstrate in the industrial areas as they were part of the “National Vital Object Area”, the police arrested Nurdin Muhidin, Ruhiyat, Udin Wahyudin, Amo Sutarmo and Adika Yadi; these five union leaders in the Bekasi Industrial Estates (West Java) were detained for about eight hours before they were released; and (vi) the hiring by a Korean company in Bekasi of dozens of thugs who attacked workers using water cannons.

- 630.** *The Committee notes that the Government confirms that Apindo in Bekasi district has indeed issued a position statement for the attention of its members, in which the employers’ organization expressed its view that the national strike was illegal (as not being an action envisaged under the Law on Manpower) and thus, the employers could enforce the “no work no pay” principle or impose “measurable” sanctions pursuant to company regulations or a collective agreement, as the case may be, on the striking workers. The Committee notes that the Government agrees with Apindo regarding the nature of the action taken by the workers and argues that the national strike of November 2015 was in fact a demonstration. The Government also considers that the Bekasi industrial area is one of the national vital objects that should be free of rallies and demonstrations. At the same time, the Government points out that the demonstration in that area was not carried out in accordance with the procedure provided for in Law No. 9 of 1998. According to the Government, protesters violating public order are thus subject to sanctions under the Criminal Code and related legislation. Furthermore, while the Government confirms that local manpower offices in Batam and Bekasi have issued written statements regarding the strike, it considers that the aim of the statements was not to prohibit the strike or demonstration, but rather to call on the strikers or protesters to comply with the legislation in force and in particular, in the case of the Bekasi office, to comply with the steps imposed by the legislation. In respect of the latter point, the Committee notes that the statement recalled that a strike should be a result of a failed negotiation, otherwise the strike is considered illegal. The Government denies that the local INP made similar statements and threatened the workers with criminal sanctions.*
- 631.** *The Committee notes the diverging views of the complainant and the Government as to the qualification of the activity undertaken by the KSPI as a national strike or demonstration, respectively. The Committee considers, as it did in Case No. 3050 concerning Indonesia [see Report No. 374, para. 468], that it is not relevant for the purposes of the examination of this present case whether the KSPI activity is ultimately qualified as a national strike or a national demonstration. Noting that the Government, while invoking actions such as the blocking of roads, has not provided detailed information of any acts of violence committed by the workers and, at the same time, has not provided information denying the allegation that thugs were hired by a company in Bekasi to attack and disperse the workers, the Committee recalls that the rights of workers’ and employers’ organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest**, op. cit., para. 44]. The Committee expects that the Government will make every effort to ensure that this principle is fully respected in the future. Furthermore, the Committee wishes to generally recall that, in the event of assaults on the physical or moral integrity of individuals, it has considered that an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts [see **Digest**, op. cit., para. 50]. The Committee trusts that this principle will be fully respected as regards all perpetrators and instigators of the alleged acts of violence. Further in this respect, the Committee regrets that no information has been provided by the Government regarding the alleged attack by the police on picketing workers. The Committee further recalls in this regard the 2016 conclusions of the ILC Committee on the Application of Conventions and Recommendations which called upon the Government to investigate*

allegations of violence against trade unionists during demonstrations. It therefore requests the Government to investigate the matter and if proven to be true, to take appropriate measures to punish those responsible and to ensure appropriate compensation for any damages suffered. It requests the Government to keep it informed in this respect.

- 632.** *With regard to the allegation that Bekasi is a special economic zone where strikes, rallies and demonstrations are prohibited, the Committee notes that while on the one hand the Government confirms this situation, on the other, it declares that the procedure for declaring a demonstration was not followed by its organizers. The Committee wishes to generally recall in this respect that a prohibition of an industrial action, including protests and demonstrations, in special economic zones is incompatible with the principles of freedom of association.*
- 633.** *The Committee notes the Government's indication that it is currently seeking clarification from the management of the PT. DMCTI in Jababeka, Bekasi, regarding the allegation that workers were forced into signing statements declaring that they will not participate in the strike. The Committee requests the Government to keep it informed in this respect and further expects that the allegation of dismissal of 75 workers following their participation in the industrial action will be fully investigated and the appropriate remedial action taken.*

The Committee's recommendations

- 634.** *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 review the situation of the 23 workers in light of the principles set out in its conclusions with a view to dropping any remaining charges and to keep it informed of any developments in this respect.*
 - (b) The Committee requests the complainant to provide further information in relation to its allegation that the police occupied the branch office of the KSPI in North Jakarta, in view of the Government's reply.*
 - (c) The Committee requests the Government to institute independent inquiries into all alleged acts of violence with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts and to ensure appropriate compensation for any damages suffered. It requests the Government to keep it informed in this respect.*
 - (d) Noting the Government's indication that it is currently seeking clarification from the management of the PT. DMCTI in Jababeka, Bekasi, regarding the allegation that workers were forced into signing statements declaring that they will not participate in the strike, the Committee requests the Government to keep it informed in this respect and further expects that the allegation of dismissal of 75 workers following their participation in the industrial action will be fully investigated and the appropriate remedial action taken.*

CASE NO. 2508

INTERIM REPORT

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

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

Allegations: The complainants allege that the authorities and the employer committed several and continued acts of repression against the local trade union at the Tehran bus company, as well as the arrest and detention of large numbers of trade unionists

- 635.** The Committee has examined the substance of this case on nine occasions, most recently at its June 2015 meeting, when it presented an interim report to the Governing Body [see 375th Report, paras 354–371, approved by the Governing Body at its 324th Session].
- 636.** The International Trade Union Confederation (ITUC) submitted new allegations and additional information in support of the complaint in communications dated 30 June and 28 September 2015.
- 637.** The Government sent partial observations in a communication dated 26 October 2015. The Government sent further information in a communication received on 26 October 2016, which, in view of its late receipt, could not be examined by the Committee at this meeting. The Committee will examine the information provided therein, along with any further information provided by the Government in reply to its recommendations, when it next examines this case.
- 638.** At its meeting in June 2016, the Committee observed that, despite the time which had elapsed since the previous examination of this case, it had still not received the full observations of the Government. The Committee issued an urgent appeal to the Government indicating that in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of the case at its next meeting even if the Government's observations or information had not been received in due time [see para. 8]. To date, no further information has been received from the Government.
- 639.** The Islamic Republic of Iran has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 640.** At its June 2015 meeting, the Committee made the following recommendations [see para. 371]:
- (a) The Committee urges the Government to carry out independent investigations into the allegations of ill-treatment to which Mr Ebrahim Madadi, Vice-President of the SVATH union, and Mr Reza Shahabi, Treasurer of the Syndicate of Workers of Tehran and Suburbs Bus Company are said to have been subjected to while in detention. The Committee further expects that if these allegations are found to be true, both union leaders

will be compensated accordingly. The Committee expects that the Government will be able to report without further delay on the outcome of these investigations.

- (b) The Committee urges the Government to secure without further delay Mr Shahabi's definitive release, through pardon or other means, the dropping of any remaining charges, as well as the restoration of his rights and the payment of compensation for the damage suffered. The Committee urges the Government to keep it informed in this regard.
- (c) The Committee expects that the Labour Law and accompanying regulations will be effectively amended without delay so as to bring them into full conformity with the principles of freedom of association, including by allowing for trade union pluralism at all levels. It encourages the Government to accept the technical assistance of the Office in this regard and, in this framework, to transmit to it the latest version of the draft legislation with a view to ensuring its full conformity with the principles of freedom of association as set out in the Constitution of the ILO and the applicable Conventions.
- (d) Pending the implementation of the legislative reforms, the Committee urges the Government to indicate the concrete measures taken in relation to the de facto recognition of the SVATH union, irrespective of its non-affiliation to the Confederation of Iranian Workers' Trade Unions.
- (e) The Committee once again requests the Government to provide a detailed report of the findings of the SGIO and the Headquarters for the Protection of Human Rights into the allegations of workplace harassment during the period of the union's founding, from March to June 2005. It once again requests the Government, in light of the information revealed by these investigations, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities. The Committee requests the Government to keep it informed in this regard, as well as to provide a copy of the court judgment on the action initiated by the union concerning the attacks on union meetings in May and June 2005, once it is handed down.
- (f) Recalling that it had previously welcomed the Government's request for ILO technical cooperation for the training of its disciplinary forces for the proper management of labour protests, the Committee expects that the Government will engage with the Office in this respect without delay. The Committee further notes the interest expressed by the Government in a training course on international labour standards for the judiciary and requests the Government to keep it informed on the progress made in this regard.
- (g) The Committee draws the Governing Body's special attention to the extremely serious and urgent nature of this case.

B. The complainants' new allegations

641. In communications dated 30 June and 28 September 2015, the ITUC alleges that the Government employs so called "security laws" to suppress public expression of dissent. Many activists have been convicted of disseminating "propaganda against the State" and "jeopardising national security" without regard to international standards of due process. Workers who try to organize independent unions are subjected to acts of violence, arrest and detention. Some are sentenced to and are serving lengthy prison sentences, often in the notorious Section 209 of the Evin Prison – reserved for political prisoners where mistreatments of trade unionists by prison authorities are reportedly common.

642. The complainant indicates that the Government recently appointed one of the highest ranking intelligence officers to the post of the Labour Minister. Furthermore, according to the complainant, there has been a full deployment of intelligence and security personnel in the Ministry of Labour and intelligence agents are often at workplaces to monitor the activities of workers and inform the Government and employers.

643. The ITUC further indicates that together with a number of global union federations, it has worked with independent trade unions in the Islamic Republic of Iran in an attempt to

improve the situation. They have met with the Permanent Mission of the Islamic Republic of Iran to the United Nations and other international organizations in Geneva on many occasions to no avail.

644. The ITUC alleges new cases of imprisonment of trade unionists. In particular, the ITUC alleges that Mr Jafar Azimzadeh, President of the Free Union of Workers of Iran (*Ettehadieh Azad e Kargaran e Iran*) and Mr Jamil Mohammadi, a member of the Free Union were sentenced by Branch 15 of the Revolutionary Court to six and three-and-a-half years of imprisonment, respectively, for their trade union activities. They were the coordinators of the 40,000 signature minimum wage increase petition campaign. Mr Azimzadeh was sentenced to five years on charges of gathering and collusion with intent to act against national security and to disturb the public peace (section 610 of the Islamic Penal Code) and one year on the charge of propaganda against the Islamic Republic (section 500 of the Islamic Penal Code). He was also banned for two years from membership in political parties and groups, as well as Internet and media activities (section 23 of Islamic Penal Code). According to the complainant, the decision referred to the following acts to support the final judgment:

- establishment of the Free Union of Workers of Iran, the National Union of Unemployed Workers and the Committee to Pursue the Establishment of Workers' Organizations;
- leading workers' protest in 2005;
- taking part in the International Workers' Day rally in Laleh Park in 2009;
- organizing, planning and managing workers' gatherings and threatening to call rallies and strikes in March 2013;
- collecting 40,000 workers' signatures on the minimum wage petition and leading rallies outside the National Assembly and the Ministry of Labour;
- threatening to hold a rally on International Workers' Day outside the Ministry of Labour in protest against the announced level of minimum wage, which was below the cost of living;
- lodging a complaint to Parliament, on behalf of 1,000 workers, against the former prosecutor of the Islamic Revolutionary Court and Prosecutor General of Tehran and others who embezzled from the Social Welfare Fund of up to 3,000 billion toman;
- leading protests against anti-labour amendment to the Labour Law;
- meeting other independent workers' organizations, such as the Syndicate of Workers of Tehran and Suburbs United Bus Company, Haft Tappeh Sugarcane Workers' Unions, the Coordinating Committee to Pursue the Establishment of Workers' Organizations;
- giving and posting interviews on the website of the Free Union of Workers of Iran and a number of international news media.

Mr Azimzadeh was released on bail amounting to 200 million toman (approximately US\$60,000) on 11 June 2015. However, it appears that all the charges against him remain pending. Mr Jamil Mohammadi, a member of the Free Union of Workers of Iran, was sentenced to three-and-a-half years imprisonment in 2015. He was a member of the Follow-up Committee to Pursue the Establishment of Workers' Organizations, and charged for threatening national security. He is in Tabriz Central Prison, subjected to threats and persecution by the prison guards. According to the ITUC, he has been suffering from

sleeplessness and losses of consciousness because of exhaustion; his requests for medical attention are ignored.

645. The ITUC further submits allegations regarding violations of the right to freedom of association at Polyacryl, a holding company employing 1,500 workers and organized into ten separate subsidiaries. According to the ITUC, the management decided to divide the operations and break down the company, making some workers sign contracts with these subsidiaries. This led to concerns over job security, which resulted in the first protests on 30 October and 2, 3 and 5 November 2013. A second round of protest over job security was held on 16 November 2013 in Isfahan. More than 700 workers spent the night of 18 November 2013 at the factory mosque where they had joined with more co-workers. Around 1,000 workers continued their protest into the next day. The protest resumed with gatherings in the factory compounds on 17, 18, 19 and 20 November 2013. The workers called for the resignation of some board members of the company and a review of their actions. The workers also demanded the reinstatement of those who were dismissed due to their trade union activities; the company's Islamic Labour Council was shut down and the activists associated with the Council expelled from the company. On 21 November 2013, daily protests were announced. On the same day, four workers, Mr Javad Lotfi, Mr Abbas Haghigh, Mr Kioumars Rahimi and Mr Ahmad Saberi were arrested and transferred to the city of Dastgerd.

646. The ITUC also refers to other following cases of detention and imprisonment of trade unionists:

- In 2010, Mr Behnam Ebrahimzadeh's sentence was extended for another nine and a half years; he had already served five years in prison for alleged collusion against the regime and for association with Ahmad Shahid and the People's Mojahedin Organization of Iran.
- Workers at Loushan Cement Factory in the city of Rasht protested outside the Governor's office on Sunday, 29 December 2013 against the closure of the factory. They were detained by security forces.
- In 2014, a court sentenced four petrochemical workers to 50 lashes and six months in prison.
- On 5 April 2015, a court sentenced five protesting mine workers to one year in prison and lashes for "disturbing public order". Over the past two years, over one thousand workers at Chadormalu iron ore mine held a series of gatherings and sit-in protests against mass layoffs and low wages. Dozens of workers were arrested in February 2014, but released a few days later while another group of 31 workers were also summoned to the court.
- On May Day 2015, the Government detained Mr Shapour Ehsanirad, Ms Parvin Mohammadi and other Tehran bus workers. Furthermore, Mr Shapour Ehsanirad, an executive member of the Free Union of Workers of Iran was arrested by the security forces on Saturday, 16 May 2015 and charged with "inciting workers of the Safa Rolling and Pipe Mills Co.". The complaint believes that Mr Ehsanirad was recently released on bail.
- In 2015, labour activist Mr Mohammad Jarrahi was subjected to repeated harassment in the Tabriz Central Prison.
- Mr Shahrokh Zamani, a member of the Founding Board of the Syndicate of Paint Workers of Tehran and the Committee to Pursue the Establishment of Workers' Organizations, was found dead on 13 September 2015 in Gohardasht (Rajai Shahr)

Prison in Karaj. He was serving an 11-year sentence for the crime of disseminating “propaganda against the regime and forming socialist groups” and “endangering national security”. The complainant claims that Mr Zamani was denied access to medication and visitors, which resulted in him staging hunger strikes against maltreatment, and that he was under extreme duress due to the harassment of his family by the Government. While the cause of death was listed as “of natural causes”, the complainant underlines the absence of an independent investigation.

- Mr Mahmoud Salehi, a trade union activist and founding member of the Committee of the Trade Association of Bakery Workers of the city of Saez has been targeted and persecuted by the Government for organizing legitimate trade union activities. He was arrested and detained in 1986 (for three years), 1995, 1999 (for 75 days), 2000 (for ten months, after which he was deprived of the right to stand for union office) and 2001 (for several days, after which he was dismissed), 1 May 2004 and in 2007 (detained for one year for organizing the Saez May Day rally). The complainant alleges that he was arrested again in April 2015 before May Day celebration and sentenced to a nine-year-term of imprisonment on 16 September 2015.
- Mr Ali Nejati, former President of Haft Tapeh Sugar Company Workers’ Syndicate, was arrested on 15 September 2015 and his personal belongings including his computer and notes were seized. Mr Nejati was one of the five union leaders who were arrested in December 2008 two months after the establishment of the union. The complainant is unaware of his whereabouts and expresses concerns as Mr Nejati suffers from a long-term heart problem and relies on medication.

647. The ITUC points out that it is unaware of any reform to the Labour Law initiated by the Government to address the issues raised. The ITUC further alleges escalated repression against teachers’ union activists.

C. The Government’s reply

648. In a communication dated 26 October 2015, the Government explains that many of the issues relating to the situation of workers in the Islamic Republic of Iran result from unilateral sanctions imposed on the country and its trade relations and which led to a precarious economic situation for many workers and enterprises. The Government underlines that in order to help solve these issues, Islamic Republic of Iran has taken measures at the national level and asked that a special rapporteur be appointed to investigate the effect of unilateral sanctions on human rights in the country.

649. The Government recalls that the right of unions to protest is protected by the national Constitution, the Labour Law, the Act on the 5th Economic Development Plan of the country and the 2011 by-law on managing trade union demands.

650. The Government indicates that a particular effort has been made to treat workers’ offences with leniency and tolerance; going as far as reducing penalties after the verdict in some cases. In other cases, however, the accused used freedom of association rights in an abusive way or for illegitimate objectives such as terrorist actions, armed conflicts, attempts to overthrow the State or to cause ethnic and religious hatred.

651. The Government provides the following information on the situation of the workers named in the ITUC communications:

- Mr Jafar Azimzadeh was arrested on 30 April 2014; after a few days in prison he was released on bail on 20 May 2014.

- Mr Jamil Mohammadi was released on bail on 30 April 2014, after a few days in prison. The court has examined the charges against him, but no final verdict has been issued.
- Mr Shapour Ehsani-Raad was released on bail on 10 June 2015, after 27 days in prison.
- Ms Parvin Mohammadi received a court summons to testify on 18 May 2015 and was released on bail the same day.
- Mr Mehdi Bohluli was arrested on 1 September 2015 and released on bail on 29 September 2015.
- Mr Mohammadreza Niknejad was arrested on 1 September 2015 and released on bail on 29 September 2015.
- Mr Ali Nejati was released on bail after one month in jail on 17 October 2015.

652. The Government explains that some workers were accused of crimes unrelated to trade union activities. With regard to Mr Ebrahimzadeh, the Government indicates that he was tried by the Tehran Islamic Revolutionary Court for the following offences: (1) assembly and collusion to commit crimes against national security; (2) propaganda against the Islamic Republic of Iran; and (3) disturbing public order. On 2 July 2011, the court sentenced Mr Ebrahimzadeh to five years of discretionary imprisonment. The sentence was confirmed on appeal. The Government indicates that during his time in prison, he had access to the medical and health-care facilities outside the detention house in various hospitals. Furthermore, he has benefited from several visitation privileges to meet his wife and family members and used prison leave from 21 January to 11 February 2013. He is currently serving his prison sentence in Rajaei-Shar Prison.

653. The Government further explains that Mr Jarrahi was convicted on 28 August 2011 by the Tabriz Court to five years of discretionary imprisonment for his participation in an illegal opposition group, engaging in propaganda against the State and assembly and collusion to commit a crime against national security. The decision was upheld on appeal. According to the Government, with the help of other accomplices, he organized a group called the Labour Democratic Movement which published a leaflet entitled “The Voice of Revolution” which encouraged workers to take armed action against the State.

654. Addressing the case of Mr Salehi, the Government points out that he was charged with propaganda against the State and membership in an illegal group, the Komoleh terrorist group. He was arrested on 8 April 2015 in Saghez. No final verdict has yet been issued in his case and he is currently free.

655. Regarding the case of Mr Zamani, the Government recalls that he was charged with membership in an illegal opposition group and propaganda against the State. He was sentenced to ten years of imprisonment and one year of discretionary imprisonment by the court of Tabriz on 28 August 2011. He was serving his prison sentence and enjoyed all legal rights. The Government indicates that according to the records of Alborz Province justice administration, on 13 September 2015, at 4.50 p.m., some of the inmates noticed the lack of mobility of Mr Zamani; he was immediately transferred to the prison clinic where the medical examination revealed that he had died of a stroke while sleeping. Upon the issuance of a burial permit, he was buried on the date requested by his family. His family called for an independent investigation which was still ongoing.

656. The Government concludes by stating that it is ready to receive ILO technical assistance on exchange of experiences and take advantage of trainings on the management of corporate gatherings.

The Committee's conclusions

- 657.** *The Committee recalls that this case, lodged in July 2006, concerns acts of repression against the local trade union at the Tehran bus company, as well as the arrest and detention of large numbers of trade union trade unionists.*
- 658.** *The Committee regrets that, despite the time that has elapsed since the last examination of this case, the Government has not provided its full observations on the pending matters even though it had been requested several times to do so, including through an urgent appeal. The Committee is therefore bound to reiterate its previous recommendations and urges the Government to provide detailed information thereon without further delay.*
- 659.** *The Committee notes with serious concern numerous new allegations of arrest and imprisonment of trade unionists submitted by the ITUC.*
- 660.** *The Committee notes, in particular, that the ITUC alleges that Mr Jafar Azimzadeh, President of the Free Union of Workers of Iran, and Mr Jamil Mohammadi, a member of that union, were sentenced to six and three-and-a-half years of imprisonment, respectively, for their trade union activities. They were the coordinators of the minimum wage increase petition campaign. Mr Azimzadeh was sentenced to five years on charges of gathering and collusion with intent to act against national security and to disturb the public peace and one year on the charge of propaganda against the Islamic Republic. He was also banned for two years from membership in political parties and groups, as well as Internet and media activities. According to the complainant, the decision referred to the following acts to support the final judgment:*
- *establishment of the Free Union of Workers of Iran, the National Union of Unemployed Workers and the Committee to Follow Up the Formation of Free Labour Organizations;*
 - *leading workers' protest in 2005;*
 - *taking part in the International Workers' Day rally in Laleh Park in 2009;*
 - *organizing, planning and managing workers' gatherings and threatening to call rallies and strikes in March 2013;*
 - *collecting 40,000 workers' signatures on the minimum wage petition and leading rallies outside the National Assembly and the Ministry of Labour;*
 - *threatening to hold a rally on International Workers' Day outside the Ministry of Labour in protest against the announced level of minimum wage, which was below the cost of living;*
 - *lodging a complaint to Parliament, on behalf of 1,000 workers, against the former prosecutor of the Islamic Revolutionary Court and Prosecutor General of Tehran and others who embezzled from the Social Welfare Fund of up to 3,000 billion toman;*
 - *leading protests against anti-labour amendment of Labour Law;*
 - *meeting other independent workers' organizations, such as the Syndicate of Workers of Tehran and Suburbs United Bus Company, Haft Tappeh Sugarcane Workers' Unions, the Coordinating Committee to Pursue the Establishment of Workers' Organizations;*

- giving and posting interviews on the website of the Free Union of Workers of Iran and a number of international news media.

According to the ITUC, Mr Azimzadeh was released on bail amounting to 200 million toman (approximately US\$60,000) on 11 June 2015. However, it appears that all the charges against him are still pending. Mr Mohammadi was sentenced to three-and-a-half years imprisonment in 2015. He was a member of the Follow-up Committee to Pursue the Establishment of Workers' Organizations, and charged for threatening national security. In Tabriz Prison, he is subjected to threats and persecution by the prison guards. According to the ITUC, he has been suffering from sleeplessness and losses of consciousness because of exhaustion and his requests for medical attention are ignored.

661. The Committee notes that regarding these two individuals, the Government indicates that Mr Azimzadeh was arrested on 30 April 2014 and released on bail on 20 May 2014. Mr Mohammadi was released on bail on 30 April 2014, after a few days in prison. The court has examined the charges against him, but no final verdict has been issued.
662. The Committee notes that the information provided by the Government dates back to April 2014, while the ITUC refers to developments occurring in 2015. The Committee regrets that the Government provides no details in reply to the ITUC allegations as to the reasons behind their arrest and that it would appear that the two trade unionists had been arrested, detained and charged for carrying out genuine trade union activities, nor does it refute these allegations. While noting that he was released on bail, the Committee deplores that the charges against Mr Azimzadeh appear to be pending for over two years and recalls the importance of ensuring prompt and fair trial, as justice delayed is justice denied. The Committee further recalls that the detention of trade union leaders or members for trade union activities or membership is contrary to the principles of freedom of association. The detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 105, 61 and 64]. In light of the information available to it and in the absence of any detailed explanation by the Government relating to the reasons for this arrest, the Committee requests the Government to take the necessary measures to ensure that the charges against Mr Azimzadeh are immediately dropped. It further urges the Government to transmit a copy of the court judgment against Mr Mohammadi and to take the necessary measures to secure his immediate release should his conviction be related to his trade union activities. The Committee also urges the Government to take the necessary measures to secure that he is provided all medical assistance required.
663. The Committee further notes that according to the ITUC, on May Day 2015, the Government detained Mr Shapour Ehsanirad, Ms Parvin Mohammadi and other Tehran bus workers. Mr Ehsanirad, executive member of the Free Union of Iranian Workers, was arrested by the security forces on 16 May 2015 and charged with "inciting workers of the Safa Rolling and Pipe Mills Co.". The complaint believes that Mr Ehsanirad was recently released on bail.
664. The Committee notes the Government's indication that Mr Ehsanirad was in fact released on bail on 10 June 2015, after 27 days in prison. According to the Government, Ms Mohammadi was summoned to testify on 18 May 2015 and was released on bail the same day.
665. The Committee regrets that the Government provides no information as to the reason for the measures taken against Mr Ehsanirad, Ms Mohammadi and other Tehran bus workers. In addition to the principles above, the Committee recalls 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 urges the Government to provide detailed information on the reasons for the arrest and detention of Mr Ehsanirad, Ms Mohammadi and other Tehran bus workers on May Day 2015.

666. The Committee notes the ITUC allegations of violation of freedom of association at the Polyacrylic company. According to the ITUC, the management's decision to divide the operations and break down the company led to concerns over job security, which resulted in protests in October and November 2013. The workers demanded the reinstatement of workers dismissed for their trade union activities. In this connection, on 21 November 2013, four workers, Mr Javad Lotfi, Mr Abbas Haghigh, Mr Kioumars Rahimi and Mr Ahmad Saberi were arrested and transferred to the city of Dastgerd.
667. Similarly, the ITUC alleges that workers at the Loushan Cement Factory in the city of Rasht protested outside the Governor's office on Sunday, 29 December 2013 against the closure of the factory. They were detained by security forces. Furthermore, according to the complainant, in 2014, a court sentenced four petrochemical workers to 50 lashes and six months in prison. On 5 April 2015, a court sentenced five protesting mine workers to one year in prison and lashes for "disturbing public order"; the employers named five workers as leaders of the protests and had demanded that they be dealt with harshly. According to the ITUC, over the past two years, over 1,000 workers at Chadormalu iron ore mine held a series of gatherings and sit-in protests against mass layoffs and low wages. Dozens of workers were arrested in February 2014, but released a few days later while another group of 31 workers were summoned to the court.
668. The Committee deeply regrets that the Government provides no information in respect of the above extremely serious allegations and urges the Government to do so without delay.
669. The Committee further notes that the ITUC alleges that in 2010, Mr Behnam Ebrahimzadeh's (a labour activist and a member of the Committee to Pursue the Establishment of Workers' Organizations) sentence was extended for another nine-and-a-half years and recalls that he had already served five years in prison for an alleged collusion against the regime and for association with Mr Ahmad Shahid and the People's Mojahedin Organization of Iran. The ITUC further alleges that in 2015, labour activist Mr Jarrahi has been subjected to repeated harassment in Tabriz Central Prison.
670. The Committee notes the Government's explanation to the effect that some workers were accused of crimes that are unrelated to trade union activities. With regard to Mr Ebrahimzadeh, it indicates that he was tried by the Tehran Islamic Revolutionary Court for the following offences: (1) assembly and collusion to commit crimes against national security; (2) propaganda against the Islamic Republic of Iran; and (3) disturbing public order. The court sentenced Mr Ebrahimzadeh to five years of discretionary imprisonment on 2 July 2011. The sentence was confirmed on appeal. The Government indicates that during his time in prison, he was allowed to use medical and health-care facilities outside the detention house, meet his wife and family members. He also used prison leave from 21 January to 11 February 2013. He is currently serving his prison sentence in Rajaee-Shar Prison. With regard to Mr Jarrahi, the Government explains that he was convicted on 28 August 2011 by the Tabriz Court to five years of discretionary imprisonment for his participation in an illegal opposition group, engaging in propaganda against the State and assembly and collusion to commit a crime against national security. The decision was upheld on appeal. According to the Government, with the help of other accomplices, he organized a group called the Labour Democratic Movement which published a leaflet entitled "The Voice of Revolution" which encouraged workers to take armed action against the State.

- 671.** *Noting the Government's indication that these persons were charged with engaging in propaganda against the State, association with an illegal organization and the complainant's contention that the accused are labour activists convicted for their activities in defence of workers' interest, the Committee wishes to emphasize that in cases where the complainants alleged that trade union leaders or workers had been arrested for trade union activities, and the Government's replies amounted to general denials of the allegation or were simply to the effect that the arrests were made for subversive activities, for reasons of internal security or for common law crimes, the Committee has followed the principle that the Government concerned should be requested to submit further and as precise information as possible concerning the arrests, particularly in connection with the legal or judicial proceedings instituted as a result thereof and the result of such proceedings, in order to be able to make a proper examination of the allegations. Observing that the information provided is quite general, and in light of the possible link between their arrest and their trade union activities, the Committee urges the Government to provide it with precise and detailed information on the specific actions that have warranted charges against Mr Ebrahimzadeh and Mr Jarrahi and copies of their court judgments in their cases.*
- 672.** *The Committee further notes that the ITUC alleges that Mr Shahrokh Zamani, a member of the Founding Board of the Syndicate of Paint Workers of Tehran and the Committee to Pursue the Establishment of Workers' Organizations, was found dead on 13 September 2015 in Gohardasht (Rajai Shahr) Prison in Karaj. He was serving an 11-year sentence for the crime of disseminating propaganda against the regime and forming socialist groups and endangering national security. The complainant claims that Mr Zamani was denied access to medication and visitors, which resulted in him staging hunger strikes against maltreatment, and that he was under extreme duress due to the harassment of his family by the Government. While the cause of death was listed as "of natural causes", the complainant underlines the absence of an independent investigation in this respect.*
- 673.** *The Committee notes the Government's indication that Mr Zamani was accused of being a member of an illegal opposition group and disseminating propaganda against the State. He was sentenced to ten years of imprisonment and one year of discretionary imprisonment by the court of Tabriz on 28 August 2011. He was serving his prison sentence and enjoyed all rights enjoyed by all other inmates. The Government indicates that according to the records of Alborz Province justice administration, on 13 September 2015, at 4.50 p.m., some of the inmates noticed the lack of mobility of Mr Zamani; he was immediately transferred to the prison clinic where the medical examination revealed that he had died of a stroke while sleeping. Upon the issuance of a burial permit, he was buried on the date requested by his family. His family called for an independent investigation which was still ongoing.*
- 674.** *The Committee expects that the independent investigation into the circumstances of Mr Zamani's death will be concluded without delay and requests the Government to provide detailed information on the outcome thereof.*
- 675.** *The Committee notes the ITUC allegation that another trade union activist, Mr Ali Nejati, now retired and former President of Haft Tapeh Sugar Company Workers' Syndicate, was arrested on 15 September 2015 and his personal belongings including his computer and notes were seized. The ITUC recalls that Mr Nejati was one of the five union leaders who were arrested in December 2008 two months after the establishment of the union. The complainant is unaware of his whereabouts and expresses concerns as Mr Nejati suffers from a long-term heart problem and relies on medication.*
- 676.** *The Committee notes the Government's indication that Mr Nejati was released on bail after one month in jail on 17 October 2015.*

- 677.** *The Committee recalls that it had previously examined the allegation of arrest, conviction and imprisonment of several officers of the Haft Tapeh Sugar Cane Workers' Union, including Mr Nejati, in connection with the organization of a strike in 2007 and the creation of a union in June 2008 [see 365th Report, Case No. 2747]. On that occasion, and following the abrogation of the relevant court sentences, the Committee further urged the Government to ensure that the prohibition to engage in trade union activities imposed on him and other trade union officials was immediately lifted [see para. 98]. The Committee regrets that the Government does not provide a detailed reply to this new allegation and on the charges pending against him. The Committee expresses its deep concern over the allegations and urges the Government to provide detailed information on the situation of Mr Nejati without delay.*
- 678.** *The Committee further notes that the complainant refers to the case of Mahmoud Salehi, a trade union activist and founding member of the Committee of the Trade Association of Bakery Workers of the city of Saez. The ITUC recalls that he was arrested and detained in 1986 (for three years), 1995, 1999 (for 75 days), 2000 (for ten months, after which he was deprived of the right to stand for union office) and 2001 (for several days, after which he was dismissed), 1 May 2004 and in 2007 (detained for one year for organizing the Saez May Day rally). The complainant alleges that he was arrested again in April 2015 before the May Day celebration and sentenced to nine years' imprisonment on 16 September 2015.*
- 679.** *The Committee notes that the Government points out that he was charged with propaganda against the State and membership in an illegal group, the Komoleh terrorist group; was arrested on 8 April 2015 in Saghez; no final verdict has yet been issued in his case and he is currently free.*
- 680.** *The Committee recalls that it had examined the allegations concerning the arrest and detention of some 50 participants, including Mr Salehi, leader of the Trade Association of Saez Bakers, in a peaceful May Day rally in Saez, as well as the allegations of search and seizure of documents in the home of Mr Salehi in Case No. 2323 (see 354th Report, last examined in June 2009, closed due to the lack of the follow-up information). The Committee notes that the Government indicates, just as it did in relation to Case No. 2323, that Mr Salehi's arrest is unrelated to his trade union activities. The Committee recalls that Mr Salehi had been already acquitted of the charge of participation in the activities in a banned Komoleh Party [see 342nd Report, para. 683 and 337th Report, paras 1037–1044]. In this respect, and recalling that workers should enjoy the right to peaceful demonstrations to defend their occupational interests [see **Digest**, op. cit., para. 133], the Committee requests the Government to ensure that all charges related to the organization of the Labour Day march and the peaceful participation therein, are immediately dropped. It requests the Government to keep it informed in this respect and to provide a copy of the judgment in relation to any other charges.*
- 681.** *The Committee notes that the Government reiterates its readiness to receive ILO technical assistance on exchange of experiences and take advantage of trainings on the management of gatherings. Recalling the interest previously expressed by the Government in a training course on international labour standards for the judiciary and for the training of its disciplinary forces for the proper management of labour protests, the Committee expects that the Government will engage with the Office in this respect without delay.*
- 682.** *As regard the information provided by the ITUC together with the Government's reply in relation to the repression of teachers' union activities, these matters will be examined in the framework of Case No. 2566, concerning the repression of teachers and the obstruction of their exercise of legitimate trade union activities.*

The Committee's recommendations

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

- (a) Deeply regretting that the Government has not provided full replies to its previous recommendations, the Committee urges the Government to be more cooperative in the future and to provide detailed information in relation to the following requests:*
 - (i) The Committee urges the Government to carry out independent investigations into the allegations of ill-treatment to which Mr Ebrahim Madadi, Vice-President of the SVATH union, and Mr Reza Shahabi, Treasurer of the Syndicate of Workers of Tehran and Suburbs Bus Company are said to have been subjected to while in detention. The Committee further expects that if these allegations are found to be true, both union leaders will be compensated accordingly. The Committee expects that the Government will be able to report without further delay on the outcome of these investigations.*
 - (ii) The Committee urges the Government to secure without further delay Mr Shahabi's definitive release, through pardon or other means, the dropping of any remaining charges, as well as the restoration of his rights and the payment of compensation for the damage suffered. The Committee urges the Government to keep it informed in this regard.*
 - (iii) The Committee expects that the Labour Law and accompanying regulations will be effectively amended without delay so as to bring them into full conformity with the principles of freedom of association, including by allowing for trade union pluralism at all levels. It encourages the Government to accept the technical assistance of the Office in this regard and, in this framework, to transmit to it the latest version of the draft legislation with a view to ensuring its full conformity with the principles of freedom of association as set out in the Constitution of the ILO and the applicable Conventions.*
 - (iv) Pending the implementation of the legislative reforms, the Committee urges the Government to indicate the concrete measures taken in relation to the de facto recognition of the SVATH union, irrespective of its non-affiliation to the Confederation of Iranian Workers' Trade Unions.*
 - (v) The Committee once again requests the Government to provide a detailed report of the findings of the State General Inspection Organization (SGIO) and the Headquarters for the Protection of Human Rights into the allegations of workplace harassment during the period of the union's founding, from March to June 2005. It once again requests the Government, in light of the information revealed by these investigations, to take the necessary measures to ensure that all employees at the company are effectively protected against any form of discrimination related to their trade union membership or their trade union activities. The Committee requests the Government to keep it informed in this regard, as well as to provide a copy of the court judgment on the action*

initiated by the union concerning the attacks on union meetings in May and June 2005, once it is handed down.

- (b) The Committee requests the Government to take the necessary measures to ensure that the charges against Mr Azimzadeh are immediately dropped. It further urges the Government to transmit a copy of the court judgment against Mr Mohammadi and to take the necessary measures to secure his immediate release should his conviction be related to his trade union activities. The Committee also urges the Government to take the necessary measures to secure that he is provided all medical assistance required.*
- (c) The Committee urges the Government to provide detailed information on:*
 - the reasons for the arrest and detention of Mr Ehsanirad, Ms Mohammadi and other Tehran bus workers on May Day 2015;*
 - the alleged arrest of Mr Javad Lotfi, Mr Abbas Haghigh, Mr Kioumars Rahimi and Mr Ahmad Saberi; alleged detention of workers of Loushan Cement Factory; alleged sentencing of four petrochemical workers to 50 lashes and six months in prison in 2014, and of five protesting mine workers to one year in prison and lashes for “disturbing public order” in 2015; and alleged arrest and summons to court of workers of Chadormalu iron ore mine;*
 - the specific actions that have warranted charges against Mr Ebrahimzadeh and Mr Jarrahi, including copies of the court judgments in their cases; and*
 - the allegations involving Mr Nejati and in particular, on the charges pending against him.*
- (d) The Committee expects that the independent investigation into the circumstances of Mr Zamani’s death will be concluded without delay and requests the Government to provide detailed information on the outcome thereof.*
- (e) The Committee requests the Government to ensure that all charges related to the organization of the Labour Day march and the peaceful participation therein pending against Mr Salehi are immediately dropped. It further requests the Government to provide a copy of any judgment in relation to any other charges.*
- (f) Noting that the Government reiterates its readiness to receive ILO technical assistance, the Committee expects that the Government will engage with the Office in this regard without delay.*
- (g) The Committee draws the Governing Body’s special attention to the extremely serious and urgent nature of this case.*

CASE NO. 3081

INTERIM REPORT

**Complaint against the Government of Liberia
presented by
the Petroleum, Oil, Chemical, Energy and General Services
Union of Liberia (POCEGSUL)**

***Allegations: Unilateral cancellation by the
employer of the collective bargaining agreement
and unfair dismissal of trade union leaders***

- 684.** The Committee last examined this case at its October 2015 meeting, when it presented an interim report to the Governing Body [see 376th Report, paras 705–728 approved by the Governing Body at its 325th Session (November 2015)].
- 685.** The complainant submitted new allegations in a communication dated 31 May 2016.
- 686.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case on two occasions. At its meeting in May–June 2016 [see 378th Report, para. 9], the Committee issued an urgent appeal to the Government, indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting even if the information or observations requested had not been received in due time. To date, the Government has not sent any information.
- 687.** Liberia 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

- 688.** In its previous examination of the case in October 2015, the Committee made the following recommendations [see 376th Report, para. 728]:
- (a) The Committee regrets that, despite the time that has elapsed since the complaint was presented in May 2014, the Government has still not replied to the complainant's allegations, despite having been invited on several occasions to do so, including by means of an urgent appeal [see 375th Report, para. 8]. The Committee urges the Government to provide its observations on the complainant's allegations without further delay.
 - (b) The Committee requests the Government to immediately conduct an independent inquiry into the complainant's allegations with regard to the unilateral cancellation of the CBA, and the employer's refusal to comply with the obligations established therein, and if these allegations were proved true, to take immediate measures to ensure that the employer abides by the commitments it has freely assumed, including deduction and payment of union dues in accordance with article 20 of the CBA and keep it informed of developments.
 - (c) Expressing its concern at the employer's alleged statements with regard to the remittance of union dues that would appear to undermine a CBA freely entered into, and at the impact that such statements might have on the exercise of trade union rights at the RIA, the Committee requests the Government to reply in full to these allegations.
 - (d) The Committee requests the Government to conduct an immediate inquiry into the grounds for Mr Weh and Mr Garniah's dismissal, and should it appear that they have been

dismissed due to their trade union activities, including for actions in conformity with the CBA, which the employer is said to have unilaterally annulled, to ensure that they are reinstated in their positions without loss of pay and keep it informed of developments.

- (e) The Committee requests the Government to solicit information from the employers' organizations concerned, in order to have at its disposal their views as well as those of the enterprise concerned on the questions at issue.
- (f) In more general terms, the Committee requests the Government to take the necessary measures as a matter of urgency to ensure full compliance with the freely concluded collective agreement and to ensure that the RIAWU can continue to fulfil its functions in representing the workers and defend their occupational interests without fear of intimidation or reprisal and to keep it informed of developments.
- (g) The Committee requests the complainant to furnish further details on its reference to public sector workers' leaders wrongful dismissals during the period 2007–14, should it wish the Committee to examine this allegation.

B. The complainants' new allegations

689. In a communication dated 31 May 2016, the complainant alleges that, since the presentation of the complaint, the union has become the target of the Ministry of Labour. The complainant denounces ongoing action of the Ministry of Labour to deny workers the right to join the union although they have declared to do so. The Ministry has refused to process any documents in relation to organizing, submitted by the complainant since May 2014, in violation of section 2.6 of the recently adopted Decent Work Act. For instance, it has failed to respect organizing documents with attached declaration forms containing the individual names and signatures of workers of the Roberts International Airport and the Liberia Telecommunication Corporation.

The Committee's conclusions

- 690.** *The Committee regrets that, despite the time that has elapsed since the last examination of the complaint, the Government has once again not replied to the complainant's allegations even though it has been requested several times, including through an urgent appeal. The Committee urges the Government to be more cooperative in the future and reminds the Government of the possibility to avail itself of the technical assistance of the Office.*
- 691.** *Hence, in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1971)], the Committee is obliged to present a report on the substance of the case without being able to take account of the information which it had hoped to receive from the Government.*
- 692.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments, in turn, will recognize the importance of presenting, for objective examination, detailed replies concerning allegations made against them [see First Report, para. 31].*
- 693.** *Under these circumstances, recalling that this case concerns allegations of unilateral cancellation by the employer of a collective bargaining agreement (CBA) signed between the management of the Roberts International Airport (RIA) and the workers' union; the anti-union dismissal of Mr Melliah PG Weh and Mr Jaycee W. Garniah, respectively the President and the Secretary General of the Roberts International Airport Workers Union (RIAWU); and the failure by the Government to ensure that Conventions Nos 87 and 98 are*

applied in practice, the Committee finds itself obliged to reiterate the conclusions and recommendations it made when it examined this case at its meeting in October 2015 [see 376th Report, paras 705–728].

- 694.** *With regard to the alleged wrongful dismissals of public sector workers' leaders during the period 2007–14, noting that the complainant did not furnish further details in this regard albeit requested to do so, the Committee will not pursue the examination of this allegation unless the complainant provides additional information.*
- 695.** *Moreover, the Committee notes the new allegations of the complainant concerning the alleged ongoing denial of the right of workers to join the POCEGSUL. It also notes with concern that the complainant feels it is being targeted by the Ministry of Labour for its action before the ILO. The Committee emphasizes that workers' and employers' organizations should not be subject to retaliatory measures for having lodged a complaint with the Committee on Freedom of Association. It urges the Government to reply to these allegations without delay.*

The Committee's recommendations

- 696.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee regrets that, despite the time that has elapsed since the complaint was last examined in October 2015, the Government has still not replied to the complainant's allegations, despite having been invited on two occasions to do so, including by means of an urgent appeal [see 378th Report, para. 9]. The Committee urges the Government to provide its observations on the complainant's allegations without further delay. It urges the Government to be more cooperative in the future.*
 - (b) The Committee requests the Government to immediately conduct an independent inquiry into the complainant's allegations with regard to the unilateral cancellation of the CBA, and the employer's refusal to comply with the obligations established therein, and if these serious allegations were proved true, to take immediate measures to ensure that the employer abides by the commitments it has freely assumed, including deduction and payment of union dues in accordance with article 20 of the CBA and keep it informed of developments.*
 - (c) Expressing its concern at the employer's alleged statements with regard to the remittance of union dues that would appear to undermine a CBA freely entered into, and at the impact that such statements might have on the exercise of trade union rights at the RIA, the Committee requests the Government to reply in full to these allegations.*
 - (d) The Committee requests the Government to conduct an immediate inquiry into the grounds for Mr Weh and Mr Garniah's dismissal, and should it appear that they have been dismissed due to their trade union activities, including for actions in conformity with the CBA, which the employer is said to have unilaterally annulled, to ensure that they are reinstated in their positions without loss of pay, or, if this is not possible, to provide adequate*

compensation. It requests the Government to keep it informed of developments.

- (e) The Committee requests the Government to solicit information from the employers' organizations concerned, in order to have at its disposal their views as well as those of the enterprise concerned on the questions at issue.*
- (f) In more general terms, the Committee requests the Government to take the necessary measures as a matter of urgency to ensure full compliance with the freely concluded collective agreement and to ensure that the RIAWU can continue to fulfil its functions in representing the workers and defend their occupational interests without fear of intimidation or reprisal and to keep it informed of developments.*
- (g) Noting with concern that the complainant feels it is being targeted by the Ministry of Labour for its action before the ILO, the Committee emphasizes that workers' and employers' organizations should not be subject to retaliatory measures for having lodged a complaint with the Committee on Freedom of Association, and requests the Committee's Chairperson to meet with a representative of the Government of Liberia in order to express its deep concern over this allegation and the absence of cooperation with the Committee's procedures. It urges the Government to reply to each of the new allegations of the complainant without delay.*
- (h) With regard to the alleged wrongful dismissals of public sector workers' leaders during the period 2007–14, noting that the complainant did not furnish further details in this regard albeit requested to do so, the Committee will not pursue the examination of this allegation unless the complainant provides additional information.*
- (i) The Committee encourages the Government to consider availing itself of the technical assistance of the Office with a view to addressing the Committee's recommendations and strengthening the capacity of the Government and the social partners.*

CASE NO. 3126

INTERIM REPORT

**Complaint against the Government of Malaysia
presented by
the National Union of Bank Employees (NUBE)**

Allegations: The complainant organization alleges the violation of the collective agreement in force by the employer, Hong Leong Bank, dismissal of union members and a series of other anti-union acts including the restriction of the right to industrial action by compulsory arbitration and an attempt to deregister the union following the declaration of a trade dispute by the complainant

- 697.** The complaint is contained in a communication dated 6 May 2015 from the National Union of Bank Employees (NUBE).
- 698.** The Government provided its reply in a communication dated 28 October 2016.
- 699.** Malaysia has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), but has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

A. The complainant's allegations

- 700.** In a communication dated 6 May 2015, NUBE asserts that the Government is neglecting its duties to protect the job security of 27 NUBE members. The workers were subjected to extreme victimization over a period of two months by Hong Leong Bank (hereinafter “the company), and eventually dismissed for not being able to relocate from their rural workplaces to new workplaces in the cities. The company argued failure to comply with a relocation directive, while in NUBE’s view, this directive would have inevitably resulted in the 27 workers being separated from their families, suffer undue hardship and increased cost of living without adequate and fixed compensation.
- 701.** Furthermore, NUBE indicates that the company is the fifth largest commercial bank in Malaysia and is a member of the Malayan Commercial Banks Association (MCBA), an employers’ organization. The company is also party to the MCBA/NUBE Collective Agreement (copy provided). NUBE refers to the hubbing and relocation process whereby the company’s Hire Purchase/Housing Loan Collection Department job functions are centralized from the various states to three cities in Peninsular Malaysia. The company actually carried out Phase I of this hubbing and relocation process in the fourth quarter of 2012, and the relocation was within the same state/city. Workers were not badly affected by the move.
- 702.** According to NUBE, the company continued with Phase II of the hubbing and relocation process which, however, affected a larger population of workers. A total of 49 workers were forced to leave their homes, families and relocate. Workers subjected to relocation under Phase II were from the rural states in Peninsular Malaysia. They were forced to leave their

homes and families behind and move to either one of the cities. This move would have a serious impact on the workers' livelihoods.

- 703.** NUBE asserts that it was engaged in discussions with the company since March 2013 over this matter. However, the company failed to justify the real need to carry out the hubbing and relocation process which would have an adverse impact on the lives and livelihood of the workers. While NUBE appealed to the Chairman and the CEO, the company remained adamant with its decision. The unresolved complaints evolved into a trade dispute between NUBE and the company. The dispute was reported to the Industrial Relations Department of the Ministry of Human Resources on 28 October 2013. NUBE officials met with the Department on 31 October 2013, but there was no follow-up action from the Department. On 10 November 2013, NUBE announced mass picket action against the company to be held on 16 November 2013. The Department met with the company on 14 November 2013, and called NUBE immediately for a conciliation meeting on 15 November 2013, but without the presence of the company. During the meeting, NUBE urged the Director-General of Industrial Relations (DGIR) to exercise his vast powers vested under Section 2A(3) of the Industrial Relations Act 1967 to direct the company to stop all forced relocation with a view to finding an amicable solution. However, the Department did not intervene and instead called for a subsequent tripartite reconciliation meeting on 19 November 2013. Consequently, NUBE proceeded with its picket action on 16 November 2013.
- 704.** According to NUBE, at the reconciliation meeting held on 19 November 2013, the following decisions were reached: (i) the company agreed to review its hubbing and relocation process and revert back by 4 December 2013; (ii) the company agreed to maintain status quo until they reverted back on 4 December 2013; and (iii) NUBE agreed to stop all industrial action.
- 705.** NUBE denounces the fact that the company did not comply with its commitments and took the following actions against the workers: (i) locked out workers, preventing them from entering the premises and signing their attendance; (ii) denied access to washrooms/toilets; (iii) denied access to prayer rooms to fulfil their religious obligations; (iv) denied their annual leave; (v) denied bonus payments that were supposed to be paid by 15 December 2013 as per Article 20 of the MCBA/NUBE Collective Agreement; and (vi) denied salaries for the days the workers were not able to report to the new workplace. They were present at the old workplace but were locked out.
- 706.** In addition, NUBE indicates that on 27 November 2013, the company notified the Industrial Relations Department of the Ministry of Human Resources that it was not willing to review the hubbing and relocation process and would proceed with it. The company had also urged the Department to refer the trade dispute to the Industrial Court for adjudication immediately to deny NUBE the right to picket. On the same day, the company issued a letter to the workers stating that their inability to report to the new workstation would be treated as unpaid leave for being absent without leave. The company deemed it absence without leave and deducted their salaries without consent, although the workers reported to their old workstations, and despite the workers repeatedly writing appeal letters against the arbitrary hubbing and relocation process.
- 707.** NUBE reported to the Industrial Relations Department urging it to take steps to prevent the firing of the workers. The only action taken by the Department was merely appealing to the company to maintain the status quo. At the conciliation meeting on 4 December 2013, NUBE made a one-hour presentation regarding the effect of the hubbing and relocation process on the lives of the workers and the various provisions of the Collective Agreement, Malaysian law and policies and International Labour Standards that were breached by the company. NUBE requested the Industrial Relations Department to make a stand in the best interest of the workers. However, the Department remained evasive and the company adamant.

- 708.** On 6 December 2013, the Ministry of Human Resources referred the trade dispute to the Industrial Court ignoring the plight of the workers and denying NUBE's right to picket. According to the complainant, this was an unprecedented and most expedient submission to the Industrial Court ever by the Industrial Relations Department. However, more than a year after the submission of the complaint, the trade dispute remains pending at the Industrial Court. In addition, to date, the Minister has not responded to Parliamentarians' questioning about the trade dispute.
- 709.** According to the complainant, after the trade dispute on the hubbing and relocation process was referred to the Industrial Court, the company continued the said process, subjecting the affected workers to various abuses such as disciplinary action, non-payment of wages and contractual bonus, denial of annual leave and the final blow of dismissal in stages from 18 to 22 December 2013. The complainant denounces the fact that the Industrial Relations Department of the Ministry of Human Resources remained passive, although it was warned about the dismissal as early as October 2013, ignoring claims that the whole transfer exercise was a guise to reduce the workforce, and that where the workers resisted, the employer would eventually dismiss them.
- 710.** This situation gave rise to yet another series of violations of human rights and union busting. NUBE declared a trade dispute and commenced picketing action on the disruption to family lives, neglect of children, non-payment of wages, bonuses and denied annual leaves, denied access to sanitary facilities and prayer rooms. In a move to deny NUBE its right to picket, the company filed an ex-parte application for an injunction against NUBE carrying out the picket and an Application for Mandamus for the Director-General of Trade Unions to deregister NUBE. The hearing of this injunction and mandamus was heard on 1 April 2015. The decision is presently pending.
- 711.** In view of this interference by the employer, the victimization and violation of fundamental rights of workers and trade union rights, and the Government's inaction, NUBE requests an urgent decision from the Committee on Freedom of Association and action from the ILO to address the non-compliance of Conventions Nos 87 and 98 by the Government.

B. The Government's reply

- 712.** In a communication dated 28 October 2016, the Government indicated that the matters raised by the complainant were dealt with in two pending cases before the courts. First, NUBE disputed the interpretation of Articles 4 and 15 of the Collective Agreement in a case (trade dispute case) before the Industrial Court. On 13 April 2016, the Court handed down an award which acknowledged that: (i) the Collective agreement recognizes the right of the company to transfer its employees to another town or city; (ii) the company had given sympathetic consideration to the 27 employees who had failed to report for duty at their new centres by giving them a five months' notice instead of the limit of three provided by the collective agreement, therefore the failure to obey the transfer order cannot be justified; and (iii) the hardship and grievances of the 27 employees have not been identified in any document by them or by NUBE or in court. As a result, the Industrial Court dismissed the case (Award No. 435 of 2016, on Case No. 22 (5)/3 1449/13). NUBE filed for a judicial review of the case in the High Court, for which mention is scheduled on 21 November 2016.
- 713.** The Government further indicates that NUBE also filed cases involving the 27 employees dismissed pursuant to their refusal to be transferred (Case No.13/4-545/14). While the proceedings were ongoing, the claimants walked out of the Court, however the Industrial Court handed down an award on 7 September 2016. NUBE took the case to the High Court which decided in its favour on a legal point. Now, the company is appealing the decision to the Court of Appeal. The date of the hearing is yet to be scheduled.

The Committee's conclusions

- 714.** *The Committee notes that, in the present case, the National Union of Bank Employees (NUBE) alleges the violation by the company of a collective agreement to which it is party, the dismissal of union members and anti-union acts including the restriction of the right for industrial action by compulsory arbitration and an attempt to deregister the union following the declaration of a trade dispute.*
- 715.** *The Committee notes from the information provided by NUBE that the company is a member of the Malayan Commercial Banks Association (MCBA), an employers' organization, and is party to the MCBA/NUBE Collective Agreement. The Committee also notes that a trade dispute arose in 2013 between the complainant and the company concerning the implementation of a relocation of jobs exercise (hubbing and relocation process whereby a number of job functions are centralized from the various states to three cities in Peninsular Malaysia). According to NUBE, Phase I of the relocation exercise, which took place in the fourth quarter of 2012, was within the same state/city and workers were not badly affected by the move. However, Phase II of the exercise affected a larger population of workers from the rural states who were forced to leave their homes and families behind and relocate. NUBE was engaged in discussions with the company since March 2013 over the second phase of the relocation exercise which, according to the trade union, would have an adverse impact on the lives and livelihood of the workers. Despite NUBE's appeal, the company remained adamant with its decision. The unresolved complaints evolved into a trade dispute between NUBE and the company.*
- 716.** *The Committee notes that the dispute was reported to the Industrial Relations Department of the Ministry of Human Resources on 28 October 2013 and that, after NUBE announced on 10 November 2013 mass picket action against the company to be held on 16 November, the said Department started holding conciliation meetings with both parties. After NUBE proceeded with its picket action on 16 November 2013, and following a reconciliation meeting held on 19 November 2013, the parties reached the following decisions: (i) the company agreed to review its hubbing and relocation process and revert back by 4 December 2013; (ii) the company agreed to maintain the status quo until they reverted back on 4 December 2013; and (iii) NUBE agreed to stop all industrial action.*
- 717.** *However, according to NUBE, on 27 November 2013, the company notified the Industrial Relations Department of the Ministry of Human Resources that it had no intention to review the hubbing and relocation process and would proceed with it. The company also urged the Industrial Relations Department to refer the trade dispute to the Industrial Court for adjudication immediately to deny NUBE the right to picket. On the same day, the company issued a letter to the workers refusing to comply with the transfer directive stating that their inability to report to the new workstation would be treated as unpaid leave for being absent without notice. Furthermore, the Committee notes the complainant's allegations that the company took the following actions against these workers: (i) prevented them from entering the work premises and signing their attendance; (ii) denied them access to washrooms/toilets; (iii) denied them access to prayer rooms to fulfil their religious obligations; (iv) denied their annual leave; (v) denied bonus payments that were supposed to be paid by 15 December 2013 as per Article 20 of the MCBA/NUBE Collective Agreement; and (vi) denied salaries for the days they were not able to report to the new workplace, although the workers were present at the old workplace but were locked out.*
- 718.** *The Committee notes that NUBE urged the Industrial Relations Department to take steps to prevent the firing of the workers. However, according to the complainant, the said Department only appealed to the company to maintain status quo and held a conciliation meeting on 4 December 2013, whereby despite NUBE's in depth presentation on the effect of the hubbing and relocation process on the lives of the workers and the various provisions*

of the Collective Agreement, Malaysian law and policies and International Labour Standard that were breached, the company remained adamant. On 6 December 2013, the Ministry of Human Resources referred the trade dispute to the Industrial Court denying NUBE's right to picket. On the date of the submission of the complaint before the Committee, the trade dispute was still pending before the Industrial Court of Kuala Lumpur.

- 719.** *Firstly, while certain substantive aspects of the complaint, such as the jobs relocation process put in place by the company are outside the mandate of the Committee, it will pursue its examination of this case as it relates to the trade dispute arising from this process, including as regards the breach of the collective agreement.*
- 720.** *In this regard, the Committee notes from the Government's reply that the Industrial Court of Kuala Lumpur issued its award in this case on 13 April 2016. The Committee observes from the award that the case was subject to hearings in January, August, October and November 2015, and that the company and NUBE submitted written submissions in January and February 2016. The Committee notes that, in its findings, the Industrial Court acknowledged that the collective agreement between the company and NUBE accords the Bank the right to transfer its employees within the same city or town, and where necessary to another city or town without the consent of the employees; such a transfer will not be carried out without the Bank giving sympathetic consideration to cases where undue hardship will be caused. Where the Bank is satisfied that undue hardship will be caused, then the transfer will not be carried out without the employee being given a reasonable period of time to organize his/her affairs. The period of time allowed in such cases shall not exceed three months from the date of the first notification of transfer. The Court found – among other considerations – that the evidence provided showed that: (i) the company had engaged with the trade union on the matter and considered the hardship caused; (ii) the company complied with its obligation under the collective agreement having given the workers five months' notice to report to their new work station and provided outstation employees with a financial package; (iii) the trade union did not adduce evidence to support its contention that the company had acted mala fide and in breach of natural justice; and (iv) the union failed to identify to the company or to the Court the hardship and grievances of the 27 employees who were dismissed by the company pursuant to their refusal to be transferred. Consequently, the Industrial Court rejected the complainant's claims on the merits of the case. Noting the indication that NUBE filed for judicial review of the case before the High Court, which mention is scheduled on 21 November 2016, the Committee urges the Government to keep it informed of the outcome of the High Court review and of any follow-up to its decision.*
- 721.** *The Committee further notes the Government's indication that on 7 September 2016 the Industrial Court handed down an award concerning the 27 employees dismissed pursuant to their refusal to be transferred. The Committee notes that the case was taken by NUBE to the High Court which decided in its favour on a legal point and that the company appealed the decision to the Court of Appeal. The Committee urges the Government to keep it informed of the ruling of the Court of Appeal and of any follow-up to the decision.*
- 722.** *Furthermore, referring to the complainant's allegation that the Ministry of Human Resources referred the trade dispute to the Industrial Court denying NUBE's right to picket, the Committee wishes to recall that compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, that is in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised)*

edition, 2006, para. 564]. The Committee expects the Government to ensure full respect of these principles and to provide without delay its observations in this regard.

- 723.** Finally, with regard to NUBE's allegation that the company filed an Application for Mandamus for the Director-General of Trade Unions to deregister NUBE which was heard on 1 April 2015, the Committee urges the Government to provide without delay information on the outcome of this application and any other information relevant to this serious allegation.

The Committee's recommendations

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

- (a) *The Committee urges the Government to keep it informed of the outcome of the judicial review by the High Court on the trade dispute case as well as of the ruling of the Court of Appeal concerning the case involving 27 dismissed employees, and of any follow-up to these court decisions.*
- (b) *Recalling its principles on compulsory arbitration to end a collective labour dispute, the Committee expects the Government to ensure their full respect and to provide without delay its observations in relation to the case.*
- (c) *With regard to the allegation that the company filed an Application for Mandamus for the Director-General of Trades Union to deregister NUBE which was heard on 1 April 2015, the Committee urges the Government to provide without delay information on the outcome of such application and any other information relevant to this serious allegation.*

CASE NO. 3153

DEFINITIVE REPORT

Complaint against the Government of Mauritius presented by the Ministry of Health Employees Union (MHEU)

Allegations: The complainant organization alleges that, by treating it unfairly, the Ministry of Health and Quality of Life attempts to prevent the MHEU from functioning

- 725.** The complaint is contained in communications dated 14 July and 19 October 2015 from the Ministry of Health Employees Union (MHEU).
- 726.** The Government sent its observations in a communication dated 24 June 2016.
- 727.** Mauritius has ratified both the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 728.** In its communications dated 14 July and 19 October 2015, the MHEU explains that it represents 500 members and alleges that, despite being duly registered and recognized, it has been systematically prevented from holding meetings. Since it obtained its recognition on 3 November 2010 it could convene only two meetings. According to the MHEU, the Ministry of Health and Quality of Life “is blind and deaf” to all its representations. The MHEU has also sought the intervention of the Federation of Civil Service and Other Unions (FCSOU), the General Workers Union (GWF) and the Federation of Public Sector and Other Unions (FPSOU), which have made representations on the MHEU’s behalf, but these representations have been equally and systematically ignored.
- 729.** The MHEU alleges that there are systematic attempts by the Ministry of Health and Quality of Life to prevent the union from functioning; its officers have been prevented from using time-off facilities on various occasions. It further alleges that the management gives preferential treatment to a rival union, the Government Services Employees Association (GSEA), and that there are cases where MHEU members have been pressured to join the GSEA.
- 730.** According to the complainant, in 2011, when the union denounced certain malpractices, Mr Seetohul, its President was transferred to a place of work where hygienic conditions left much to be desired. As a result of the unhygienic conditions, the President fell ill and had to be hospitalized. The treating doctors diagnosed a chest infection and an allergic rhinitis. His doctor confirmed that the working environment to which Mr Seetohul was exposed was intensively poor. Furthermore, his workload increased despite the fact that other officials were available to share his tasks. When the union denounced malpractices, the then Minister gave instructions to open an inquiry to resolve the problems of the union. The inquiry was suspended after the general elections and the representative of the MHEU was again transferred to another hospital.
- 731.** Later on, the President of a rival union was given a green light to preside over a meeting, the objective of which was to convince members to leave the MHEU and join his union. When members refused to do so they were harassed and one of its members who refused to join the other union chose to resign from his post.
- 732.** Also in 2011, the Permanent Secretary of the Ministry of Health and Quality of Life convened Mr Seetohul to a meeting but the management of the Moka Eye Hospital refused to release him despite the fact the request was made sufficiently in advance to allow the management of the hospital to make the necessary arrangements.
- 733.** Also in 2011, following a request made by the Ministry to consider check-off facilities, the complainant sent, by secured post, the originals of several hundred duly filled applications to the Senior Chief Executive. Months later, the union was informed that the application forms went missing and was told to send newly filled application forms. Following the refusal of the Ministry to consider photocopies of the applications, the union referred the matter to the Employment Relations Tribunal which ordered the Ministry of Health and Quality of Life to consider photocopies of the application forms.
- 734.** Furthermore, when the complainant was granted only two days off per month for trade union activities whereas other unions, even smaller, are granted time off every day, it filed a dispute procedure with the Conciliation Service of the Ministry of Civil Service and Administrative Reforms. The tribunal responded in its favour and an agreement was reached between the union and the Ministry of Health and Quality of Life regarding time off granted to the union President and its executive members.

- 735.** The complainant also alleges that Mr Seetohul, being the second most senior officer in his department when he was posted at Victoria Hospital and thus eligible to take on the responsibility of an acting officer when the latter was on leave, was not assigned this responsibility. This matter was reported to the Ministry on 10 December 2013.
- 736.** In addition, the local leave of the MHEU President was deducted by the management of Victoria Hospital without authorization. The management of the hospital justified this deduction from the balance of Mr Seetohul's leave for the excess of days taken to conduct union activities, which is another violation of the labour law. The matter was raised with the Permanent Secretary during an official meeting on 10 December 2013 but no remedial action was undertaken in this regard.
- 737.** On 28 March 2014, the MHEU held its annual general meeting to which all of its members were convened. However, not only its members but its executive council members as well were denied time off for this most important annual event. This refusal for release from work for trade union members, which is usually granted to most unions, has caused real and unjustified prejudice to the union and its members.
- 738.** The complainant indicates that after years of struggle to set up an inquiry into the allegations of harassment against its members, the Ministry of Health and Quality of Life called a meeting on 5 September 2014 during which the Senior Chief Executive decided to set up such an inquiry and agreed that representatives of the MHEU and the federation to which it is affiliated will participate to ensure its fairness. However, according to the complainant, when the inquiry began its work neither representatives of the MHEU nor of the federation were invited. As the inquiry was against the principle of good governance, the MHEU informed the Ministry that its members and executive members who were victims of the harassment would only attend the hearing if its representative as well as the representative of the federation participated, as per the decision of the September 2014 meeting. Nevertheless, in October 2014, the Ministry pursued with its one-sided inquiry and ignored the union's request.
- 739.** Furthermore, according to the complainant, in 2015, an official of the Ministry went to the extent of saying that he could not tolerate the presence of the official representative of the MHEU at the electrocardiography (ECG) unit. He made the statement in the presence of the Acting Regional Service Health Administrator. He insisted that the representative of the MHEU should be transferred and the MHEU representative was in fact transferred some time later. This incident has had the effect of weakening the union in the eyes of the public and has apparently caused the union to lose, to some extent, credibility among its own members.
- 740.** Following the assault of the MHEU President on 20 January 2015, which was reported to the police, the Senior Chief Executive set up an inquiry with a view to initiating a disciplinary action against the President. Despite the fact that the MHEU and the FCSOU informed the Ministry that this inquiry is in violation of section 34 of the Public Service Commission regulation, which regulates disciplinary actions against public officers, the Ministry tried to convene Mr Seetohul on three occasions.
- 741.** The complainant also alleges that the work performance for 2014 of its President was underrated and that a representative of the GSEA, who is also senior to Mr Seetohul, participated in the evaluation. The matter was referred to an appeal panel set up by the Ministry of Health and Quality of Life for further consideration. The MHEU objected to the composition of the panel on the basis of a conflict of interest. The panel ignored the union's protest and decided to maintain the rating without giving Mr Seetohul the opportunity to contest it. The union had lodged a dispute procedure with the Conciliation Service in February 2015 but has not heard back in this respect.

- 742.** On 18 March 2015, at the initiative of the federation to which the MHEU is affiliated, a meeting was convened to examine the issue of harassment of the officials of the MHEU. At this meeting, instead of finding a solution to the issue of harassment and persecution of the union and its officials, the Chairperson announced that the President of the union was being transferred to another hospital. On the union's insistence, the Ministry decided to disclose the outcome of the inquiry conducted in October 2014. The representative of the union was not given the opportunity to defend himself and the meeting was closed. The MHEU points out that its President, Mr Seetohul, was never invited to testify before the inquiry set up by the then Minister of Health and Quality of Life in June 2012 nor before the inquiry set up by the Senior Chief Executive in October 2014. The union denounces the conflict of interest and absence of transparency of the inquiry. The Senior Chief Executive informed the union that no further consideration will be given to the allegations of harassment of Mr Seetohul, which dates back to 2011, as according to him, the problem has been resolved following the change in posting of the President in March 2015.
- 743.** The MHEU alleges that it is widely recognized as a militant organization in the country, which denounces all irregularities and malpractices noted in the health service. Apparently, the style and denunciations of the union are not being "digested" by a group of people and especially by some high officials who work in close collaboration with another union, silent about the irregularities and weaknesses of the health service. Their aim is to silence the MHEU and to maintain status quo and they are doing so by victimizing MHEU officials and at the same time indirectly sending a message to its members to the effect that it prefers to deal with the rival union.
- 744.** The complainant alleges that the Ministry ignores the MHEU and indicates in this respect that there was no follow-up to the three meetings held in 2010–14 between the Ministry of Health and Quality of Life and the union. Following the brutal assault of its members as well as paramedical and medical staff by patients and members of the public in regional hospitals and other health centres, the MHEU appealed to the Ministry to initiate remedial actions. On 18 March 2015, the union was called to attend a meeting where the Senior Chief Executive listened to the complaints of other unions but did not allow the complainant to express its views which the latter believes to be a deliberate attempt to discredit it. Other meetings were held with other unions but the MHEU was never invited. While the Ministry's decision on the issue of violence was transmitted to other unions, no copy thereof was forwarded to the MHEU. By a letter dated 6 June 2015, the union disapproved of the way the inquiry was conducted and on 4 August 2015 another meeting was held which was chaired by the Permanent Secretary. The Ministry decided to table the findings of the inquiry, which confirmed the union's suspicion that there was a conflict of interest and absence of a fair trial. The findings also revealed how the Ministry was in connivance with the representative of the GSEA who persecuted the MHEU President and its members. The complainant indicates that despite the fact that the representatives of the GSEA confessed during the inquiry that they had conducted a trade union meeting without any authorization by closing down the ECG unit in the Accident and Emergency Department at Victoria Hospital for more than half an hour thus endangering the lives of patients, the inquiry committee did not initiate any disciplinary action against them. It is to be noted that the unauthorized meeting was chaired by the President of the GSEA.
- 745.** The complainant also alleges that in violation of sections 30(a) and 31(1)(b)(ii) of the Employment Relation Act, the management of the hospital, in connivance with the representative of the GSEA initiated disciplinary action against Mr Seetohul in relation to the time-off facility.
- 746.** Following the third punitive change of posting since 2005, Mr Seetohul reported to the Moka Eye Hospital on 2 March 2015. The medical superintendent of the Moka Eye Hospital refused to accept the resumption letter of Mr Seetohul arguing that the MHEU President will

disrupt the smooth running of the work as he is entitled to time-off facilities. The superintendent has even challenged the abovementioned time-off agreement between the Ministry of Health and Quality of Life and the MHEU. This serious violation was reported to the Ministry on two occasions, on 18 March and 4 August 2015, as well as to the Prime Minister's Office.

B. The Government's reply

747. In its communication dated 24 June 2016, the Government indicates that the MHEU is among 19 registered trade unions recognized by the Ministry of Health and Quality of Life. Its membership is open to any person employed at the Ministry, excluding employees in the grades of "Medical Officer" and "Nursing Officer". Its membership strength is about 531. The Government transmits the following information received from the relevant ministries on the issues raised by the MHEU.

748. With regard to the allegations of violation of trade unions rights, ignoring trade union representations and refusal of management to allow the union to hold meetings, the Ministry of Health and Quality of Life indicated that it employs about 14,279 employees of different grades who are represented by different unions. As and when required, the Ministry holds regular meetings with the unions to discuss labour relation matters. Equal treatment is given to all recognized unions, irrespective of their size, in discussing their grievances. However, the MHEU has, most of the time, been reporting unfounded grievances. Its representations are mostly allegations against the officers of the Ministry. Internal inquiries carried out by the Ministry into such allegations revealed that the allegations were unfounded. Regarding the request for a meeting to discuss the issue of harassment of members of the MHEU by another union, the Ministry set up a departmental inquiry to look into the matter but the President of the MHEU and its members chose not to testify before it as they were contesting the composition of the committee. On the basis of the rules and regulations governing the public service, which safeguard and protect the rights of all officers, the Ministry did not accede to the additional request of the union for the setting up of another inquiry. The Ministry did not find it appropriate to hold meetings on issues which it has already discussed and for which corrective actions have been taken. The Ministry noted that the MHEU continues to dig up past conflicts which have already been addressed just to tarnish the image of the Ministry.

749. Regarding the allegations of denial of time-off facilities, the Ministry of Civil Service and Administrative Reforms confirmed that pursuant to a dispute reported to the Conciliation Service of the Ministry on time-off facilities, an agreement was reached in December 2012 between the MHEU and the Ministry of Health and Quality of Life on the following terms:

- two half days every week to the President (in his dual capacity as the MHEU President and as an executive member of the GWF);
- one half day every week to the secretary;
- one half day every two weeks to the treasurer;
- one half day per month to other executive members;
- over and above the grant of time-off facilities mentioned above, release of officers, upon request as and when required, subject to production of documentary evidence;
- the granting of time-off facilities as indicated above will be subject to exigencies of service.

The Ministry of Health and Quality of Life indicated that it is granting time-off facilities to the MHEU in line with the above collective agreement. However, it pointed out that the MHEU is not the only union requesting time-off facilities for its members. There is a need, therefore, to devise a fair allocation of time-off facilities to other recognized unions and to ensure that fair treatment is given to each of them on this issue. Nevertheless, although the health sector is an essential service which operates on a 24-hour basis, the Ministry had, most of the time, released officers to attend trade union meetings, except in cases of exigencies of the service when the Ministry had to deal with urgent situations requiring top priority.

750. Regarding the allegation of unfair treatment towards the MHEU and favouritism towards a rival union, the Ministry of Health and Quality of Life pointed out that the right to join an association is guaranteed by the Constitution. It is not the policy of the Ministry to give preferential treatment to any union and to interfere with any union's business or its relationship with other unions. In fact, the conflicting relationship which the MHEU harbours against its rival union is hampering the smooth running of the Ministry. No green light whatsoever was given by the Ministry to another union to hold meetings during working hours. While ensuring a fair and equitable treatment to every union, the Ministry adopts a collaborative approach to resolve problems encountered by its employees.

751. Regarding the allegation of punitive transfer, postings in improper working conditions and health deterioration of the MHEU President, the Ministry of Health and Quality of Life informed that the postings of Mr Seetohul had been as follows:

- from 31 August 2007 to 16 June 2011 at Moka Hospital;
- from 17 June 2011 to 1 March 2015 at Victoria Hospital; and
- from 2 March 2015 until now at Moka Hospital.

Rotation of staff is a current and normal activity which is done to suit the requirements of the service. There has never been any punitive transfer of Mr Seetohul. As regards the issue of improper working conditions, corrective actions were taken by the Ministry. The Ministry abstained from commenting on the medical report made by the treating doctors of Mr Seetohul regarding the deterioration of his health.

752. Concerning the alleged harassment of MHEU officials, the Ministry of Health and Quality of Life indicated that a departmental inquiry was set up in October 2014 by the then Senior Chief Executive to look into the cases of harassment of MHEU officials. However, the President of the MHEU contested the composition of the inquiry committee. The MHEU requested that the committee should allow the union's representatives to accompany its members for the sake of fairness. The Ministry did not accede to the request of the union as it was a matter before an inquiry committee and not before a disciplinary committee. The Ministry denied that there was any lack of fairness. Thereafter, the Acting Senior Chief Executive of the Ministry convened the MHEU for a meeting on 18 March 2015 at 1.30 p.m. to discuss the matter. However, the representatives of the MHEU turned up at 10.30 a.m. In spite of that, the then Acting Senior Chief Executive met the union representatives and listened to their grievances. However, the MHEU President called again at 1.30 p.m. on that day and was informed that since he had a meeting in the morning, there was no need for another one on the same issue. The Ministry denied any conflict of interest and lack of fairness of the inquiry committee set up to hear the matter and it proceeded, following advice of the Ministry of Civil Service and Administrative Reforms. According to the report of the committee, none of the charges levelled by the MHEU President were proved. The report mentioned that there existed a visible open conflict between two unions at the ECG unit and a situation of inter-trade union and interpersonal conflict. The committee recommended a transfer of either Mr Suntoo, the President of the ECG Union, or Mr Seetohul to avoid

conflicts in future. The findings of the committee were communicated to the MHEU and the FCSOU on 10 April 2015.

753. Regarding the case of assault against the MHEU President, the Ministry of Health and Quality of Life informed that, on 20 January 2015, the President of the GSEA reported a case of assault against Mr Seetohul to the police. Thereafter, Mr Seetohul also reported a case of assault against the President of the ECG Union to the police following the same incident. It was reported to the Ministry that Mr Seetohul was running after Mr Suntoo in the corridor in front of patients. This incident was viewed with serious concern by the Ministry and pending the finalization of the police case, an inquiry was conducted at ministerial-level to determine the circumstances of the incident in order to avoid recurrence of such incidents in the future. The inquiry committee met on 10 September and 11 December 2015 but Mr Seetohul did not attend its two sittings. In its report dated 13 January 2016, the committee observed that out of eight witnesses, seven turned up before the committee and confirmed that they had seen Mr Seetohul hitting Mr Suntoo on 20 January 2015 at about 3.50 p.m. The committee did not recommend any disciplinary action against Mr Seetohul but the Ministry has, however, subsequently transferred both Mr Suntoo and Mr Seetohul to different hospitals. Further in this respect, the Commissioner of the Police confirmed that, on 20 January 2015, a case of assault was reported by Mr Suntoo against Mr Seetohul at 4.21 p.m. while at 5.44 p.m. on the same day Mr Seetohul reported a case of assault regarding the same incident, against Mr Suntoo. Inquiry in both cases is under way.

754. Concerning the performance appraisal of the MHEU President, the Ministry of Civil Service and Administrative Reforms informed that the MHEU reported a dispute on behalf of its President on 18 February 2015 regarding his performance appraisal for the year 2014. The terms of the dispute were as follows:

- Whether my performance appraisal should be conducted by Mr Suntoo, appraiser in the present circumstances of the conflictual situation between him and me, the appraisee?
- Whether a reassessment of the overall score should be conducted by the Appeal Panel set up by the Ministry of Health and Quality of Life or otherwise by an independent Appeal Panel?

The Ministry sought the views of the Ministry of Health and Quality of Life on 27 February 2015. The latter informed that, in view of the continued conflict between the appraiser and the appraisee, it was decided that the performance agreement of Mr Seetohul for the year 2015 would be signed in the presence of the next level supervisor and the officer in charge of the Human Resources Division. With regard to his rating for the year 2014, as Mr Seetohul, was not satisfied, an Appeal Panel was set up to review it. The panel met on three occasions, on 8, 12 and 26 December 2014 but Mr Seetohul attended only once, on 12 December 2014, to contest the composition of the panel. Upon advice of the Ministry of Civil Service and Administrative Reforms, the Ministry of Health and Quality of Life proceeded further and the Appeal Panel maintained the performance score obtained by Mr Seetohul in the absence of any justification on his part. The final rating of Mr Seetohul was communicated to him on 12 January 2015. The FCSOU requested on 6 February 2015 that the recommendation of the Appeal Panel be reviewed but its request was turned down given that the appeal procedure had been carried out according to established procedures. The Ministry of Health and Quality of Life further explained that Mr Seetohul was granted an overall score of 2.41 for the year 2014 while he was of the view that he should have received the maximum score of 4. In accordance with the established Performance Management System procedures, a moderation exercise was carried out for him to sign his final performance score, which he refused to do. His original score was thus maintained. With this score, he was eligible for both an annual increment and a promotion.

- 755.** As to the allegation of non-assignment of duties as senior officer to the President of MHEU, the Ministry of Health and Quality of Life explained that a duty of an officer in charge is assigned to an officer for performance of higher duties only upon the recommendation of a supervisor and if the circumstances so require. The decision, therefore, to assign higher duties to any officer rests with the Ministry of Health and Quality of Life. According to the Assistant Manager of the Human Resources Division of the Ministry, the need to assign higher duties to Mr Seetohul did not arise given that, in addition to the agreed time-off facilities granted to him, he was, most of the time, not at his site of work as a result of his union activities.
- 756.** Regarding the allegation of unauthorized deduction of local leave of the MHEU President, the Ministry of Health and Quality of Life informed that Mr Seetohul is used to leaving his site of work without any notification, over and above his time-off entitlements. As such, his absences without authorization during working hours are offset against his leave entitlement. Any unauthorized absences were liable to be considered as leave without pay, which had not been the case.
- 757.** In addition to the above, the Ministry of Health and Quality of Life indicated that it provides an essential 24-hour service in a sector where the management should devote its efforts towards achieving the strategic objectives of the Ministry to, inter alia, enhance the health status of the population and social equity, as well as to improve the quality of health-care delivery. The Ministry is strongly committed to ensuring that sound working conditions and employment relations prevail and that employees' rights are respected. To that effect, it is very important that unions and the Ministry work in partnership to achieve meaningful results for the benefit of the citizens of the country. Even though the MHEU is a relatively small union as compared to other large unions recognized by the Ministry, the latter has attended to all grievances of the union. However, the MHEU constantly brings forth the resolved issues and past conflicts into the limelight just to wield sympathy and acknowledgement from its members.

The Committee's conclusions

- 758.** *The Committee notes that this cases involves the allegations of unfair treatment of the MHEU and favouritism towards a rival union (GSEA). In particular, the complainant refers to the refusal of the Ministry of Health and Quality of Life to consider copies of the application forms authorizing check-off facilities, denial of time-off facility to the MHEU's officers, unfair leave deductions, non-assignment of the officer in charge duties to the MHEU President, the low score of the MHEU President's performance appraisal, assault against the MHEU President, punitive transfers of the MHEU President and improper working conditions to which he was exposed and which prompted the deterioration of his health, management's refusal to allow the MHEU to hold its meetings, and absence of reaction from the Ministry of Health and Quality of Life to the MHEU's representations.*
- 759.** *The Committee notes the Government's detailed reply thereon. It further notes that the issues of check-off and time-off facilities appear to have been addressed by the Government. In relation to the latter, the Committee notes that in December 2012 an agreement was concluded between the complainant and the Ministry of Health and Quality of Life which provides for the time off for trade union activities to be granted to the officers of the MHEU. In this connection, and in relation to the allegation of leave deductions, the Committee notes the information provided by the Government to the effect that any unauthorized absence during working hours which is taken over and above Mr Seetohul's negotiated time-off entitlement, should be considered to be leave without pay, instead, they were offset against his leave entitlement and deducted as such. The Committee will therefore not pursue the examination of these allegations.*

- 760.** *Regarding the allegation of non-assignment of the officer in charge duties to the MHEU President, the Committee notes the Government's explanation that if the circumstances so require, the decision to assign higher duties to any officer rests with the Ministry of Health and Quality of Life and that the need to assign higher duties to Mr Seetohul did not arise given that, in addition to the agreed time-off facilities granted to him, he was, most of the time, not at his site of work as a result of his union activities. Considering that decisions of such nature may be considered to be a matter which appertain primarily or essentially to the management, the Committee will not pursue the examination of this allegation.*
- 761.** *Regarding the low score obtained by Mr Seetohul for his performance appraisal, the Committee notes that the Ministry of Health and Quality of Life acknowledges that there was a continued conflict between Mr Seetohul and Mr Suntoo, his supervisor, who is also a representative of the GSEA, which, according to the complainant, is a rival union. The Committee considers that the appraisal score received by the MHEU President could in these circumstances appear to be influenced by partiality. The Committee notes nevertheless that, according to the Government, with the obtained score Mr Seetohul was still eligible for both an annual increment and a promotion and that a performance appraisal exercise for the year 2015 should have included the next level supervisor and a Human Resources Department officer. The Committee understands that Mr Seetohul and Mr Suntoo were transferred to different hospitals and no longer work together.*
- 762.** *Regarding the allegation of assault against Mr Seetohul by Mr Suntoo that occurred on 20 January 2015, the Committee notes that the case was reported to the police and was still under investigation. It further notes that, in the meantime, the Ministry of Health and Quality of Life has conducted an internal inquiry into the circumstances of the incident. The Committee notes the Government's indication that seven witnesses confirmed seeing Mr Seetohul hitting Mr Suntoo. While the inquiry committee did not recommend any disciplinary action against Mr Seetohul, he and Mr Suntoo were transferred to different hospitals. The Committee notes from the Note of the meeting held on 18 March 2015 between representatives of the Ministry of Health and Quality of Life, the management of the hospital, the FCSOU and the MHEU regarding this incident (forwarded by the complainant) that Mr Seetohul had accepted the change in posting. The Committee trusts that the police investigation will soon be concluded and that appropriate measures of redress will be taken as relevant.*
- 763.** *As concerns the allegations of punitive transfer, postings in improper working conditions and health deterioration of the MHEU President, the Committee notes that the complainant did not provide a detailed account of events regarding the three transfers it considers to be punitive. The Committee further notes that according to the Ministry of Health and Quality of Life, between 31 August 2007 and 24 June 2016 (the date of the Government's communication), Mr Seetohul had three postings (twice at the Moka Eye Hospital and once at Victoria Hospital), that the rotation of staff is a normal activity which is done to suit the requirements of the service and that there has never been any punitive transfer of Mr Seetohul. With reference to the abovementioned Note of the 18 March 2015 meeting, the Committee understands that Mr Seetohul had agreed to the last transfer. Regarding the allegation of improper working conditions in which Mr Seetohul had to work, while noting the Government's indication that corrective actions had been taken by the Ministry of Health and Quality of Life, the Committee regrets that no information had been provided on the nature of these corrective measures.*
- 764.** *In the light of the above, the Committee considers that the complaint does not contain any tangible proof as to the allegation of unfair treatment of the MHEU and favouritism of another union. The Committee notes the Government's indication that although the health sector is an essential service which operates on a 24-hour basis, the Ministry of Health and Quality of Life had, most of the time, released officers to attend trade union meetings, except*

in cases of exigencies of the service when the Ministry had to deal with urgent situations requiring top priority, that the Ministry collaborates with all unions, regardless of their membership strength and that the conflict appears to be one of trade union rivalry and conflicting relationship between their representatives, which impacts negatively on the services for which the Ministry is responsible. It further notes that according to the report of the 2014 inquiry into the allegations of harassment of the MHEU President and members established by the Ministry, a copy of which was provided by the complainant, concluded that the situation was one of inter-union conflict.

765. *With regard to the allegation that the Ministry of Health and Quality of Life does not react to the representations of the complainant, the Committee understands that the Ministry had conducted inquiries into various allegations of harassment on at least two occasions, in 2014 and 2015. In this respect, the Committee notes that the complainant disputes the composition of the 2014 inquiry committee believing that its representatives should have been involved and that, on this basis, the complainant decided not to participate in its meetings or to testify before it. In this respect, the Committee notes from the explanation provided by the Government and the abovementioned Note of the 18 March 2015 meeting, that contrary to the disciplinary committee, an inquiry committee is an independent body established according to a specific procedure to ensure “good practice and governance [which] require that one cannot be judge and the party at the same time”.*

The Committee’s recommendation

766. *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. 3106

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

Complaint against the Government of Panama presented by

- **the International Transport Workers’ Federation (ITF)**
- **the Union of Tugboat Captains and Officers (UCOC)**
- **the Union of Panama Canal Pilots (UPCP)**
- **the Union of Marine Engineers (UIM) and**
- **the Panama Canal and Caribbean Union (SCPC)**

Allegations: prohibition of strike action by Panama Canal workers in the absence of sufficient compensatory guarantees; obstacles to the exercise of privileges by workers’ representatives; failure to implement a collective agreement and unilateral imposition of changes in working conditions; failure to bargain in good faith and victimization of trade unionists

767. The complaint is contained in communications dated 10 August and 20 November 2014 from the International Transport Workers’ Federation (ITF), the Union of Tugboat Captains

and Officers (UCOC), the Union of Panama Canal Pilots (UPCP), the Union of Marine Engineers (UIM) and the Panama Canal and Caribbean Union (SCPC).

- 768.** The Government sent its observations in communications dated 24 and 27 February 2015, and 24 October 2016.
- 769.** 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

- 770.** In their communications of 10 August and 20 November 2014, the complainant organizations allege that the Government denies Panama Canal workers the right to strike, does not provide sufficient compensatory guarantees in that regard, hinders the exercise of privileges that should be enjoyed by workers' representatives, does not meet some of the commitments established in a collective agreement, imposes unilateral changes in working conditions, fails to bargain in good faith and victimizes trade unionists.
- 771.** The complainants maintain that Panama Canal workers do not have the right to strike. They state that section 92 of the Organic Act establishing the Panama Canal Authority (LOACP) classifies the Canal as an international public service and establishes that its operation may not be interrupted in whole or in part or diminished for any reason by strike action, go-slows or any other unjustified work stoppage. They emphasize that this prohibition is based on the fact that the Canal is viewed not as an "essential" service but as an international "public" service. They consider that the conditions necessary as stipulated by the Committee to totally deny Panama Canal workers the right to strike are not present.
- 772.** The complainants also allege that the compensatory guarantees for workers who have been deprived of the right to strike are insufficient. They indicate that the LOACP provides two avenues for addressing labour disputes in the Panama Canal zone, both of which limit the potential to appeal the resulting decisions or awards: (i) the Labour Relations Board (JRL), which is empowered to impose binding settlements of disputes on bargaining rights, break deadlocks in negotiations and address complaints of unfair labour practices (its decisions may not be appealed unless they violate the LOACP); and (ii) collective bargaining and the established conciliation and arbitration mechanisms (the resulting arbitral awards may only be appealed on the grounds of misinterpretation of a law or regulation, clear bias on the arbitrator's part or abuse of due process). The complainants report that although the LOACP places these restrictions on the right of appeal, the Panama Canal Authority (ACP) has appealed all decisions and awards that were unfavourable to it before the Supreme Court. They allege that these appeals are brought for the sole purpose of delaying application of the decisions since the appeals proceedings can take up to five years and the ACP refuses to implement decisions until they have been confirmed by the Supreme Court. The complainants therefore consider that the compensatory guarantees for workers who have been denied the right to strike are insufficient and that this is contrary to the principles of freedom of association. In support of this allegation, they mention six cases: (i) Complaint No. 05/10 on unfair labour practices, brought before the JRL on 26 January 2010, alleging failure to pay captains who had been required to report for work early without the usual prior notice as required under a collective agreement (on 25 February 2011, the JRL ruled in favour of the UCOC; the ACP lodged an appeal immediately and the Supreme Court's decision is pending); (ii) Complaint No. 11/10 on unfair labour practices, brought before the JRL on 10 May 2010, alleging failure to pay overtime to marine engineers pursuant to a collective agreement (on 20 July 2012, the JRL ruled in favour of the UIM; the ACP lodged an appeal on 17 September 2012, and the Supreme Court's decision is still pending); (iii) Complaint No. 18/10 on unfair labour practices, brought on 27 August 2010, alleging

failure to provide lunch boxes to marine engineers pursuant to a collective agreement (on 17 January 2013, the JRL ruled in favour of the UIM; the ACP lodged an appeal on 24 June 2013 and the Supreme Court's decision is still pending); (iv) a complaint, brought before the JRL on 7 April 2009, alleging that captains had been excluded from the collective agreement between the UCOC and the ACP on the grounds that they were "trusted employees" (the JRL ruled in favour of the UCOC; the ACP lodged an appeal immediately and in April 2014 the Supreme Court ruled in favour of the UCOC); (v) Complaint No. 34/06 on unfair labour practices, brought in 2006, alleging failure to follow the procedures governing health care (on 31 March 2014, the JRL ruled in favour of the UICP; the Supreme Court's decision is still pending; and (vi) Arbitral Cases Nos 79/10 and 80/10, alleging that the members of a bargaining unit had been denied access to ships whose operation required additional compensation (the hearings were held in July 2011 and July 2012; the arbitrators ruled in favour of the UICP, the ACP appealed and the Supreme Court's decision is still pending).

- 773.** The complainants further allege that the ACP puts obstacles in the way of the exercise of privileges by workers' representatives. They recall that the LOACP allocates workers' representation to an "exclusive representative", defined as the trade union that represents the workers in a bargaining unit, and envisages "representation leave": leave granted to the worker that the exclusive representative designates to represent it in a legally authorized activity. The complainants also report that, in December 2009, the UCOC signed a Memorandum of Understanding, supplementing the provisions on representation, under which the three designated area representatives are granted a collective maximum of 40 hours of representation leave. The complainants report that, deliberately misinterpreting this Memorandum of Understanding in order to deny access to representation privileges: (i) the ACP denies the trade union organization's right to designate the representatives who are entitled to representation leave (in that regard, the complainants mention, as examples, Arbitration No. 14-002 on failure to grant representation leave to the General Secretary or the representative and legal adviser of a trade union, and disciplinary proceedings brought against two captains, in which the union representatives assigned to represent the workers in question were not granted representation leave); and (ii) in response to requests to hold meetings to be attended by other trade union representatives, the ACP maintained that workers' representatives could only be granted such leave when the meeting was organized by the ACP (and refused to grant such leave when the representatives organized a meeting pursuant to the Memorandum of Understanding, although that restriction is not envisaged in the LOACP). In order to show the negative impact of limiting representation leave to the three area representatives, the complainants explain that the trade union assigns and distributes cases to trade union secretaries on the basis of the subject matter and does not assign them to area representatives. They also mention other events as examples of an attempt to hinder the exercise of privileges by workers' representatives, alleging that the ACP: (i) has begun to suggest that meetings should only be held on the trade union representative's rest days; (ii) has altered the duty roster to ensure that representatives and/or workers who have been subject to disciplinary hearings have only a short rest period between shifts and meetings; (iii) does not give line managers full authority to grant representation leave (as was the practice, and although it is the line managers who best understand needs as regards duty rosters and representation), requiring them to follow direct oral instructions from their superiors; and (iv) with regard to the mid-term negotiations envisaged in the collective agreement with the UICP, the negotiating team was granted only 75 calendar days of official leave whereas the ACP negotiating team had been granted paid leave in which to prepare for more than a year. The complainants maintain that their representatives should be able to communicate with management without delay and should be granted the paid leave that they require in order to fulfil their representation responsibilities, and that the trade unions have the right to decide who their representatives will be and, in particular, who may exercise representation privileges.

- 774.** The complainants also maintain that the ACP is failing to meet some of the commitments established in collective agreements, imposing unilateral changes in working conditions and failing to bargain in good faith. With regard to relations between the Canal authorities and the UCP, they report that, first, the ACP has denied the trade union's request for the joint development and implementation of a training programme for the Canal pilots who pilot ships through the new canals and locks, even though a Memorandum signed by the ACP and the UCP on 31 May 2012, which is part of the collective agreement with the UCP, specifically provides for such joint preparation. The complainants state that the UCP plans to bring proceedings against the ACP for unfair labour practices in this matter. Second, the complainants report that on 9 May 2014, the ACP sent the UCP written notification of changes in the current working conditions (and also future changes resulting from the opening of the third set of locks), implicitly denying the trade union's right to full negotiations on these changes in the conditions of employment, including the right to negotiate on ways and means of carrying out the work as established in the LOACP. Similarly, the complainants allege, with regard to the working conditions covered by the collective agreement, that: (i) section 4 of the agreement establishes that its provisions may only be reopened for negotiation by mutual agreement; and (ii) although the UCP did not consent to such reopening, the ACP persisted in imposing new rules, leading the UCP to bring proceedings for unfair practices before the JRL.
- 775.** With regard to relations between the authorities and the UCOC, the complainants report that the ACP has failed to bargain in good faith and that, for almost five years – since December 2012 – the UCOC has been attempting to negotiate a new collective agreement but, despite those efforts, has been unable even to successfully negotiate the basic rules applicable to the negotiation of such an agreement. The complainants maintain that the negotiations on basic rules began in January 2013 and that, after just a few meetings, it was clear that the ACP was not acting in good faith. Specifically, they allege that: (i) the UCOC was not granted representation leave in order to prepare; (ii) the captains involved in the negotiations were required to work their usual shifts and, at times, were forced to attend meetings without having had their compulsory rest periods; (iii) the members of the UCOC team were still required to work whenever it suited the ACP, interrupting the continuity of the negotiations (whereas the ACP team members were allowed to take time off to focus on the negotiations); (iv) the UCOC was not allowed to bring lawyers or other advisers to the bargaining table; (v) the ACP tripled the length of the short list of issues proposed by the trade union and added issues related to the negotiation of a collective agreement, not to the basic rules of negotiation; and (vi) the ACP team stated that it did not have decision-making power and was acting on the orders of senior management. The complainants state that the negotiations on basic rules were terminated in September 2013 and that the UCOC reported this deadlock to the JRL.
- 776.** Lastly, the complainants allege that the ACP victimizes trade unionists. They report that, on one occasion during the negotiations with the UCOC on the basic rules for negotiating a collective agreement, when the trade union team had been given, exceptionally, a week of representation leave, the negotiations were stalled after just one meeting and the ACP ordered the trade union team back to work. The complainants report that when that team's members refused to do so on the grounds that they had been granted representation leave, they immediately received written notification that they were subject to a disciplinary measure for failing to obey the order. The complainants add that, while the disciplinary measure was ultimately lifted, the show of force and the attitude displayed by the ACP added to the impression that management had no interest in negotiating a collective agreement with the UCOC.

B. The Government's reply

777. In its communications of 24 and 27 February 2015, the Government sends its reply, which is based on the ACP's comments on the complainants' allegations.

778. Concerning the allegation that Panama Canal workers are denied the right to strike, the Government recalls that it does not prevent workers from exercising this right; the labour policy in question was the outcome of a tripartite decision in which the trade unions (which included members of the four complainants) participated with full knowledge and which resulted in article 322 of the Constitution. In that regard, the Government emphasizes that, not only is the prohibition based on a provision of the LOACP, it is established in Panama's Constitution, article 322 of which establishes that because the Canal provides an essential international service, its operation may not be interrupted for any reason. On that point, the Government refers to the statement made by the representative of the Coalition of Panama Canal Workers' Unions (American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)) on 22 December 1993, during the regular session of the Legislative Assembly of Panama, recognizing that "there is no right to strike at the Panama Canal and we, the members of the Coalition of Unions, are at no time calling for the right to strike to apply". The Government adds that, in order not to leave the workers unprotected, it was proposed that labour disputes between Canal workers and the ACP be settled between the workers or their trade unions and the Administration using the dispute settlement mechanisms established by law, with arbitration as the final administrative remedy. The Government stresses that the LOACP was the outcome of countless consultations and of a consensus reached by the various political, civil, environmental and labour groups of Panamanian society with support from the United Nations Development Programme (UNDP). The Government adds that this prohibition not only reflects a decision taken by the Panamanian people; it was confirmed by the three branches of Government. In that regard, the Government recalls that the Supreme Court considered the issue in its decision of 27 April 2009, in which the plenary of the Court ruled that, while the right of workers to strike was constitutionally protected, it must be borne in mind that, following the principle of consistency with the provisions of the Constitution, priority must be given to uninterrupted provision of the essential public service that the Panama Canal provides, which is expressly enshrined in the Constitution. Lastly, the Government recalls that the provision of the Constitution on which the prohibition of strikes is based is consistent with Article II of the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal, which "declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality". The Government explains that this commitment (which was signed by Panama and the United States on 7 September 1977 and to which 14 States are parties) is the basis for the obligation to keep the Canal open without interruption. The Government emphasizes that this is not merely a service that may be interrupted without risk to life or personal safety; the stability of our societies, the sustainability of the global system that links them even more closely and, ultimately, peace itself depend on its provision. For this reason, the Government considers it to be a service of global interest.

779. Concerning the allegation of insufficient compensatory guarantees, the Government maintains, first, that the complainants have neglected to state that, in addition to access to the JRL and to collective bargaining procedures, Canal workers have other compensatory guarantees, including the principle of security of tenure, the freedom of information system, the right of trade union organizations to membership in international trade union organizations, the right to the procedure for the handling of complaints and resulting arbitration, and the right to establish a labour-management council that includes the Administration and the trade unions in order to improve labour relations, identify problems and find solutions. The Government also explains that the number of cases in which the trade unions have exercised their right to appeal arbitral awards or rulings of the JRL is greater

than the number in which the Administration, with equal legitimacy under the law, has appealed (in support of this claim, in its latest communication the Government provides detailed data on the number of cases on labour issues involving the ACP between 2000 and 2016, including the number of charges brought by each party: 36 by the ACP and 55 by the trade unions). The Government further indicates that in none of the cases to which the complainants allude have the Administration's appeals been brought at the whim of the ACP in an attempt to avoid implementing unfavourable decisions and to abuse the prohibition of strikes in the Canal zone; in every case, care was taken to respect both the guarantee of due process and the competency of the court and every appeal legitimately invoked violation of provisions of the law. Concerning the complaints of unfair practices (Nos 05/10, 11/10 and 18/10), the Government states that, under the law, the complaints did not concern unfair labour practices and should have been submitted for arbitration; thus, they were unlawfully judged receivable by the JRL. The Government was therefore obliged to appeal the rulings of the JRL in order to safeguard the integrity of the Canal's labour regime. The Government states that one of these cases (Complaint No. 05/10) was settled by the Supreme Court on 5 February 2015, in a decision annulling the ruling of the JRL on the grounds that the latter had not been competent to consider the complaint, which could not be treated as involving an unfair labour practice (the Government considers that this same criterion should apply to the other complaints of the same type (Nos 11/10 and 18/10), which are still pending before the Supreme Court). With respect to the two arbitration cases, the Government reports that the Administration was also obliged to appeal the awards because it considered them unlawful (in one case because the arbitrator's remit had been exceeded by the ruling and in the other because the arbitrator had departed from the issue under consideration).

- 780.** With regard to the allegations of denial of representation privileges, the Government states that the ACP merely carried out its role of obeying and enforcing the law, collective agreements and memoranda of understanding between the parties in order to ensure the effectiveness and efficiency of the service provided by the Canal. The ACP considers that the new tugboat captains' union, the UCOC, disrupts the proper functioning of labour relations by encouraging non-compliance with existing agreements. In that connection, the ACP recalls that the Memorandum of Understanding that the UCOC signed in 2009 establishes that only the three area representatives (designated by the trade union, one for each operational sector) are entitled to representation leave. For this reason, the ACP could not grant representation leave to other workers' representatives in the aforementioned arbitral and disciplinary proceedings; in order for it to do so, they would need to have been designated area representatives by the trade union. As an illustration, the Government states that in Arbitration No. 14-002, the trade union was not represented at various meetings because, since this requirement – established in the Memorandum of Understanding – had not been met, the requested representation leave could not be granted.
- 781.** With respect to the allegation of failure to negotiate in good faith with the UCOC, the ACP alleges that it was the UCOC that acted in bad faith at the bargaining table. The ACP reports that, after more than a year of attempting to agree on basic rules for the negotiation of a collective agreement with the UCOC, the trade union brought seven allegations of deadlock before the JRL, upon which the attempted negotiations were suspended. According to the Government, the JRL ruled in favour of the ACP on six of the seven issues (and, on the remaining issue, merely allowed the trade union to have five negotiators instead of four, as the ACP had proposed). The ACP explains that, once the rulings on the allegations of deadlock had been issued, the Administration sent the UCOC several invitations to resume the negotiations.
- 782.** In its communication of 24 October 2016, the Government makes additional observations and forwards further information supplied by the ACP. In general, the Government considers that the complaint does not fulfil the basic requirements of the precise identification of the facts and the provision of evidence, for which reason it considers that it would be difficult

for the Committee to make recommendations on such delicate matters as compensatory guarantees, as it has not been demonstrated or evidence provided that the allegations are well-founded.

- 783.** The ACP indicates that it remains in continuous dialogue with workers' organizations, as illustrated by the conclusion of four collective agreements in 2016, including one with the UCP and one with the UCOC, and that negotiations are being held with machine engineers and firefighters for the conclusion of a new collective agreement with the workers in these bargaining units.
- 784.** The ACP reports that it signed a collective agreement with the UCP on 9 May 2016. It adds, with reference to the allegations in the complaint concerning this organization, that: (i) during the course of the negotiations, the JRL in ruling No. 35/2015 of 6 April 2015 set aside the appeal lodged by the UCP relating to the deadlock; and (ii) the parties included general clauses on training in the new collective agreement, and six paid training courses have already been agreed upon with the UCP.
- 785.** The ACP adds that it concluded a collective agreement with the UCOC on 27 July 2016, and notes that the 2009 Memorandum of Understanding (referred to in relation to the issues concerning representation facilities raised by the organization) was included in the trade union representation clauses agreed to in the new collective agreement.
- 786.** The ACP also reports that, with reference to the collective agreement that is in force covering Canal pilots, the parties recognize that all work relating to the Cocolí and Agua Clara Locks (the expanded Canal) is new and that the parties will revise the standard times for the calculation of working time, which means that the channels of communication will remain open to improve operations and the labour climate. The ACP adds that the last four collective agreements concluded offer benefits, including significant financial elements, for 97.5 per cent of Canal workers.
- 787.** With regard to the expeditious nature of the procedures for dealing with complaints as compensatory guarantees, the ACP is of the view that consideration could be given to greater supervision of the work of the JRL, which it recalls is the institution that can offer the most appropriate response adapted to the specific labour regulations governing the Canal, as well as continuous training for arbitrators.

The Committee's conclusions

- 788.** *The Committee observes that the complaint concerns allegations of denial of the right to strike, insufficient compensatory guarantees for denial of this right, obstacles to the exercise of privileges by workers' representatives, failure to implement a collective agreement, imposition of unilateral changes in working conditions, failure to bargain in good faith and victimization of trade unionists.*
- 789.** *Concerning the alleged denial of the right to strike, the Committee notes that, according to the Government, the fact that the right to strike does not apply in the Panama Canal zone arises from the country's Constitution and is the outcome both of a tripartite national agreement and of the international obligations assumed by the State of Panama, as confirmed by the highest institutions of the State powers. The Committee also notes that, in a direct request published in 2001, the Committee of Experts on the Application of Conventions and Recommendations (CEACR), in considering the question of the prohibition of strikes in the Panama Canal zone, expressed the hope that, within the protection of the LOACP, workers who were deprived of an essential means of defending their socio-economic and occupational interests (such as strike action) were, in practice, afforded impartial and rapid compensatory guarantees, for example, conciliation and mediation*

procedures leading, in the event of deadlock in negotiations, to arbitration machinery seen to be reliable by the parties concerned. The Committee will examine this case from the point of view of the need to ensure that the compensatory guarantees are sufficient, particularly as regards their effectiveness and rapidity, in light of the complainants' allegations and the Government's observations.

- 790.** *In that regard, the Committee observes that, according to the complainants, the compensatory guarantees for denial of the right to strike are insufficient and, in particular, that the Administration has appealed all decisions and awards that were unfavourable to it before the Supreme Court in order to delay their application for years since, once an appeal has been brought, the authorities do not implement them until the Supreme Court has ruled. The Committee notes that the cases to which the complainants refer involve disputes concerning the implementation of collective agreements. In that connection, it recalls that restriction of the right to strike must be compensated by the right to have recourse to impartial and rapid machinery for individual or collective grievances concerning the interpretation or application of collective agreements. With regard to the specific cases mentioned by the complainants, the Committee takes due note of the Government's explanation that the authorities were obliged to appeal the aforementioned rulings and awards because, in its view, they were unlawful. The Committee observes, however, that these cases show that the proceedings – from the lodging of a complaint or grievance to its settlement – can take several years (for example, the complainants indicate that in Complaint No. 34/06 on unfair labour practices, over eight years elapsed between the lodging of the complaint and the JRL's ruling and the Supreme Court's decision on appeal is still pending) and that, in the event of an appeal, the ruling or arbitral award is not implemented until it has been confirmed by the Supreme Court. The Committee also notes that the ACP, with regard to the expeditious nature of procedures for dealing with complaints as compensatory guarantees, envisages a better supervision of the work of the JRL and continuous training for arbitrators. The Committee emphasizes that the rapidity of the proceedings and the prompt implementation of the awards or rulings issued are a key element of compensatory mechanisms for denial of the right to strike. It therefore requests the Government, in light of all the statistics on the length of the proceedings established as compensatory guarantees, including the frequency of appeals to the Supreme Court, to facilitate dialogue with the social partners in order to ensure the efficiency and the rapidity of these procedures. The Committee requests the Government to keep it informed in that regard.*
- 791.** *Concerning the alleged refusal to grant representation privileges, the Committee takes note of the complainants' statement that, misinterpreting a Memorandum of Understanding signed with the trade union, the ACP denies that workers' organizations are empowered to decide which of their representatives are entitled to paid representation leave. The Committee also observes that the complainants mention other practices that hinder representation (allegations that representation leave was not granted for meetings organized by trade unions, demands that meetings only be held on the representative's rest days, alteration of the duty roster to allow only a short rest period before meetings, requiring that senior management approve the granting of representation leave, and granting less leave to the workers' team during the mid-term negotiations on a collective agreement). On the one hand, the Committee notes the Government's explanation in its reply that, according to the Memorandum of Understanding, only the three area representatives designated by the trade union are entitled to paid representation leave (a maximum of 40 hours per week) and that in order for other representatives to be granted such leave, the union would need to designate them area representatives. The Committee also notes the Government's indication that the Memorandum was included in the clauses on trade union representation agreed upon in the new collective agreement. On the other hand, the Committee regrets that the Government has not replied to the other allegations of obstacles to representation and observes that the ACP does not deny that limiting representation leave to the three area*

representatives can undermine the principles of freedom of association invoked by the complainants (in fact, the ACP recognizes that in one of the aforementioned arbitral proceedings, restricting privileges to area representatives prevented the trade union from attending several meetings). The Committee also observes that, as is clear from the wording of the Memorandum, two weeks' notice of any change in the designated area representatives is required. While recognizing the need to ensure the effective operation of the service, as mentioned by the Government, the Committee would like to point out that trade union representatives should enjoy the appropriate privileges for the performance of their duties, including having the time needed to fulfil their representation responsibilities, and that trade unions should be able to decide, without undue restrictions, which representatives can enjoy the representation privileges provided for that purpose. The Committee therefore invites the Government to facilitate dialogue between the competent authorities and the social partners on the existing representation privileges and their implementation in practice in light of the principles of freedom of association.

- 792.** *With respect to the allegation of failure to negotiate in good faith with the UCOC, the Committee takes note of the disparities between the complainants' account and that of the ACP, each accusing the other of acting in bad faith at the bargaining table. The Committee also notes that the complainant has lodged a complaint on this matter with the JRL and that, on 30 January 2015, the latter issued a ruling in favour of the Administration on six of the seven issues raised by the trade union. Moreover, the Committee notes the Government's indication that, once the ruling had been issued by the JRL, the ACP made several further invitations to the UCOC to resume negotiations, and that it reports in its recent communication that a collective agreement was concluded with the UCOC on 27 July 2016. Consequently, the Committee will not pursue its examination of this allegation.*
- 793.** *In relation to the allegations with regard to the UPCP of failure to implement a collective agreement (denial of a request to develop a training programme), unilateral imposition of working conditions and refusal to allow the trade union to engage in collective bargaining, the Committee notes that, according to the information provided by the Government in its latest communication: (i) negotiations continued with the UPCP, and the JRL therefore set aside the appeal lodged by the organization concerning the deadlock; (ii) on 9 May 2016 a collective agreement was concluded with the UPCP; and (iii) the parties included general clauses on training in the new agreement, and six paid training courses have already been agreed to with the UPCP. As a consequence, the Committee will not pursue its examination of this allegation.*
- 794.** *With regard to the alleged victimization of workers who carry out legitimate trade union activities, the Committee observes that, according to the complainants, when the trade union team was ordered to go back to work during negotiations and refused to do so on the grounds that its members had been granted representation leave, they immediately received written notification that they were subject to a disciplinary measure for failing to obey the order. The Committee also notes that the complainants add that the disciplinary measure was ultimately cancelled and that the complainants do not provide any other specific information or evidence in support of their allegation of victimization and anti-trade-union discrimination. In these circumstances, the Committee will not pursue the examination of this allegation.*

The Committee's recommendations

- 795.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government, in light of all the statistics on the length of the proceedings established as compensatory guarantees, including the*

frequency of appeals to the Supreme Court, to facilitate dialogue with the social partners in order to ensure the efficiency and rapidity of these procedures for dealing with complaints as compensatory guarantees. The Committee requests the Government to keep it informed in that regard.

- (b) *The Committee invites the Government to facilitate dialogue between the competent authorities and the social partners on the existing representation privileges and their implementation in practice in light of the principles of freedom of association.*

CASE NO. 3132

DEFINITIVE REPORT

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

Allegations: Anti-trade union dismissals of trade union leaders by the enterprises, Fondo de Garantía para la Pequeña Industria (FOGAPI), Viettel Perú SAC and Centro Cerámico las Flores SAC

- 796.** The complaint is contained in communications dated 21 May and 25 August 2015 from the Confederation of Workers of Peru (CTP).
- 797.** The Government submitted its observations in communications dated 13 August, 7 September and 29 December 2015.
- 798.** 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

- 799.** In its communications of 21 May and 25 August 2015, the CTP reports anti-trade union dismissals in three enterprises and alleges an effort to destroy the unions in question after they had been formed.
- 800.** First, the complainant alleges that on 22 and 25 February 2015, the public company, Fondo de Garantía para la Pequeña Industria (FOGAPI), dismissed Mr César Gavilano Cossio, General Secretary of the National Union of FOGAPI Workers (SINTRAFOGAPI), and Ms María Ibáñez Álvarez, Secretary of SINTRAFOGAPI, arbitrarily and without just cause. The complainant indicates that the trade union – which had just been formed on 4 February 2015 – lodged with the National Labour Inspection Authority (SUNAFIL) a complaint that led to the issuance of violation report No. 1010-2015 of 2 June 2015, confirming the commission of very serious offences: the employer's interference with freedom of association, anti-union dismissals of trade union leaders and violation of trade union rights. The violation report proposed a fine of 154,000 Peruvian sol (PEN) (equivalent to US\$45,860).

- 801.** Second, the complainant alleges that on 18 March 2015, the day after the Union of Viettel Perú Workers (SITRAVIET) was registered with the Ministry of Labour, that private company arbitrarily dismissed Mr Rogelio Rosell Mújica, the trade union's National General Secretary, and, a few days later, Mr Julio Cisneros Postigo, its National Deputy General Secretary; Mr Fernando Santos Salazar, its National Secretary; Mr Roberto Gamero Puma, its National Records Secretary and Archivist; and Mr Martín Berrios Álvarez, one of its members. The complainant reports that the trade union lodged with SUNAFIL a complaint that led to the issuance of an order dated 5 August 2015 in which, it having been verified that the enterprise had not shown just cause for dismissing the aforementioned trade union leaders and that anti-union discrimination was considered to have occurred, the enterprise was instructed to take the necessary measures to ensure respect for the legislation on freedom of association, without prejudice to the possible issuance of a violation report.
- 802.** Third, the claimant alleges that on 9 April 2015, the day after the announcement that the National Union of Centro Cerámico las Flores Workers (SUNATRACCLF) had been registered, the private company referenced arbitrarily dismissed Mr Jaime Chávez Pérez, National General Secretary of the trade union, and Mr Bernardo Mora Ferreiros, its National Secretary. The complainant reports that the trade union lodged with SUNAFIL a complaint that led to the issuance of violation report No. 739-2015, confirming the commission of very serious offences: violation of the trade union rights of leaders and failure to comply with a previous order from the inspection authorities, requiring it to take the necessary measures. The report proposes the issuance of two fines totalling PEN462,000 (approximately equivalent to US\$137,580).

B. The Government's reply

- 803.** In its communications of 13 August, 7 September and 29 December 2015, the Government sends comments and information provided by the relevant enterprises, as well as information provided by the inspection authorities and the Department of Labour. The Government emphasizes that Peru's legal system guarantees the exercise of freedom of association and establishes mechanisms that provide protection against anti-trade-union dismissals – including the provisions of trade union law and those that establish the invalidity of anti-trade union dismissals – and requests that the case be declared closed.
- 804.** With regard to the alleged anti-trade-union dismissals of SINTRAFOGAPI leaders, the relevant enterprise indicates that the two workers in question were dismissed for serious misconduct, not because they were trade union leaders. It alleges that Mr César Gavilano Cossio was dismissed for two uncertified absences and reports that he has filed an appeal against his dismissal, which is currently before the Supreme Court. The enterprise indicates that Ms María Ibáñez Álvarez initiated court proceedings and that a subsequent court settlement terminated her employment with the agreement of both parties. The Government also reports that after conducting the legally required inspections, the authorities issued violation report No. 1010-2015 against the enterprise in question, having identified violations of the labour legislation on freedom of association and, in particular, discrimination against workers owing to their membership in SINTRAFOGAPI and violation of the trade union rights of its leaders. The Government explains that Dispute Settlement Chamber No. 3 of the Lima Metropolitan Labour Inspection Authority is expected to issue a ruling at first instance on this violation order, in which it will decide whether to penalize the enterprise that was inspected.
- 805.** Concerning the alleged dismissal of leaders of SITRAVIET, which was in the process of formation on 18 March 2015, the enterprise in question indicates that all of the aforementioned workers were dismissed for serious and duly verified misconduct, not because they were trade union leaders. In that connection, it adds that it did not learn of the trade union's existence until 17 April 2015 and that the union was registered on 26 and not

17 March 2015 (the day before the first of the aforementioned dismissals) as the complainant claims. The Government also reports that by inspection order No. 7745-2015, the labour inspector was instructed to carry out inspections to determine whether the enterprise was compliant with the provisions of labour law concerning freedom of association and that those inspections are currently under way. Furthermore, in its most recent communication (of 29 December 2015), the Government reports that SITRAVIET and the relevant enterprise have reached a non-court settlement and provides a copy of the resulting agreement, signed in the presence of the labour authorities, in which the trade union and the enterprise agreed on the reinstatement of Mr Rosell Mújica, the National General Secretary, and of the two trade union leaders, Mr Cisneros Postigo and Mr Santos Salazar.

- 806.** Concerning the alleged dismissal of SUNATRACCLF leaders, the enterprise in question indicates that the job title of the two workers (Mr Jaime Chávez Pérez and Mr Bernardo Mora Ferreiros) was Chief of Operations, a position of trust since their work entailed working directly with the employer and gave them access to the enterprise's confidential information. The enterprise states that they were dismissed legally because they had lost the enterprise's trust, not because they were trade union leaders. It adds that the two workers did not announce that they had joined the trade union until the day after their termination; thus, they could not have been dismissed for being union members. The enterprise also reports that both workers have appealed for reinstatement with the enterprise before the Lima Labour courts and that final judgments have not been issued in either of those cases. Furthermore, the Government states that the inspections carried out by the labour inspectorate resulted in the issuance of violation order No. 739-2015 against the enterprise for the offence of violating the trade union rights of the trade union leaders and failing to take the measures indicated by the labour inspector with regard to the workers who had been dismissed. The Government indicates that Dispute Settlement Chamber No. 3 of the Lima Metropolitan Labour Inspection Authority is expected to issue a ruling at first instance on this violation order (which proposes a total fine of PEN462,000, approximately equivalent to US\$137,580), in which it will decide whether to penalize the enterprise that was inspected.
- 807.** The Government also provides general information on the provisions of Peruvian law that protect freedom of association, and particularly those of trade union law (which stipulate that trade union leaders and members of trade unions in the process of formation may not be arbitrarily dismissed or transferred) and those that invalidate anti-trade-union dismissal (which must be invoked before a labour court judge, who is empowered to order reinstatement of the worker in question).

The Committee's conclusions

- 808.** *The Committee observes that the complaint concerns the alleged dismissal of trade union leaders in three enterprises. It takes due note of the Government's statement that in all of the alleged cases, the national procedures – both inspection and judicial – that have been established in order to ensure respect for freedom of association and to provide protection against anti-trade union discrimination were followed: (a) with regard to the SINTRAFOGAPI leaders, Mr César Gavilano Cossio has filed an appeal against his dismissal, which is currently before the Supreme Court; Ms María Ibáñez Álvarez's dismissal was the subject of a court settlement that resulted in an agreement between the parties; and the investigation carried out by the labour inspectorate resulted in the issuance of a violation report against the enterprise, FOGAPI, establishing discrimination against workers on the grounds of trade union membership and violation of the leaders' trade union rights (the competent authorities have yet to decide whether, as proposed in the violation report, the enterprise should be penalized); (b) with respect to the SITRAVIET leaders, the labour inspectorate has opened an investigation into the enterprise, Viettel Perú SAC and, as a result of a non-court settlement signed in the presence of the labour authorities, the parties have agreed to reinstatement of three of the four trade union leaders who had been*

dismissed; and (c) both of the SUNATRACCLF leaders have appealed before the labour courts for reinstatement with the enterprise, Centro Cerámico las Flores SAC (although final judgments have not been issued in either of those cases); and the investigation carried out by the labour inspectorate resulted in the issuance of a violation report against the enterprise, stating that it had violated the trade union rights of the trade union leaders and had failed to take the measures indicated by the labour inspector in that regard (the competent authorities have yet to decide whether to penalize the enterprise as proposed in the violation report).

- 809.** *The Committee is confident that the investigations and court proceedings with regard to the complainant's allegations will continue through the national inspection and judicial procedures established in order to provide protection against anti-trade-union discrimination and that if these allegations are proved, deterrent penalties will be imposed on those responsible and the victims will be compensated appropriately.*

The Committee's recommendation

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

The Committee is confident that the investigations and court proceedings with regard to the complainant's allegations will continue through the national inspection and judicial procedures established in order to provide protection against anti-trade-union discrimination and that if these allegations are proved, deterrent penalties will be imposed on those responsible and the victims will be compensated appropriately.

CASE NO. 3185

INTERIM REPORT

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

- **the National Confederation of Transport Workers' Unions of the Philippines (NCTU)**
- **the Center of United and Progressive Workers of the Philippines (SENTRO) and**
- **the International Transport Workers' Federation (ITF)**

Allegations: The complainant organizations allege the extrajudicial killings of three trade union leaders and denounce the failure of the Government to adequately investigate these cases and bring the perpetrators to justice. The complainants further allege the use of threats and murder attempts against a fourth trade union leader and his family, who have been forced into hiding, and denounces the Government's failure to adequately investigate this case and protect the victims. The failure to investigate and prosecute in these cases would have reinforced the climate of impunity, violence and insecurity with its damaging effect on the exercise of trade union rights

- 811.** The complaint is contained in a communication dated 5 February 2016 from the National Confederation of Transport Workers' Unions of the Philippines (NCTU), the Center of United and Progressive Workers of the Philippines (SENTRO) and the International Transport Workers' Federation (ITF).
- 812.** The Government forwarded its observations to the allegations in communications dated 28 October 2015 (communication concerning the same matters sent to the Committee of Experts on the Application of Conventions and Recommendations and subsequently referred to by the Government), and 31 May, 29 June and 17 October 2016.
- 813.** The Philippines has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 814.** In their communication dated 5 February 2016, the complainants allege that the Government has failed to adequately investigate the murders and attempted murders of a number of trade unionists, including NCTU leaders Antonio Petalcorin and Kagi Alimudin Lucman, and identify, bring to trial and convict the guilty parties. These acts and omissions constitute violations of Convention No. 87, which the Government ratified in 1953, and the principles of freedom of association protected under the ILO Constitution, which the Government is bound to respect by virtue of its membership of the ILO.

- 815.** The NCTU was originally founded in 2003 as the NTU. The NCTU is affiliated to SENTRO, a national trade union centre, and the ITF. The Land Transportation Franchising Board of Davao (LTFRB) is a public body under the direct control of the Department of Transportation and Communications.
- 816.** On 28 November 2012, Antonio Petalcorin, the then President of the NCTU-affiliated Network of Transport Organizations (NETO), Emilio Rivera, the then Chairperson of the Matina Aplaya Transport Cooperative, and Carlos Cirilo, Chairperson of the Mindanao Alliance of Transport Organizations, filed a complaint with the Office of the Ombudsman against the Director of the LTFRB, alleging corruption. Among other things, the petitioners claimed that the Director took bribes in exchange for franchise approvals. The three petitioners were all transport leaders and activists in Davao City.
- 817.** On 25 January 2013, Mr Rivera was killed by unknown assailants near the LTFRB office. The police announced the capture of a suspect, but he was later released. To date, no proper police investigation has been conducted and the assailants have not been identified.
- 818.** On 21 April 2013, a hand grenade was found near the front entrance to Mr Cirilo's family home. It was discovered by his son-in-law. The subsequent police investigation concluded that the primary safety pin of the hand grenade had been removed. On 21 May 2013, Mr Cirilo's wife discovered another hand grenade at their property. The police investigation confirmed that the only reason it failed to detonate was because of a defective secondary safety pin. Between November 2012 and May 2013, Mr Cirilo also received a number of threatening SMS messages and had animal excrement thrown at his office. His wife was also verbally threatened by the Director. Despite these incidents, Davao City Police refused to give Mr Cirilo a police escort. He subsequently went into hiding with his wife.
- 819.** On 2 July 2013, Mr Petalcorin was fatally shot three times in the chest as he was leaving his residence at around 8 a.m. to go to the LTFRB office. The police investigation identified the killer as a known gun-for-hire assassin, but he has not been brought to justice. Prior to his murder, Mr Petalcorin had received a number of death threats.
- 820.** To date, the Ombudsman has failed to investigate the case against the Director. The complainants believe that the murders of Mr Rivera and Mr Petalcorin and the threats, pressure and violence against Mr Cirilo and his family are linked to the case against the Director, a public official, and their roles as trade union leaders. The complainants consider these murders to be extrajudicial political killings. A police investigation into the possible involvement of the Director and/or LTFRB in the murder of Mr Petalcorin was opened, but never concluded. The complainants do not accept the Government's finding, via the Davao City Commission on Human Rights, that the murder of Mr Petalcorin was non-political and unconnected to his anti-corruption advocacy, and consider the investigation to be inadequate.
- 821.** On 18 July 2013, Kagi Alimudin Lucman, then then leader of the Cotabato City branch of the NCTU was shot dead by two gunmen on a motorcycle after dropping off his children at school. To date, the perpetrators of this crime have not been identified. The complainants believe that Mr Lucman was assassinated because of his trade union activities.
- 822.** The complainants denounce the Government's failure to guarantee a social climate conducive to the effective exercise of trade union rights as enshrined in Convention No. 87 and the principles of freedom of association. In particular, the complainants refer to: (i) the lack of adequate investigations, prosecutions and independent judicial inquiries into the murders of Emilio Rivera, Antonio Petalcorin and Kagi Alimudin Lucman; (ii) the failure to adequately investigate the physical and non-physical threats against Mr Cirilo and his

family; and (iii) the refusal to give Mr Cirilo a police escort despite two failed assassination attempts and the murders of Emilio Rivera and Antonio Petalcorin in Davao City.

- 823.** The complainants highlight the common understanding that freedom of association is wholly ineffective without the protection of trade unionists' fundamental civil liberties. In their view, it is evident that the leaders were targeted for their trade union activities, including attempts to combat corruption at the LTFRB.
- 824.** The complainants underline that the incidents cited above are by no means isolated events. The ILO's supervisory bodies (including the Committee of Experts on the Application of Conventions and Recommendations and the International Labour Conference Committee on the Application of Standards (CAS)) have been reporting on the Government's failure to protect the civil liberties of trade unionists for many years.
- 825.** In 2007, following numerous reports of extrajudicial killings and harassment of trade unionists, the CAS called on the Government to accept a high-level ILO mission. Despite the Government setting up the Melo Commission to investigate the rising number of extrajudicial killings, the CAS heard in 2009 that the number of trade unionists killed in the Philippines between 2001 and 2008 was 87, including five in the preceding year. The Government only accepted the high-level mission in 2009. Among other things, the mission concluded that the rapid establishment of a high-level tripartite inter-agency monitoring body to investigate extrajudicial killings and violence against trade unionists would constitute an important first step in bringing the relevant partners together to engender a greater common understanding of the issues.
- 826.** In January 2010, the Government announced the formation of the National Tripartite Industrial Peace Council (NTIPC) to act as a high-level monitoring body on the application of international labour standards and, in particular, of Convention No. 87. Regional monitoring bodies were also set up to, among other things, investigate allegations of extrajudicial killings. Furthermore, the Inter-Agency Committee (IAC) on Extrajudicial Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty and Security of Persons was created pursuant to Administrative Order No. 35 (AO 35). It was also announced in 2012 that a national monitoring mechanism was to be set up under the auspices of the Commission on Human Rights (CHR) with a view to monitoring the nation's progress in resolving extrajudicial killings.
- 827.** Despite the Government's laudable efforts to combat violence against trade unionists, the complainants regret that no judicial or non-judicial measures have been initiated following the murders of Mr Rivera, Mr Petalcorin, and Mr Lucman and the murder attempts and threats against Mr Cirilo. In October 2015, in its latest comments on Case No. 2528, the Government stated that the IAC had already finished the evaluation of all reported cases of extrajudicial killings of trade union leaders and members. It is unclear whether these comments refer solely to extrajudicial killings mentioned in that case.
- 828.** In conclusion, the complainants believe that the Government's failure to conduct independent judicial inquiries into the killings of Mr Rivera, Mr Petalcorin and Mr Lucman and the murder attempts and threats against Mr Cirilo has created a culture of impunity, which reinforces the climate of violence and insecurity and has a damaging effect on the exercise of trade union rights.

B. The Government's reply

- 829.** In its communications dated 28 October 2015 and 31 May, 29 June and 17 October 2016, the Government refers at the outset to the efforts made to ensure the expeditious investigation, prosecution and resolution of pending cases concerning alleged harassment

and assassination of labour leaders and trade union activists. The National Tripartite Industrial Peace Council – Monitoring Body (NTIPC–MB) has built a comprehensive inventory of 65 cases of extrajudicial killings and attempted murder of trade union leaders and members with identified future actions to ensure investigation, prosecution and conviction. The NTIPC–MB has issued resolutions to facilitate movement on cases of extrajudicial killings, harassment and abductions involving trade union leaders/members. Of the 65 cases, 50 occurred from 2001 to June 2010 under the Arroyo administration and 15 under the Aquino administration (including Emilio Rivera, Antonio Petalcorin, and Kagi Alimudin Lucman).

- 830.** Based on the NTIPC–MB initial evaluation, 28 cases are possibly labour-related, while 29 are possibly not labour-related. NTIPC–MB has recommended closure or dropping 18 of the 65 cases. On the other hand, four cases endorsed by the NTIPC–MB to the Supreme Court for expeditious resolution have been resolved by the trial courts, two of which have resulted in convictions. NTIPC–MB endorsed nine cases to the Department of Justice (DOJ) for possible reinvestigation. Out of this number, two were with recommendation for closure as the cases were dismissed by the court with finality. The DOJ ordered the reinvestigation and resolution of seven cases filed before the Prosecutors Office, but no new developments or progress have been reported to date.
- 831.** To expedite the investigation and prosecution of cases of alleged extrajudicial killings, the Government has re-established and strengthened inter-agency coordination by introducing two major initiatives: (i) the creation of the IAC; and (ii) the cooperation and coordination between prosecutors and law enforcement investigators.
- 832.** Firstly, as to the IAC, it was created on 22 November 2014 through AO 35 and mandated to investigate old and new cases of extrajudicial killings, enforced disappearances, torture and other grave human rights violations. Among others, the IAC is tasked to: inventory all cases of extrajudicial killings, enforced disappearances, torture and other grave violations of the right to life, liberty and security of persons, perpetrated by State and non-State forces alike, from all sources (Government and non-government); and prioritize for action unsolved cases and assign special investigation teams to conduct further investigations for possible identification of perpetrators.
- 833.** The Operational Guidelines of AO 35 expand the traditional meaning of extrajudicial killings. The IAC does not only focus on the killing of political activists but increased the scope of protection to include advocates or those perceived to be involved in an advocacy. AO 35 provides redress to cases of the killing of labour leaders and labour advocates (and even those mistaken to be so) through investigation by composite teams as well as the supervisory and monitoring processes of the various special oversight teams, and, ultimately, the plenary powers of the high-level IAC itself. The NTIPC–MB, together with its regional counterparts, is recognized as the source of information on incidents and circumstances surrounding killings of trade union leaders or members. Thus, the social partners, particularly the labour sector, were invited to take advantage of the mechanisms of the IAC and to actively participate in the investigation of cases. They were given seats in the meetings of the IAC as observers or possible sources of information on labour-related cases. The Office of the Ombudsman and the CHR participate in the IAC as independent observers.
- 834.** The NTIPC–MB has brought before the IAC all of the 65 cases of extrajudicial killings, 11 cases of abduction and 12 cases of harassment. The IAC has focused on the 65 cases of extrajudicial killings of which 11 have been identified as genuine extrajudicial killings covered by AO 35 based on the above criteria. These cases were assigned to the different IAC structures (special investigation teams; special investigation team for unsolved cases; special oversight team) and, to date, three have been recommended by the IAC for closure due to lack of material evidence or leads which could have been useful for filing said cases

in court. Progress in the investigation of the 11 AO 35 cases is hindered by lack of material witnesses or non-cooperation of victims' families and relatives.

- 835.** The 54 cases not covered by AO 35 are handled and investigated through the regular process of criminal investigation and prosecution. According to the DOJ, the reasons for the exclusion from AO 35 include: (i) insufficiency of evidence which triggers referral of the case to agencies like the Philippine National Police (PNP), the National Bureau of Investigation (NBI) and the CHR for further investigation subject to a second review by the technical working group; and (ii) absence of all the elements of extrajudicial killings as provided in the AO 35 Operational Guidelines. The non-AO 35 cases include those of Antonio “Dodong” Petalcorin, Emilio Rivera and Kagi Alimudin Lucman.
- 836.** Secondly, as to the closer cooperation and coordination between prosecutors and law enforcement investigators, Joint Department Order No. 003-2012 (Operational Guidelines for Prosecutors and Law Enforcement Investigators in Evidence-Gathering; Investigation and Case Build-Up; Inquest and Preliminary Investigation; and Trial of Cases of Political-Activist and Media Killings) was signed by the DOJ and the Department of Interior and Local Government (DILG) on 5 November 2012 to ensure cooperation of prosecutors and law enforcement investigators in the investigation, case build-up, inquest, and preliminary investigation and trial of cases. Under the said Guidelines, prosecutors and law enforcement investigators shall work together as early as case build-up and evidence gathering after an incident has been assessed to be a possible political activist or media killing. A group of prosecutors and law enforcement investigators shall be convened to identify the witnesses, assist in the preparation of their affidavits and evaluate the Scene of the Crime Report and other physical or object evidence necessary in the filing of the case. After the termination of the investigation, the same group shall be responsible for the filing of the case/complaint before the prosecution office concerned. After which, the group will continue to convene for the purpose of evaluating and gathering additional evidence necessary to further strengthen the case. The Joint Guidelines run parallel to the efforts of the AO 35, not only to come up with a credible list of human rights violations, but, more importantly, to ensure the successful prosecution of such cases.
- 837.** Aside from re-establishing and strengthening inter-agency coordination, the Government is also working towards the strengthening of the operational capability of the PNP and the Armed Forces of the Philippines (AFP) to foster an enabling environment for the enjoyment of constitutionally guaranteed civil liberties and trade union rights. This is done through undertakings such as the revision or formulation of guidelines or manuals (Joint DOLE–PNP–PEZA Guidelines in the Conduct of PNP Personnel, Economic Zone Police and Security Guards, Company Security Guards and Similar Personnel During Labour Disputes of 23 May 2011; and Guidelines on the Conduct of the DOLE, DILG, DND, DOJ, AFP and PNP Relative to the Exercise of Workers’ Rights and Activities of 7 May 2012), conduct of capability-building activities, infrastructure developments and distribution of advocacy materials. The Philippines–European Union technical cooperation programmes on the protection and promotion of human rights, which has resulted in significant improvement in closing the gap between investigation and prosecution, is one of those undertakings.
- 838.** The Government admits that, despite the two major initiatives to strengthen inter-agency coordination, the prospects of the reopening or reinvestigation of old cases are not too positive, given the limited capacity concerning forensic evidence and the reliance on witnesses or testimonial evidence. It indicates continuing hurdles regarding desistance or disinterest of the victims or their families to pursue the case. Thus, of the 65 cases of killings, only 12 were filed in court with nine of the cases with resolution (seven of which occurred during the Aquino administration) and three pending resolution.

- 839.** Specific to the 15 cases of alleged extrajudicial killings and attempted murder under the Aquino administration, two were considered extrajudicial killings cases as covered by AO 35. The NTIPC–MB considered two cases as possibly not labour-related and five as possibly labour-related. Eight are not covered by any NTIPC–MB resolution and the PNP Directorate for Investigation and Detective Management (PNP–DIDM) recommended to close two cases and to treat six cases as regular PNP cases considering that the circumstances of the same could not establish a direct link to infringement of the exercise of freedom of association and the right to organize.
- 840.** Most recently, the Government reports the adoption on 25 May 2016 of TIPC Resolution No. 1, s. 2016, “Calling the Strengthening of the NTIPC Monitoring Body through the Creation of Fully-funded, Independent and Capacitated Case-based Tripartite Validating Teams for Cases of Extrajudicial Killing, Enforced Disappearance, Torture, Harassment, and Other Grave Violations Committed against Trade Unionists Needing Independent Validation or Review”. This Resolution is anchored on instances when specific cases require further validation and review of gathered information for it to serve as significant support to case build-up and resolution. The Tripartite Validating Teams shall gather and/or verify information with the following: union or organization to which the alleged victim is affiliated; victim's family and/or relatives; company/management involved in the case or complaint; investigative and prosecutorial arms of the government; local government units; and other concerned agencies such as the SC, CA, DOJ, NBI, PNP, CHR, DILG, including the military when needed. There shall be a separate NTIPC-MB Tripartite Validating Team for each of the identified ILO Cases. Each team – composed of one representative from the DOLE, one representative from the labour sector, and one representative from the employers sector – shall undertake independent validation of specific reported cases of grave violations committed against trade unionists. It shall review reports submitted by the RTMBs and evaluate the sufficiency of information provided therein, and identify what further information is needed to substantiate the case or complaint. The DOLE approved a budget allocation in support of the functioning of the Tripartite Validating Teams for the present year. The fund shall cover expenses for the conduct of case conferences, field validation and report consolidation relative to ILO Cases including Case No. 3185.

Comments on specific allegations

- 841.** The Government indicates that the cases of Antonio “Dodong” Petalcorin, Emilio Rivera and Kagi Alimudin Lucman were first brought to the attention of the Department of Labor and Employment (DOLE) through a press statement released by the NCTU and the Alliance of Progressive Labor (APL), together with its affiliates and allied organizations, in 2013. The DOLE then tasked the concerned regional tripartite monitoring bodies (RTMBs) to gather relevant information on the aforementioned cases. The RTMBs have submitted their report and the NTIPC–MB will evaluate the same for actions to be taken. The cases were likewise brought to the attention of the CHR, the PNP and the DOJ, which spearheads the IAC.
- 842.** With regard to the case of Mr Petalcorin, initial information gathered by RTMB Region XI showed that the victim was the President of the NETO, an affiliate of NCTU–APL. A lone gunman killed him on 2 July 2013. Reportedly, Mr Petalcorin had been receiving threatening messages from an alias “Toto” and an alias “Go”. According to the lawyer of the transport groups, the victim attended, prior to the incident, a meeting with other transport leaders where he informed the participants of his disappointment on their franchise application. Information gathered from the PNP in March 2014 disclosed that the victim filed a case for violation of the Anti-Graft and Corruption Practices Act against LTFRB Director Benjamin Go, Carlos “Toto” Cirilo and Annie Cirilo before the Office of the Ombudsman Mindanao docketed under OMB-M-C-13-0045. He also filed an administrative case against Director Go for grave misconduct docketed under OMB-M-A-13-0029.

- 843.** The Government indicates that the information gathered by the CHR and the PNP created doubt as to whether the Petalcorin case would qualify as extrajudicial killings or possibly labour-related. Owing to its sensitivity, the information is being withheld until the NTIPC–MB shall issue its resolution on this case. One of the leads looked into by the PNP was Petalcorin’s alleged receipt of a large sum of money from Public Utility Jeepney (PUJ) Operators of COMVAL Province to facilitate their franchise processes but the same proved futile, since, allegedly, the operators did not know that Petalcorin was already blacklisted by the LTFRB of Region XI to process registration. The Government also states that Rogelio Villafuerte Capistrano III, a witness who is currently detained for murder, has implicated Mr Jay Gascon as the gunman. The suspect is yet to be charged. Despite efforts to convince Mr Petalcorin’s wife and other immediate family members, they still refuse to file a case against the suspect.
- 844.** With regard to the case of Mr Rivera, information received from PNP revealed that both parties (victim and suspect) were fixers of LTFRB. The victim was once a transport leader of MEDTRANSCO but was replaced for neglect of duty/failure to attend General Assembly for 3 consecutive times which is a violation of their by-laws. Reportedly, the victim was known to have many illicit transactions regarding LTFRB franchising. A case for murder was filed against Ricardo Lopez at the City Prosecutor’s Office in Davao City on 30 January 2014. Another case of murder was filed against two suspects, Rey Lauron and Baltazar Mantica, on the same date. However, the murder case filed against Lauron and Mantica, as well as the case for violation of sections 11 and 12 of Act No. 9165 filed against Lopez, were dismissed for lack of probable cause. Nevertheless, Lopez was indicted in another murder case, with docket number CC No. 74-993-13-13, and an alias warrant was issued against him.
- 845.** With regard to the case of Mr Lucman, information received from the PNP in October 2014 states that dialogue with the victim’s family and a possible witness was initiated to obtain updates/information that might be helpful in the investigation but the same remained futile. Reportedly, they migrated to an undisclosed place. Follow-up investigation disclosed that the wife of the victim is in Riyadh, Saudi Arabia, while another victim and a possible witness, Mohmaden Ayunan Aloy, cannot be located.
- 846.** The Government indicates that the three cases were not considered as extrajudicial killings cases based on the AO 35 Operational Guidelines (non-AO 35 cases). The labour sector requested the re-evaluation of the cases of Mr Petalcorin and Mr Lucman. However, the NBI, the PNP and the CHR, which are all part of the IAC’s Technical Working Group, submitted their respective verifications and affirmed that the case of Mr Petalcorin was not an incident of extrajudicial killings based on the A035 Operational Guidelines, while the case of Mr Lucman has been submitted for another tripartite verification. The three cases are handled and investigated through the regular process of criminal investigation and prosecution. Considering their exclusion from the IAC, the RTMB Region XI in Davao City was tasked to gather additional information on these three cases for possible second review by the IAC to benefit from the supervisory and monitoring processes of its special oversight team, and, ultimately, the plenary powers of the high-level IAC itself.
- 847.** As to the alleged physical and non-physical threats against Mr Cirilo and his family, this was not presented to the NTIPC–MB nor to the DOLE. Hence, the RTMB concerned is still in the process of gathering information on the same. However, it has been observed that Mr Cirilo was one of the respondents in the anti-graft and corruption case filed by Mr Petalcorin before the Office of the Ombudsman Mindanao, which was docketed as OMB-M-C-13-0045. Additional updates will be provided as soon as available.

The Committee's conclusions

- 848.** *The Committee notes that, in the present case, the complainants allege the extrajudicial killings of three trade union leaders and denounce the failure of the Government to adequately investigate these cases and bring the perpetrators to justice. The complainants further allege the use of threats and murder attempts against a fourth trade union leader and his family, who have been forced into hiding, and denounces the Government's failure to adequately investigate this case and protect the victims. The failure to investigate and prosecute in these cases would have reinforced the climate of impunity, violence and insecurity with its damaging effect on the exercise of trade union rights.*
- 849.** *The Committee notes that the Government recalls the various efforts made, as also acknowledged by the complainants, to ensure the expeditious investigation, prosecution and resolution of pending cases concerning alleged harassment and assassination of trade unionists: (i) the creation of a high-level tripartite monitoring committee within the ambit of the NTIPC, the NTIPC-MB, which has built a comprehensive inventory of 65 cases of extrajudicial killings and attempted murder of trade union leaders and members with identified future actions, and has issued several resolutions to facilitate movement on those cases (evaluation of 28 cases as possibly labour-related and 29 as possibly not labour-related); (ii) the creation in 2014 of the IAC through AO 35, tasked to inventory, prioritize and investigate old and new cases of extrajudicial killings, enforced disappearances, torture and other grave human rights violations (the NTIPC-MB, together with its regional counterparts, is recognized as the source of information, and the social partners were invited to actively participate in the investigation of cases as observers or possible sources of information on labour-related cases); (iii) the cooperation and coordination between prosecutors and law enforcement investigators; (iv) the strengthening of the operational capability of the PNP and the AFP to foster an enabling environment for the enjoyment of constitutionally guaranteed civil liberties and trade union rights through the revision or formulation of guidelines or manuals, conduct of capability-building activities, distribution of advocacy materials, etc.; and (v) most recently, the adoption on 25 May 2016 of TIPC Resolution No. 1, s. 2016, setting up independent and capacitated case-based NTIPC-MB Tripartite Validating Teams (1 DOLE representative, 1 representative from the labour sector and 1 representative from the employers sector) for cases of extrajudicial killing, enforced disappearance, torture, harassment, and other grave violations committed against trade unionists, which require further validation or review of gathered information for it to serve as significant support to case build-up and resolution; the DOLE approved for the present year a budget allocation in support of the functioning of the Tripartite Validating Teams, one for each of the identified ILO Cases. As it also did in the framework of the examination of Case No. 2528, the Committee notes the measures taken by the Government and requests the Government to continue to keep it informed of steps taken and envisaged to ensure a climate of justice and security for trade unionists in the Philippines, and, more specifically, to provide information relating to the establishment of the Tripartite Validating Team for the present case, its functioning and the outcome of its work.*
- 850.** *The Committee further notes the complainants' specific allegations according to which: (i) on 28 November 2012, three leaders of transport sector trade unions in Davao City, namely Antonio Petalcorin, Emilio Rivera and Carlos Cirilo, filed a complaint with the Office of the Ombudsman for corruption (taking of bribes for franchise approvals) against the Director of a public authority, the LTFRB, under the direct control of the Department of Transportation and Communications; (ii) on 25 January 2013, Mr Rivera was killed near the LTFRB office, a captured suspect was later released, and no proper police investigation has been conducted to date; (iii) after a number of threatening SMS messages and verbal threats by the LTFRB Director between November 2012 and May 2013, a hand grenade with removed safety pin was discovered at the property of Mr Cirilo on 21 April and on 21 May 2013, respectively; however, police refused to provide a police escort, so that Mr Cirilo*

subsequently went into hiding; (iv) following a number of death threats, Mr Petalcorin was shot on 2 July 2013 on his way to the LTFRB office, a police investigation identified the killer as a known gun-for-hire assassin without bringing him to justice, and another police investigation into the possible involvement of the LTFRB or its Director was opened but never concluded; (v) to date, the Ombudsman has failed to investigate the case against the LTFRB Director; and (vi) on 18 July 2013, Kagi Alimudin Lucman, a NCTU union official, was shot by two gunmen, and, to date, the perpetrators of the crime have not been identified. The Committee notes that the complainants, recalling that the above incidents are not isolated events and that the Government's failure to protect the civil liberties of trade unionists has been the subject of comments by the ILO supervisory bodies for many years, denounce: (i) the lack of adequate investigations, prosecutions and independent judicial inquiries into the murders of Emilio Rivera, Antonio Petalcorin and Kagi Alimudin Lucman; and (ii) the failure to adequately investigate the threats against Mr Cirilo and his family as well as the refusal to give him a police escort despite two failed assassination attempts and the aforementioned murders. The Committee notes the complainants' view that: (i) all trade union leaders were targeted for their trade union activities; (ii) the murders of Mr Rivera and Mr Petalcorin, which amount to extrajudicial political killings, and the threats, pressure and violence against Mr Cirilo and his family are linked to the corruption case against the LTFRB; and (iii) the investigation as well as the Government's finding, via the Davao City CHR, that the murder of Mr Petalcorin was non-political and unconnected to his anti-corruption advocacy, are inadequate.

- 851.** *The Committee notes the Government's additional indications that: (i) the three murder cases were brought to the attention of the DOLE in 2013, which tasked the RTMBs concerned to gather relevant information, and a report was submitted by the RTMBs to the NTIPC-MB for evaluation of actions to be taken; (ii) the cases were also brought to the attention of the CHR, the PNP and the DOJ, which spearheads the IAC; (iii) regarding the case of Mr Petalcorin, information gathered by the RTMB Region XI and the PNP showed that he had been receiving threatening messages from an alias "Toto" and an alias "Go"; prior to the incident the victim attended a meeting with other transport leaders and expressed his disappointment on their franchise application; the victim had filed a case for violation of the Anti-Graft and Corruption Practices Act against LTFRB Director Benjamin Go, Carlos "Toto" Cirilo and Annie Cirilo before the Office of the Ombudsman, as well as a case for grave misconduct against the Director; information gathered by the CHR and the PNP, which is being withheld until the issuance of the NTIPC-MB resolution, created doubt as to whether the case will qualify as extrajudicial killings or possibly labour-related; one lead of the PNP was that the victim allegedly received a large sum of money from certain operators to facilitate their franchise processes while being blacklisted by LTFRB to process registration; and the suspected gunman, implicated by a witness, is yet to be charged, but Mr Petalcorin's wife and other immediate family members refuse to file the murder case against him; (iv) regarding the case of Mr Rivera, who was replaced as a transport leader for neglect of duty and purportedly known for many illicit transactions on LTFRB franchising, a case for murder was filed on 30 January 2014 at the City Prosecutor's Office in Davao City against one suspect; another case of murder was filed against two other suspects and subsequently the case against these two and the initial suspect were dismissed for lack of probable cause, although an arrest warrant has been issued against the first suspect for a subsequent indictment in another murder case; (v) regarding the case of Mr Lucman, according to information from the PNP, dialogue with the victim's family and a possible witness was initiated to obtain information that might be helpful in the investigation but remained futile as they reportedly migrated to an undisclosed place (follow-up investigation disclosed that his wife is in Saudi Arabia while another victim and possible witness cannot be located); and (vi) regarding the case of Mr Cirilo, the alleged threats were neither presented to the NTIPC-MB nor to the DOLE; the RTMB concerned is still in the process of gathering information; Mr Cirilo was one of the respondents in the anti-graft*

and corruption case filed by Mr Petalcorin before the Office of the Ombudsman; and additional updates will be provided as soon as available.

- 852.** Recalling that in the framework of Case No. 2528, it has already examined similar allegations of, among other things, the extrajudicial killings of 64 trade unionists, the Committee is bound to note with regret the gravity of the allegations made in this case involving the murders of three trade union leaders and two murder attempts and threats against a fourth trade unionist. In this respect, the Committee must reiterate 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**, fifth (revised) edition, 2006, para. 43]. The Committee must also 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].
- 853.** The Committee notes that under the Operational Guidelines of AO 35, extrajudicial killings are those cases where: (i) the victim was either a member of, or affiliated with, an organization, to include political, environmental, agrarian, labour or similar causes; or an advocate of the above-named causes; or a media practitioner; or person(s) apparently mistaken or identified to be so; (ii) the victim was targeted and killed because of the actual or perceived membership, advocacy or profession; (iii) the person(s) responsible for the killing is a state agent or non-state agent; and (iv) the method and circumstances of attack reveal a deliberate intent to kill. For purposes of the focused mandate of AO 35, killings related to common criminals and/or the perpetration of their crimes shall be addressed by other appropriate mechanisms within the justice system. The Committee observes that: (i) out of the 65 cases of extrajudicial killings brought before the IAC by the NTIPC–MB, only 11 have been identified as genuine extrajudicial killings covered by AO 35 based on the above criteria and are being investigated by the IAC; (ii) the 54 cases not covered by AO 35, including the cases of Antonio “Dodong” Petalcorin, Emilio Rivera and Kagi Alimudin Lucman, are handled and investigated through the regular process of criminal investigation and prosecution (referral to agencies like the PNP, the NBI and the CHR for further investigation subject to a second review by the technical working group); and (iii) the re-evaluation of the cases of Mr Petalcorin and Mr Lucman requested by the labour sector resulted in: the affirmation by the PNP, the NBI and the CHR that the case of Mr Petalcorin is not an AO 35 case and the resubmission of the case of Mr Lucman for tripartite verification.
- 854.** Regarding the fact that the vast majority of extrajudicial killings before the IAC (including the three murders under examination) were found not to meet the criteria of AO 35, the Committee notes that according to the DOJ, the reasons for the exclusion from AO 35 include insufficiency of evidence and absence of the elements of extrajudicial killings as provided in the AO 35 Operational Guidelines. The Committee observes that, with regard to the above murder cases, in view of the facts presented by the complainants and the Government, most of the AO 35 criteria would appear to be manifestly met, with the exception of the question as to whether the victims were targeted and killed because of the actual or perceived membership, advocacy or profession. Observing that, on one hand, the murder of at least one trade unionist (only Mr Petalcorin according to the Government; Mr Petalcorin and Mr Rivera according to the complainants) occurred against the background of filing a corruption complaint against management which could point to a link of the crime(s) with the exercise of legitimate trade union activities, while on the other hand information gathered by the CHR and the PNP has led to doubts as to the labour-relatedness or extrajudicial nature of one killing, the Committee is of the opinion that the ultimate determination of the motivation for the killing can only be made by a court of law, whereas

the threshold for setting out a possible motive related to the deceased's activism should not require more than a prima facie linking. In the absence of evidence precluding any connection of the crime with the exercise of trade union activities, membership or office, and, to the contrary, in the specific context of the exercise of a legitimate trade union activity such as the filing of a complaint, the Committee considers that the killings of trade union leaders should be able to benefit from the resources and powers of the high-level IAC (composite investigation teams and supervisory and monitoring processes of the special oversight team) in order to ensure effective steps to combat impunity. Welcoming that the RTMB Region XI in Davao City was tasked to gather additional information on the three cases for the second review by the IAC, the Committee trusts that the IAC technical working group will be made aware of the Committee's conclusions and requests the Government to keep it informed: (i) on the outcome of the second IAC review and, in case of a definitive exclusion from AO 35, on the precise reasons therefore; (ii) on the resolutions issued by the NTIPC concerning the three cases; and (iii) on the result of the tripartite verification of the case of Mr Lucman.

855. *Furthermore, the Committee observes with regret that, despite the time that has elapsed since the occurrence of the alleged crimes (more than three to three-and-a-half years), none of the cases has been resolved by bringing to justice and convicting the perpetrators. In particular, the Committee notes that, in the murder case of Mr Petalcorin, one suspect is yet to be charged but Mr Petalcorin's wife and other immediate family members refuse to file the murder case; that in the murder case of Mr Rivera, the three suspects were released for lack of probable cause; and that in the murder case of Mr Lucman, his family and a possible witness could not be contacted to help in the investigation. The Committee also takes due note that the Government generally admits that progress in investigation is hindered by lack of material witnesses or non-cooperation of victims' families and relatives or their desistance or disinterest to pursue the case, given the limited capacity concerning forensic evidence and the reliance of the system on witnesses or testimonial evidence. The Committee emphasizes that killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest**, op. cit., para. 48]. The Committee must reiterate that such crimes, due to their seriousness, should be investigated and, where evidence (not necessarily in the form of witnesses) exists, prosecuted ex officio without delay, i.e. regardless of desistance or disinterest of the parties to pursue the case and even in the absence of a formal criminal complaint being lodged by a victim or an injured party [see Case No. 2528, 364th Report, para. 949]. The Committee stresses once again that the absence of judgments against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest**, op. cit., para. 52]. The Committee expects the Government to take all necessary measures so as to ensure that the investigation and judicial examination of the above acts of extrajudicial killings advance successfully and without delay so as to identify, bring to trial, punish and convict the guilty parties so as to prevent the repetition of such acts. It requests the Government to keep it informed in this respect.*

856. *With regard to the alleged failure to provide police escort to Mr Cirilo despite two murder attempts and threats against him, the Committee recalls that facts imputable to individuals bring into play the State's responsibility owing to the State's obligation to prevent violations of human rights. Consequently, governments should endeavour to meet their obligations regarding the respect of individual rights and freedoms, as well as their obligation to guarantee the right to life of trade unionists [see **Digest**, op. cit., para. 47]. The Committee requests the Government to ensure the respect of this principle in the future.*

857. *Observing that there are divergent views from the petitioners and respondents in the corruption complaint filed against the LTFRB Director and noting that the investigation is still in its early stages (information gathering), the Committee requests the Government and the complainants to provide any additional information at their disposal in this regard, and hopes that the Government will take measures to speed up the investigation and judicial inquiry of this case and keep it informed in this regard.*

The Committee's recommendations

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

- (a) Noting the multiple efforts made by the Government in recent years to combat impunity, the Committee requests the Government to continue to keep it informed of steps taken and envisaged to ensure a climate of justice and security for trade unionists in the Philippines, and, more specifically, to provide information relating to the establishment of the Tripartite Validating Team for the present case, its functioning and the outcome of its work.*
- (b) Welcoming that the RTMB Region XI in Davao City was tasked to gather additional information, for a second review by the IAC, on the murders of the three trade union leaders Antonio “Dodong” Petalcorin, Emilio Rivera and Kagi Alimudin Lucman, the Committee trusts that its examination of this case will be made available to the IAC technical working group and requests the Government to keep it informed: (i) on the outcome of the second IAC review and, in case of a definitive exclusion from AO 35, on the precise reasons therefore; (ii) on the resolutions issued by the NTIPC concerning the three extrajudicial killings; and (iii) on the result of the tripartite verification of the murder of Mr Lucman.*
- (c) The Committee expects the Government to take all necessary measures so as to ensure that, regardless of the cooperation of the victims’ relatives, the investigation and judicial examination of the above acts of extrajudicial killings advance successfully and without delay so as to identify, bring to trial, punish and convict the guilty parties so as to prevent the repetition of such acts. It requests the Government to keep it informed in this respect.*
- (d) With regard to the murder attempts and threats against the trade union leader Carlos Cirilo, the Committee invites the Government and the complainants to provide any additional information at their disposal. The Committee requests the Government to ensure in future the respect of the principle enunciated in its conclusions and hopes that the Government will take measures to speed up the investigation and judicial inquiry of this case and keep it informed in this regard.*
- (e) The Committee draws the special attention of the Governing Body to the serious and urgent nature of the matters dealt with in this case.*

CASE NO. 3182

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

**Complaint against the Government of Romania
presented by
the Federation of Free Trade Unions of the Chemical
and Petrochemical Industries (FSLCP)**

Allegations: Anti-union dismissal by Chimica SA of Mr Martin Nicolae, the president of the Free Trade Union Plator Orastie, accompanied by the subsequent denial of his access to the premises and further anti-union action; suspension and denial of access of two union leaders before a strike at Chimica Automotive SA; and anti-union action against the Free Trade Union "Oltchim" Rimnicu Vilcea by the company Oltchim SA Rimnicu Vilcea accompanied by the promotion of new enterprise unions

- 859.** The complaint is contained in communications from the Federation of Free Trade Unions of the Chemical and Petrochemical Industries (FSLCP) dated 31 July, 15 September and 16 December 2015 and 4 April 2016.
- 860.** The Government forwarded its response to the allegations in communications dated 15 October 2015 and 4 July 2016.
- 861.** Romania has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

- 862.** In its communications dated 31 July, 15 September and 16 December 2015 and 4 April 2016, the complainant organization, FSLCP, an industrial workers' association with more than 11,000 members legally set up and representative at the branch level in Romania, presents this complaint, based on the general mandate of union representation but also on the explicit mandates received from the Free Trade Union "Plator" Orastie (Hunedoara county, Romania) and the Free Trade Union "Oltchim" Rimnicu Vilcea.
- 863.** The complainant denounces the flagrant violation of Articles 3(1), 4 and 8(1) of Convention No. 87 ratified by Romania in 1958 and Article 1 of Convention No. 135 ratified by Romania in 1975, international treaties which, according to article 11(2) of the Romanian Constitution, become through their ratification an integral part of the Romanian system of law and should be enforced as such. By virtue of article 20(2) of the Romanian Constitution, these norms prevail over the internal law. The complainant also criticizes the violation of trade union rights protected in the Romanian legislation (sections 7, 9, 10(1) and 40 of Act No. 62 of 2011 on Social Dialogue).

- 864.** In particular, the complainant alleges that Mr Martin Nicolae, the leader of a trade union at Chimica SA (hereinafter: the mother company or the industrial platform), the Free Trade Union “Plastor” Orastie, was dismissed based intrinsically on his trade union activity, in violation of section 10(1) of the Social Dialogue Act as well as other provisions mentioned above. In the first instance, the court decided that Mr Martin should be reinstated. However, the Constitutional Court issued a mandatory decision on 24 November 2015 that section 60(1)(g) of the Labour Code, upon which the reinstatement claim was based, is unconstitutional. This judgment led to the impossibility of restoring justice in court.
- 865.** In this context, the complainant draws attention to the fact that, while the Government deals with the enterprises from the industrial platform as distinct units, those enterprises have the same major shareholder and they have been detached from the mother company through various processes of reorganization. Thus, the complainant acknowledges that, while Mr Martin Nicolae has been dismissed under the same conditions as 12 other employees, all those employees have been offered jobs in the other enterprises of the industrial platform.
- 866.** Moreover, the complainant alleges that, in spite of the fact that Mr Martin still legally exerts the mandate as the president of the trade union, he is not permitted to enter the premises of the factory where the union has its legal residence, the archive and the records of the trade union and where, according to the trade union statute and its own regulations, the daily activity of the trade union should take place. As a result, the leader of the trade union cannot fulfil his duties at the place where the trade union is legally functioning, has got representative status and has got ongoing collective labour agreements which it is entitled to monitor. Highlighting that freedom of association and private property are constitutional rights that should be on an equal footing, the complainant questions the absence of intervention of the competent authorities to protect the right of the union leader to access the premises of the workers’ organization. The Hunedoara County Labour Inspection penalized the mother company by issuing a “warning” for the restriction of union rights through the denial of access of the union president to the union premises, as emerges from its communication No. 6564/155 1/SCRM/21.07.2015; however, many months have passed since then, and although the situation remained unchanged, no harsher measure has been imposed.
- 867.** The complainant organization denounces that the leader of a representative trade union according to section 51(C) of the Social Dialogue Act, which is legally functioning and has got patrimonial and organizational independence within a company, was illegally fired and has been denied access to the premises of the representative trade union, whereas the state authorities, while admitting that this is an unlawful situation, state that they cannot do anything to remedy it.
- 868.** Furthermore, the complainant alleges that, subsequently, the mother company has continued its actions directed against the Free Trade Union “Plastor” Orastie by displaying in an ostentatious manner communiques discrediting the trade union, and that the employer filed, on 25 August 2015, a motion with the court requesting the dissolution of the union and evacuation of its headquarters, in contravention of the Convention and national law.
- 869.** The complainant also alleges, with regard to the union activity carried out by the other union leaders of the enterprises from the industrial platform, that at Chimica Automotive SA (hereinafter: one of the enterprises from the industrial platform), one day before the beginning of a legally announced strike on 23 September 2015, two union leaders had their work contracts suspended and were no longer allowed access to the premises. In accordance with sections 193 and 197 of the Social Dialogue Act, the organizers of a strike must continue negotiations with the management and have the obligation to protect the assets of the company, being liable to any damage caused by the participants during the strike. These obligations became however impossible to meet under the circumstances. The complainant

adds that, at its request for intervention, the Hunedoara Labour Inspection did not consider the above actions as an abuse and did not impose any penalty on the enterprise. The strike had to be cancelled.

- 870.** Lastly, at Oltchim SA Rimnicu Vilcea (hereinafter: the company), in bankruptcy procedure since 2012, the judicial administrators, the de facto management of the company, have been continually displaying discrediting communiques against the Trade Union “Oltchim”, then representative union and signatory of the collective labour agreement at the company level, promoting and encouraging the creation of new enterprise unions with a view to achieve the fragmentation of the union movement, contrary to Romanian law and international norms and practices. As a result, from one single, representative union at the company level, there are presently four non-representative unions in the company, and the management used to display monthly, ostentatiously, a table with the number of members of each union. In the summer of 2015, the management forced elections on the Trade Union “Oltchim”, which led to a change in union leadership, with the new leaders having a conspicuous closeness to management. Following the election process and the dismissal of approximately 900 employees of the union, the Trade Union “Oltchim” has less and less members. The fragmentation of the union movement at the company is not beneficial to the employees, as the company is in insolvency and could any time go into bankruptcy.
- 871.** In conclusion, the complainant states that, at the industrial platform and the company mentioned above, the rule is that the employer systematically seeks the destruction of the unions that are legally functioning in the enterprise; and that, although the Social Dialogue Department within the Ministry of Labour has been notified of the abovementioned issues, the Government, instead of initiating a dialogue to defuse potential conflicts, has done nothing to remedy an increasingly explosive situation and avoid the recurrence of such situations in the future. The complainant regrets that, to the contrary, the Government has not responded to any of its attempts to dialogue with the relevant authorities, as a punitive measure for appealing to the ILO.

B. The Government's reply

- 872.** In its communications dated 15 October 2015 and 4 July 2016, the Government expresses the view that the ILO freedom of association complaint procedure is based on the principles of freedom of communication, which induces responsibility of action and the minimum proof of evidence, and the subject of the complaint concerning the practical application of trade union rights and freedoms guaranteed by Conventions, within the competency of the Committee on Freedom of Association. However, the complaint does not refer to the initiation of coherent approaches in solving the issues in the national context, such as the jurisdiction of the courts in the settlement of individual labour conflicts and conflicts of rights, including contesting decisions of labour inspection. The alleged violations of Convention No. 87 are not thoroughly grounded, and some statements are speculative or political.
- 873.** Moreover, the Government states that the institution responsible for social dialogue has no competence to pronounce itself on the duty to monitor compliance with legislation or the legality of decisions taken in this context or on the resolution of individual labour disputes. Also, the solution of this case goes beyond the competences of the executive authority and rather lies in the discretion of the court, in accordance with national legislation. Freedom of association and private property are fundamental constitutional rights, and the separation of powers limits any state actions or interventions in this case.
- 874.** In light of the regulations in the field of social dialogue, the Government specifies that the legal actions and remedies available in case of violation of legal provisions and the modalities to solve individual labour disputes are stipulated in the labour and social dialogue

legislation. Thus, in accordance with sections 210 and 211 of the Social Dialogue Act, the competence for the resolution of individual labour disputes concerning the conclusion, execution, modification, suspension or termination of individual contracts of employment lies with the courts. The labour courts provide for protective measures for conflict resolution such as statutory limitation periods, tax exemption and summary proceedings (sections 266–275 of the Labour Code, in conjunction with sections 208–216 of the Social Dialogue Act and the Civil Procedure Code). Similarly, the individual labour disputes concerning termination of the individual employment contract may be the subject of independent mediation, under Act No. 192 of 2006 on mediation (section 60(1)(e)), regardless of the stage of the conflict.

875. Moreover, Convention No. 87 guarantees are transposed into national legislation in the field of labour relations and social dialogue, referring, on the one hand, to the individual rights of employees to form or affiliate to trade unions of their choice and the principle of non-discrimination (Labour Code and section 3 of the Social Dialogue Act), and, on the other hand, the rights of organizations freely constituted to association and affiliation, independent organization, free election of representatives and establishing action programmes through their own statutes (sections 5–12, 32–35 and 41–50 of the Social Dialogue Act). The Government adds that freedom of association and the right of property are both constitutional rights, and that it has no competence to interpret constitutional provisions.

876. Furthermore, the law guarantees the right of trade unions to exercise trade union activities and to defend individual and collective labour rights of members before public authorities, including the right to represent members in court (sections 6 and 32). Labour and social dialogue legislation grants protection in the exercise of trade union activities in relation to the employment relationship, including through the prohibition of modification or cancellation of labour contracts of union members for reasons of trade union membership or activity (sections 9 and 10 of the Social Dialogue Act, in conjunction with section 220 of the Labour Code). However, the Government believes that the facilities granted by law in support of trade union organizations and the exercise of trade union activities (sections 21 and 35) and the benefits negotiated by collective bargaining agreements (workspaces, technical means, free headquarters, hours paid to union representatives during working hours) are independent guarantees from the recognition of freedom of association and cannot constitute prerequisites for its application nor be invoked as violations of the exercise of the right to freedom of association. During the effective application of trade union rights and legal guarantees, it is the responsibility of the trade union to organize its activity autonomously and independently, to adopt its statutes legally, to elect representatives and to establish action programmes for the purpose of its mission and to fulfil the role for which it was established.

877. Taking also into account the constitutional principles of separation of powers and freedom of access to justice, and the jurisdiction to rule on the application of constitutional provisions, the Government reiterates that its intervention in this case is limited to the exercise of monitoring and control to ascertain the notified situation, whereas at the same time the judicial authority have the exclusive competence to rule on its legality and resolve the dispute, in line with the provisions of the Constitution and the decisions of the Constitutional Court.

878. Regarding the dismissal of Mr Martin Nicolae, the Government states that an audit of inspectors of the Territorial Labour Inspectorate Hunedoara took place in the mother company on 25 May 2015. According to inspection report No. 66014/25.05.2015, it was found that, at control date, 15 people were employed, including six full-time and nine part-time (one hour/month); on 19 May 2015, pursuant to Decision No. 02/18.05.2015 of the Board, 13 decisions for termination of individual employment contracts had been issued, in line with section 65(1) (termination of employment) read in conjunction with section 75(1)

(prior notice of 20 working days) of the Labour Code. No such decision was issued with respect to two persons: Mihaela Todea (on sick leave) and Herban Alexandru (fixed-term contract until 3 June 2015). The union leader Martin Nicolae was among the 13 persons mentioned above, and his contract of employment has ceased following a termination decision made under the same conditions as for the other employees. Thus, by Decision No. 324/19.05.2015, as of 19 June 2015, “Mr Martin Nicolae, in his capacity as legal expert in Chimica SA is dismissed due to the termination of the individual employment contract recorded under No. 3018 on 6 January 1999”. As provided in section 6 of the termination decision of Mr Martin Nicolae, he had the possibility of challenging the employer’s decision to dissolve the individual labour contract, in the Tribunal of Hunedoara, which is the only competent body to rule on the legality and foundation of this decision (as indicated in section 80 of the Labour Code).

- 879.** In this regard, the Government indicates that, according to sections 210 and 211 of the Social Dialogue Act, individual labour disputes regarding the conclusion, modification and termination of individual labour contracts fall within the jurisdiction of court settlement. It then refers to Decision No. 3703 of 21 October 2015 issued by the Hunedoara County Court ruling on the reinstatement of the union President and the subsequent Decision No. 814/2015 of the Constitutional Court regarding the exception of unconstitutionality of the provisions of section 60(1)(g) of the Labour Code, due to article 16 of the Constitution on equality before the law. The Government explains that the protection of trade union members against dismissals on grounds of trade union affiliation or activities is guaranteed by section 220(2) of the Labour Code and section 10 of the Social Dialogue Act, and that national courts and authorities must take into account the decisions of the Constitutional Court. The Government reports that the first instance decision was then appealed by the mother company and recently reversed by the Court of Appeal Alba Iulia, which fully rejected the complaint formulated by the plaintiff Martin Nicolae against the mother company (Decision No. 282/01.03.2016).
- 880.** As regards the access of Mr Martin Nicolae to the premises, the Government specifies that, following the complaints filed with the Territorial Labour Inspectorate (Nos 9560/12.06.2015 and 9561/12.06.2015), a response (No. 9560, 9561/SCCMMRM/13.07.2015) was drafted and handed to the FSLCP and the Free Trade Union Plator Orastie. The Government indicates that, accordingly, following the checks carried out by inspectors of the Territorial Labour Inspectorate at the mother company and in view of the documents attached by the FSLCP and the Free Trade Union Plator Orastie as well as by the Territorial Labour Inspectorate Hunedoara, it was found as follows. The mother company is a private company with private capital. As part of the industrial platform in Orastie, there are six commercial enterprises of which five carry out their activities in the premises of the mother company, which are private property. One of the enterprises of the group operates under a management contract (No. 201/20.12.2013), which provides for the administration by it of the administrative buildings of some companies, and a service contract (No. 198/19.12.2013), which also stipulates the provision of security and protection services. The Free Trade Union Plator Orastie is representative at all five enterprises carrying out their activities in the premises of the mother company. Mr Martin Nicolae holds the function of President of the Free Trade Union Plator Orastie, which carries out its activities in a building on the industrial platform.
- 881.** Furthermore, the Government states that it was found that the Free Trade Union Plator Orastie did not present documents certifying the right to use the office space designated as its seat. There are however documents showing that the union headquarters is in the premises of the industrial platform (the by-laws of the Free Trade Union Plator Orastie, the tax registration certificate of the National Tax Administration Agency, collective labour agreements with enterprises of the industrial platform signed by the parties and judicial decisions on the representativity of trade unions (e.g. Decision No. 285/2013, etc.). By way of communication No. 354/27.05.2015, the mother company has requested the administrator to ensure “the prohibition of access to the platform of Mr Martin Nicolae, in his capacity as

president of the Free Trade Union Plator Orastie, until the establishment of an access program with the enterprises operating at the address mentioned above, which will be communicated”.

- 882.** The Government indicates that it was also ascertained that, on 28 May 2015, the enterprises in which the Free Trade Union Plator Orastie is representative, sent communications to the union addressed to its President, inviting him inside the industrial platform on 8 June 2015 to attend negotiations concerning his access to the premises (communication No. 310/28.05.2015). After the negotiations of 8 June 2015, a report of the meeting was drawn up and signed by the parties. According to the report, Mr Martin Nicolae requested unrestricted access, and the employer representatives stated that they would formulate a response on the following day. On 9 June 2015, the enterprises where the Free Trade Union Plator Orastie is representative, sent written communications (Nos 172/09.06.2015, 381/09.06.2015, 129/09.06.2015, 244/09.06.2015, 182/11.06.2015), expressing the following view: “The enterprise cannot accept the unconditional access of the president of the union to the premises, given that Mr Martin Nicolae is not an employee of the enterprise and the trade union activities at enterprise level are also carried out by the other union leaders who had been, as mentioned above, removed from production without affecting their salary rights. Also, the union is a legal entity that cannot be confused with the person of its president, whoever it may be. Moreover, the removal of further trade union leaders from production was accepted, so that they can exercise their trade union rights. In this context, we inform you that we remain ready to jointly establish a programme of access to the enterprise, and that, in addition, whenever particular situations arise, we are willing to authorize your previously announced access to the management of the enterprise.”
- 883.** Lastly, the Government states that it was established that, on 9 June 2015, at four of the five enterprises operating on the premises of the mother company, collective labour agreements concluded at enterprise level were in force. Under the provisions of those collective agreements, “for the purposes of the conduct of trade union activity, the establishment will provide for free the necessary space and furniture, means of transport and if possible, a computer and a printer, fax and telephone, and ensure their maintenance within the limits of the financial possibilities of the establishment”. Consequently, regarding the request of the Free Trade Union Plator Orastie for unlimited access to the enterprises operating on the industrial platform, the Government indicates that, in its response mentioned above, it emphasized that, in accordance with section 131(2) of the Social Dialogue Act, interference by public authorities, in any form and modality, is prohibited in the negotiation, conclusion, execution, modification and termination of collective agreements; and that disputes concerning the execution, amendment or termination of collective agreements are governed by the competent courts.
- 884.** Thus, the Government concludes that the trade union rights guaranteed by law to workers’ and employers’ organizations are illustrated in this case by the recognition of the enterprise union, the existence of its statute and programme of action, the participation of its elected leaders in trade union activities, the conclusion of a collective agreement and the granting of facilities for the exercise of trade union activities. Labour inspection decisions can be appealed in court. The Government recapitulates that the Territorial Labour Inspectorate had signalled the absence of supporting documents relating to the headquarters where the trade union operates, and that management had affirmed its availability for the mutual agreement concerning the establishment of a schedule of access able to enable the leader to carry out trade union activities. According to the Government, the access of the trade union leader at the headquarters of the union had been assured by management for the meetings to which he had been convened by the union within a programme of action freely set. In this context, issues refer to the right of unconditional access on the private property of a company which includes the headquarters of the trade union, of an external person, who is no longer an employee but was freely elected as union representative, which must comply with national

legislation and court decisions. Although Mr Martin Nicolae is a freely elected trade union leader, and while respecting the guarantees laid down in ILO Conventions, the Government believes that access of persons to premises may be limited to the extent that the union headquarters is at the seat of the mother company and constitutes private property.

- 885.** As to the alleged infringement of Article 4 of Convention No. 87, the Government indicates that the guarantee granted to organizations not to be dissolved on an administrative way, is contained in sections 7 and 40 of the Social Dialogue Act. This guarantee is not extended to the decisions of the judiciary power. Decisions of the judicial authority do not constitute administrative acts of public authorities and/or employers according to section 40(1) of the Social Dialogue Act, and section 40(2) provides to interested parties the freedom to be able to address the court, exclusively entitled to rule on the issue, a reasoned request for dissolution of an organization on the grounds that the minimum requirements for its creation are no longer met. The Government states that it does not have data concerning actions in court or court decisions regarding the request for dissolution of the trade union organization, since such documents are released only to parties in the lawsuit. Issues related to alleged attempts to dissolve the trade union (which, however, negotiated and concluded the collective agreement) may be clarified and solved by the competent courts (“proof test”), following notification by the parties.
- 886.** With regard to the alleged violations at one of the enterprises from the industrial platform, the Government states that the right to strike is a constitutional right of trade unions covered by labour law. According to section 195(1) of the Social Dialogue Act, the individual labour contract of the employee is suspended by law for the whole duration of participation in the strike. During the suspension, only health insurance rights are kept. Section 195(2) provides that, at any time of the strike, either party may request the participation of a representative of the territorial labour inspection to ascertain possible violations. The Territorial Labour Inspectorate found no irregularities in the case of the strike at the enterprise and did not impose penalties, as confirmed by the plaintiff. The decisions and measures taken by labour inspection may be challenged in court. It is the responsibility of the trade union organization to defend the rights of members and strikers, including in court (sections 28 and 187 of the Social Dialogue Act)
- 887.** Concerning the alleged violations in the company in Rimnicu Vilcea, the Government indicates that Act No. 85 of 2014 on insolvency procedure, which transposes EU Directive 2001/24/EC, stipulates at its section 40(1) that the bodies responsible for the implementation of the insolvency procedure are the courts, the syndic-judge, the judicial administrator and the judicial liquidator, and that all claims and disputes related to the actions of participants in the procedure shall be judged according to the provisions of the Code of Civil Procedure.
- 888.** In conclusion, the Government states that the role of social dialogue commissions is set out in section 121 of the Social Dialogue Act. Tripartite consultation structures in place are not decision-making and dispute-solving labour courts. Nonetheless, although the portfolio of the Minister Delegate for Social Dialogue within the Ministry of Labour, Family, Social Protection and Elderly was abolished following the reorganization of the Government in November 2015, the Government highlights that, at the initiative of the former Minister Delegate for Social Dialogue, a Protocol of collaboration with the FSLCP was concluded in 2014. The result was a series of meetings and consultations aimed at identifying problems in the chemical and petrochemical industries and action needed. The Government adds that social dialogue and participatory governance continue to be promoted, giving priority to constructive cooperation and partnership culture, instead of political pressure, but that the resolution of the above issues by applying the law falls within the jurisdiction of the courts, and to this end it is important that the trade union assumes its role of defending the legal rights of members in court, as guaranteed by law.

The Committee's conclusions

- 889.** *The Committee notes that, in the present case, the complainant denounces the anti-union dismissal by the mother company Chimica SA of Mr Martin Nicolae, the president of the enterprise-level union Free Trade Union Plator Orastie; the subsequent denial of his access to the premises; further anti-union action by the mother company; suspension and denial of access of two union leaders before a strike at Chimica Automotive SA, one of the enterprises from the industrial platform; and anti-union action against the Free Trade Union "Oltchim" Rimnicu Vilcea by the company Oltchim SA Rimnicu Vilcea and promotion of creation of new enterprise unions with a view to achieving fragmentation.*
- 890.** *The Committee notes that the complainant denounces the inaction of the Government (labour inspection, Ministry of Labour, etc.) and alleges that: (i) Mr Martin Nicolae, the leader of the Free Trade Union Plator Orastie at the mother company, was dismissed based intrinsically on his trade union activity; (ii) however, the Constitutional Court judgment of 24 November 2015 stating that section 60(1)(g) of the Labour Code is unconstitutional, led to the impossibility of enforcing the first-instance court decision that the union president be reinstated; (iii) all enterprises from the industrial platform have the mother company as major shareholder and have been detached from it through various processes of reorganization; (iv) while Mr Martin Nicolae has been dismissed under the same conditions as 12 other employees, all those employees have been offered jobs in the other enterprises of the industrial platform; (v) while Mr Martin Nicolae still legally exerts the mandate as the president of the trade union, he is not permitted to enter the premises of the factory where the union has its headquarters; (vi) the Territorial Labour Inspectorate penalized the mother company by issuing a "warning" on 21 July 2015; but although the situation remained unchanged for many months, no harsher measure has been imposed; (vii) further anti-union action by the mother company, such as display in an ostentatious manner of communiques discrediting the trade union, and the filing of a motion with the court requesting the dissolution of the union; (viii) at one of the enterprises from the industrial platform, one day before the beginning of a strike legally announced on 23 September 2015, two union leaders had their work contracts suspended and were no longer allowed access to the premises, and the Territorial Labour Inspectorate did not impose any penalty on the enterprise so that the strike had to be cancelled; (ix) at the company in Rimnicu Vilcea, the judicial administrators have been continually displaying discrediting communiques against the Free Trade Union "Oltchim" Rimnicu Vilcea and promoting and encouraging the creation of new enterprise unions with a view to achieving fragmentation of the union movement at the insolvent company (ostentatious monthly display of table with the number of members of each union; forced elections in 2015 which led to a new board close to management; decrease in membership due to election and dismissal of 900 employees of the union).*
- 891.** *The Committee notes the Government's indications, in particular that: (i) regarding the dismissal of Mr Martin Nicolae, labour inspection found that, from the 15 persons employed in the unit, 13 decisions for termination of individual employment contracts had been issued, with the exception of two persons (one on sick leave and one with a finishing fixed-term contract), and that the union leader Martin Nicolae was among the 13 persons mentioned above, and his contract of employment has ceased under the same conditions as for the other employees; (ii) the Hunedoara County Court ruled the reinstatement of the union President on 21 October 2015, the Constitutional Court ruled the unconstitutionality of section 60(1)(g) of the Labour Code on 24 November 2015 due to article 16 of the Constitution on equality before the law, and the first instance decision appealed by the mother company was reversed by the Court of Appeal on 1 March 2016; (iii) as regards the access of Mr Martin Nicolae to the premises, labour inspection found that: the mother company is a private company with private capital, that as part of the industrial platform there are six commercial enterprises and the Free Trade Union Plator Orastie is representative at five of the six and carries out its activities in a building on the industrial*

platform; the Free Trade Union Plastor Orastie did not present documents certifying the right to use the office space designated as its seat but that there are documents showing that the union headquarters is in the premises of the industrial platform; on 27 May 2015, the mother company has requested the administrator of the buildings to ensure “the prohibition of access to the platform of Mr Martin Nicolae, in his capacity as president of the Free Trade Union Plastor Orastie, until the establishment of an access programme with the enterprises operating at the address mentioned above, which will be communicated”; on 28 May 2015, the relevant enterprises invited the union President on 8 June 2015 to attend negotiations concerning his access to the premises where Mr Martin Nicolae requested unrestricted access, which was refused for the following reasons: “The enterprise cannot accept the unconditional access of the president of the union to the premises, given that Mr Martin Nicolae is not an employee of the enterprise and the trade union activities at enterprise level are also carried out by the other union leaders who had been, as mentioned above, removed from production without affecting their salary rights. Also, the union is a legal entity that cannot be confused with the person of its president, whoever it may be. Moreover, the removal of further trade union leaders from production was accepted, so that they can exercise their trade union rights. In this context, we inform you that we remain ready to jointly establish a programme of access to the enterprise, and that, in addition, whenever particular situations arise, we are willing to authorize your previously announced access to the management of the enterprise.”; (iv) in the Government’s view, access on the private property of a company which includes the headquarters of the trade union, of an external person, who is no longer an employee but is still a union representative, may be limited; (v) as to the alleged infringement of Article 4 of Convention No. 87, the guarantee granted to organizations not to be dissolved in an administrative way, is contained in sections 7 and 40 of the Social Dialogue Act, but is not extended to decisions of the judiciary; (vi) with regard to the alleged violations at one of the enterprises from the industrial platform, the right to strike is a constitutional right of trade unions covered by labour law, the individual labour contract of the employee is suspended for the whole duration of participation in the strike according to section 195(1) of the Social Dialogue Act, the Territorial Labour Inspectorate found no irregularities and did not impose penalties, and the decisions and measures taken by labour inspection may be challenged in court; (vii) concerning the alleged violations in the company in Rimnicu Vilcea, Act No. 85 of 2014 on insolvency procedure stipulates that the bodies responsible for the implementation of the insolvency procedure are the courts, the syndic-judge, the judicial administrator and the judicial liquidator, and that all claims and disputes related to the actions of participants in the procedure shall be judged according to the provisions of the Code of Civil Procedure.

- 892.** As regards the alleged anti-union dismissal by the mother company, of the president of the Free Trade Union Plastor Orastie, the Committee observes that section 60(1)(g) of the Labour Code granted an absolute protection against dismissal of employees holding a trade union function; and that the Constitutional Court ruled in November 2015 that this provision is unconstitutional, *inter alia*, on the grounds of equality before the law. The Committee considers that this ruling is not contrary to freedom of association and that section 220(2) of the Labour Code continues to ensure adequate protection of trade union officials by providing that, during their term of office, the representatives elected in the management bodies of the trade unions may not be dismissed for reasons related to the fulfilment of the mandate received from the employees in the organization. In light of the limited information provided by the complainant concerning the alleged anti-union reasons of the dismissal, the Committee does not consider that it has sufficient elements at its disposal to conclude that Mr Martin Nicolae was dismissed on the grounds of his function as union president or his legitimate trade union activities, but does observe that all 12 other employees dismissed from the unit have been re-employed in the other enterprises of the industrial platform. The Committee recalls that it has previously emphasized the advisability of giving priority to workers’ representatives with regard to their retention in employment in case of reduction of the workforce, to ensure their effective protection (see **Digest**, *op. cit.*, para. 833). For the

same reasons, it would equally appear advisable to give priority to workers' representatives in the case of an eventual subsequent re-employment of staff that had been made redundant. In light of the foregoing and the extraordinary circumstances of a reinstatement decision being reversed due to a subsequent unconstitutionality ruling, the Committee requests the Government to intercede with the parties with a view to finding a satisfactory solution with regard to the employment situation of Mr Martin Nicolae. The Committee also requests the Government to ensure respect of this principle in the future.

893. *With respect to the subsequent denial of the union President's access to the premises, the Committee observes that the union is representative in five of the six enterprises on the industrial platform; that while it was not able to present documents certifying the right to use the office space designated as its seat, there were documents showing that the union headquarters has been and is in one building of the industrial platform; that shortly after his dismissal, the mother company had ordered the prohibition of access of Mr Martin Nicolae in his capacity as president of a union, until establishment of an access programme; that on 8 June 2015, during the negotiations of his access to the premises, the President requested unrestricted access, and the enterprises on the industrial platform rejected the request signalling readiness to jointly establish a programme of access; and that the Territorial Labour Inspectorate issued a warning on 21 July 2015 for the restriction of union rights through the denial of access of the union president to the union premises but no further measures have been imposed although the situation remained unchanged. The Committee recalls that it has always held that trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned. Moreover, the Committee reiterates that governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization (see **Digest**, op. cit., paras 1103 and 1105). In view of the above, the Committee considers that, regardless of his dismissal and the existence of other full-time union officials as highlighted by the enterprises on the platform, the President should have the right to access the premises of the undertaking where the union is operating to enable him to carry out his representation function; however, such right of access is not an absolute right but a right limited by the rights of property and management. In a similar case, the Committee has emphasized that access to the workplace should not of course be exercised to the detriment of the efficient functioning of the administration or public institutions concerned. Therefore, the workers' organizations concerned and the employer should strive to reach agreements so that access to workplaces, during and outside working hours, should be granted to workers' organizations without impairing the efficient functioning of the administration or the public institution concerned (see **Digest**, op. cit., para. 1109). The Committee therefore requests the Government and the complainant to intercede with the parties to ensure the expeditious establishment of a programme of access of Mr Martin Nicolae, as may be necessary for the proper exercise of his function as President, with due respect for the rights of property and management and without impairing the efficient operation of the undertaking concerned.*

894. *As to the denounced request for dissolution of the union by the employer, the Committee observes that the mother company filed a motion for dissolution of the union with the court. The Committee emphasizes that the dissolution of a union ordered by the court on account of insufficient membership does not in itself constitute an infringement of freedom of association. The Committee notes that, under section 40(2) of the Social Dialogue Act, any third party may file a motion for union dissolution with the court on the basis of a request reasoning that the union no longer fulfils the minimum requirements for its constitution. In the absence of sufficient elements at its disposal to conclude that the action taken by the mother company amounts to anti-union harassment, the Committee requests the Government to provide a copy of the court decision on this matter once it has been issued.*

- 895.** *Concerning the suspension of two union leaders before a strike at one of the enterprises from the industrial platform, the Committee observes that the Government does not contest the allegations and argues that according to section 195(1) of the Social Dialogue Act, the individual labour contract of the employee is suspended by law for the whole duration of participation in the strike. The Committee notes however that the employment relationship of the trade union leaders was suspended already one day before the strike. Noting that labour inspection has not established any irregularities, the Committee must recall that no one should be penalized for carrying out or attempting to carry out a legitimate strike, and that it has previously emphasized that respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should also be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or to penalize the exercise of the right to strike (see **Digest**, op. cit., paras 660 and 663). Noting that, moreover, the suspension prior to the strike was accompanied by a denial of access to the undertaking which made it impossible for the trade union leaders to pursue their legitimate trade union activities, the Committee considers that this measure amounts to a sanction of trade union activity and an act of anti-union discrimination, and requests the Government to take measures to ensure adequate compensation for the workers concerned and ensure full respect of the above principles in the future.*
- 896.** *With reference to the alleged display of discrediting communiques by the mother company against the Free Trade Union Plastor Orastie and by the company in Rimnicu Vilcea against the Free Trade Union “there accompanied, in the latter case, by alleged measures to promote the creation of new enterprise unions and fragment the union movement in the company, the Committee observes that these allegations have not been contested by the Government. The Committee wishes to recall that, in previous cases it has held that respect for the principles of freedom of association requires that employers should exercise restraint in relation to intervention in the internal affairs of trade unions; they should not, for example, do anything which might seem to favour one group within a union at the expense of another.. As to the Government’s reference to insolvency law according to which the bodies responsible in this case are the courts, the judicial administrators, etc. and that all claims and disputes related to the actions of participants in the procedure are judged according to the provisions of the Code of Civil Procedure, the Committee considers that freedom of association is a transcending and enabling right which should be guaranteed in all enterprises, whether public or private, including insolvent enterprises managed by judicial administrators in the framework of a bankruptcy procedure. Considering that the alleged acts, if proven true, amount to acts of interference contrary to the principles of freedom of association, the Committee trusts that the Government will fully ensure respect for this principle.*

The Committee's recommendations

- 897.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *As regards the dismissal by Chimica SA of the President of the Free Trade Union Plastor Orastie, the Committee requests the Government to intercede with the parties with a view to finding a satisfactory solution with regard to the employment situation of Mr Martin Nicolae. It also requests the Government to ensure in the future respect of the principle enunciated in its conclusions.*

- (b) *With respect to the subsequent denial of the access of the union President to the premises, the Committee requests the Government and the complainant to intercede with the parties to ensure the expeditious establishment of a programme of access of Mr Martin Nicolae, as may be necessary for the proper exercise of his representation function, with due respect for the rights of property and management and without impairing the efficient operation of the undertaking.*
- (c) *The Committee requests the Government to provide a copy of the court decision relating to the mother company's request for the dissolution of the Free Trade Union "Plastor" Orastie.*
- (d) *Concerning the suspension of two union leaders one day before a strike at Chimica Automotive SA accompanied by denial of access to premises, the Committee requests the Government to take measures to ensure adequate compensation for the workers concerned and ensure in the future full respect of the principles enunciated in its conclusions.*

CASE NO. 3113

INTERIM REPORT

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

- **the Federation of Somali Trade Unions (FESTU)**
- **the National Union of Somali Journalists (NUSOJ) and**
- **the International Trade Union Confederation (ITUC)**

Allegations: The complainant organizations allege serious threats, acts of intimidation and reprisals against members and leaders of the National Union of Somali Journalists (NUSOJ) and the lack of adequate responses by the Federal Government of Somalia

- 898.** The Committee last examined this case at its October–November 2015 meeting where it presented an interim report to the Governing Body [see 376th Report, approved by the Governing Body at its 325th Session (November 2015), paras 957–991].
- 899.** The International Trade Union Confederation (ITUC), the Federation of Somali Trade Unions (FESTU) and the National Union of Somali Journalists (NUSOJ) sent additional information in relation to the complaint in communications dated 22, 26 and 29 February, 3 and 16 March, 28 April, 11 May, 12 August, 1 September, 5 and 17 October 2016.
- 900.** The Committee, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, invited the Government to come before it to provide information on the steps taken in relation to the pending matters. The Government made an oral presentation before the Committee during its May–June 2016 meeting and provided information in a written communication dated 26 May 2016.

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

A. Previous examination of the case

- 902.** In its previous examination of the case at its October–November 2015 meeting, the Committee made the following recommendations [see 376th Report, para. 991]:

- (a) The Committee urges the Government to refrain from any further interference in the unions registered in Somalia with particular reference to the NUSOJ and FESTU, observe the right of the union to administer its own affairs and activities without let or hindrance and in line with the principles of freedom of association and democracy, ensure that the elected leaders of the union are free to exercise the mandate given to them by their members and to that extent enjoy the recognition of the Government as a social partner. The Government must also ensure that the right to freedom of movement is fully respected and enjoyed by the union leaders.
- (b) The Committee urges the Government to take the necessary measures to ensure the protection and guarantee the security of the FESTU and NUSOJ leaders and members and establish a full and independent judicial inquiry on the allegations of intimidations and death threats affecting them. The Committee requests the Government to keep it informed of the outcome of the investigations.
- (c) The Committee requests the Government to review promptly the Somali Labour Code in consultation with the freely elected social partners with a view to ensuring its full conformity with Conventions Nos 87 and 98 and to provide a full report to the CEACR to which it refers the legislative aspects.
- (d) In these circumstances, the Committee is bound to urge the Government to avail itself of all necessary ILO assistance in this regard.
- (e) In light of the seriousness of the matters raised in this case and the apparent lack of understanding as to their fundamental importance, the Committee invites the Government, by virtue of its authority as set out in paragraph 69 of the procedures for the examination of complaints alleging violations of freedom of association, to come before the Committee at its next session in March 2016 so that it may obtain detailed information on the steps taken by the Government in relation to the pending matters.

B. Additional information from the complainants

- 903.** In a number of communications sent to the Committee from February to October 2016, the ITUC, FESTU and NUSOJ denounce a series of acts of intimidation and of reprisal against FESTU and NUSOJ members, in particular the trade union leader Omar Faruk Osman, after their complaint filed before to the Committee.
- 904.** In a communication dated 22 February 2016, the ITUC denounces an assassination attempt on the life of Mr Osman on 25 December 2015. Mr Osman's vehicle was parked at the gate of the NUSOJ headquarters, waiting for the gate to be opened, when three armed men in a white sedan sprayed his vehicle with bullets. Mr Osman's bodyguards exchanged fire with the assailants until the attackers ran away from the scene. One of Mr Osman's bodyguards and two pedestrians on Taleex Street were seriously wounded in the attack. While Mr Osman was informed that the car and the assailants were apprehended, no prosecution had been undertaken against them.
- 905.** The ITUC indicates that a decision dated 4 February 2016 by the Supreme Court reaffirmed that the Government had violated NUSOJ's right to freedom of association and interfered in internal affairs of the union by holding an unconstitutional general assembly in order to change the democratically elected leadership. NUSOJ obtained permission to hold its

general assembly from 13 to 14 February 2016 from the Hodan District Commissioner. On 7 February 2016, the union leadership informed the Minister of Internal Security about the scheduled general assembly and requested support in relation to the safety of the participants. On 9 February 2016, the Banadir Regional Appeal Court confirmed that NUSOJ's right to hold its general assembly must be respected and that the Ministry of Internal Security was obliged to safeguard the safety of the participants. Nonetheless, in the early hours of 13 February 2016, the National Intelligence and Security Agency (NISA) called both the Diplomatic Hotel in Mogadishu where the meeting was scheduled and NUSOJ Secretary-General, Mr Osman, stating that the general assembly would not take place unless they obtained written approval letters from the Ministry of Internal Security and the Ministry of Information. However, according to the complainants such requirement is not prescribed in Somali law. The 66 worker delegates who had come from various regions of the country in accordance with NUSOJ's statutes were intimidated and turned away by NISA soldiers heavily armed at the hotel. NUSOJ attempted to relocate the meeting in its headquarters in Taleex Street, however the police threatened to arrest the participants if they tried to proceed with the meeting.

- 906.** In communications dated 29 February and 3 March 2016, NUSOJ reports that the Ministry of Information called a meeting with media managers whereby they decided to set up a committee of 12 people, dominated by media owners and managers, who are all employers. The chairperson of this committee is the owner and chairperson of Shabelle Media Network, and the vice-chairperson of the committee is the manager of STAR FM radio station. According to the complainant, this committee had decided to organize a general assembly of NUSOJ on 20–21 March 2016 to elect a new leadership to the union, namely the owner and chief editor of Xaqiiqa Times. NUSOJ deplores that after having disbanded its general assembly on 13–14 February 2016, the Government has decided to team up with employers of the media sector in order to take over an independent union and intimidate media workers and journalists. The complainant denounces the fact that the Ministry of Information is undoubtedly committed to remove NUSOJ from workers' control and bring it under the control of the Government, which constitutes a deliberate breach of trade union rights, the Somali Labour Code and ILO Conventions.
- 907.** In communications dated 16 March, 28 April and 11 May 2016, the complainants informed that the Attorney-General's Office – the Chief Legal Adviser of the Government and the Government's chief law enforcement officer – started an investigation against Mr Osman with the intention to lay criminal charges against him. He was informed about the accusations against him in a letter dated 29 February 2016 and in person after having been summoned to the Attorney-General's Office on 23 April 2016. Allegedly, he has become a "threat to peace and security ... aggravating the relations between the government and international institutions" by submitting a complaint to the ILO Committee on Freedom of Association. The complainants are concerned over these clearly retaliatory measures taken against Mr Osman for having lodged a complaint with the ILO supervisory mechanisms.
- 908.** Furthermore, the complainant accuses the Government of resorting to peddle deliberate lies associating Mr Osman with a criminal offence that he never committed in order to confuse the international community. According to the complainants, the unfounded criminal accusations against Mr Osman are damaging as they discredit trade unionists and tarnish their reputations as legitimate trade union activists both within Somali society and in the international community.
- 909.** In a communications dated 12 August and 1 September 2016, the complainants report that during the last few weeks, Somali trade unions have been severely battered by a series of actions and threats by the country's authorities, designed to restrict their officials and members from legitimate union activities. On 9 July 2016, the Ministry of Internal Security of the Federal Government of Somalia issued an order (reference

No. WAG/XAG/0067/2016) banning all meetings held at hotels in Mogadishu. This order forbids any assembly without hotels notifying the Ministry and seeking permission, allegedly “to safeguard security and minimise problems by UGUS (Al-Shabaab) against people”. Hotels have already started implementing the order and demand unions wishing to hire a meeting place to obtain a written permission from the Ministry of Internal Security. Although this new development may seem reasonable in the severe security situation of the country, it is however seen by many observers as a convenient way by authorities to impede the activities of civil society organizations and opposition politicians.

- 910.** Furthermore, on 20 July 2016, the Ministry of Labour and Social Affairs spearheaded the setting up of a “trade union” for public sector workers by initiating a committee tasked to launch it, led by the Director of the Labour and Human Resources Department of the Ministry. FESTU which was informed, protested and recalled the Government that it must have no role whatsoever in setting up trade unions. This, in the complainants’ view, is another confirmation of interference by Somali authorities, purposefully denying workers their fundamental right to organize themselves freely and independently. Finally, the complainants referred to the fact that, on May 2016, the former Chief Justice who made the landmark ruling for trade union freedom (Decision of 4 February 2016 of the Supreme Court which dismissed the May 2011 Congress of NUSOJ) and the chairperson of Regional Appeals Court were sacked by presidential decree, although the President has no such power since article 109A, subsection 6, of the provisional Constitution clearly provides that only the Judicial Service Commission (JSC) has the power to appoint, discipline or transfer judges. Moreover, in July 2016, the newly appointed Chief Justice wrote a letter supporting an attempt to delegitimize the authentic leadership of NUSOJ and propel individuals who have never been members, tacitly imposed by the Ministry, to lead the union. This action of the Chief Justice compromises judiciary independence and ignores the Supreme Court ruling of 4 February 2016. In the complainants’ view, these developments are in direct violation of the Government’s duties and obligations under international laws and the country’s provisional Constitution, and illustrates the deteriorating human and trade union rights in the country.
- 911.** In a communication dated 5 October 2016, FESTU denounced the assassination of Mr Abdiasis Mohamed Ali, a journalist and member of NUSOJ, who was killed on 27 September 2016 by two men armed with pistols in northern Mogadishu. The complainant argue that the law enforcement authorities have not yet conducted any investigation on the murder. The complainant considers that this horrific assassination is an illustration of the Government’s inaction on the Committee’s previous recommendations to ensure the protection and guarantee the security of the unions’ leaders and members and to establish independent judicial inquiries on the allegations of death threats affecting them and argues that the Government has rather consciously increased its attacks on them.
- 912.** Lastly, in a communication dated 17 October 2016, NUSOJ denounces the arrest of Mr Abdi Adan Guled, Vice-President of the union, on 15 October 2016 by NISA at the Xog-Ogaal newspaper premises, the oldest and leading daily newspaper in Mogadishu. During the raid, NISA confiscated all the materials for publication of the newspapers, as well as computers, archives and cameras.

C. The Government’s reply

- 913.** In a communication dated 26 May 2016, the Government asserts that reports from the complainants on regular abuse and violations of freedom of association rights by the Government are unfounded as there is no evidence supporting such allegations. In addition, the Government underlines that some individuals take advantage of the fragile institutions of a post-conflict emerging country for their own personal gains.

- 914.** With regard to NUSOJ, the Government indicates that the union, formerly known as the Somali Journalists Network (SOJON), was established in 2002 with the approval of its Constitution according to which the leadership is to be elected democratically every three years. According to the Government, NUSOJ was split in two wings in 2011 since one group had accused Mr Osman of financial misappropriation. As per the information received by the Government from NUSOJ, Mr Osman has been removed as the Secretary-General of the union during the Leadership and Strategic Planning Congress on 28–29 May 2011 (copy provided). The Congress elected Mohamed Ibrahim as the Secretary-General of NUSOJ to replace Mr Osman with immediate effect. Many delegates from different regions of Somalia were present in the meeting. Many Somali social organizations were also invited to participate and function as observers of the election process. The Ministry of Information simply accepted the outcome of that meeting following receipt of a report from observers of the meeting including civil society groups. Finally, the Government indicates that following a Supreme Court order of 4 February 2016, NUSOJ held a democratic election on 17 May 2016 and chose a new leader without any kind of interference from the Government. The election was widely publicized through social media, local and international media. In its decision, the Court found that Mr Osman's removal as Secretary-General by the members of NUSOJ in 2011 was unlawful with their constitutions but proving that Mr Osman was indeed removed from his position by NUSOJ's members. In due process, the appeal court judges with consultations of nationwide NUSOJ members had scheduled the general assembly of the union and has elected a new leadership.
- 915.** With regard to the leadership of FESTU, the Ministry of Labour and Social Affairs received officials from several FESTU members confirming that Mr Osman has not been the Secretary-General of FESTU since he was replaced on 30 September 2013 (copy provided). The statements affirm that Mr Osman cannot speak on behalf of the association, as he is not the Secretary-General of FESTU. The Government believes that the legitimacy from the union comes from its members and therefore, the Ministry of Labour and Social Affairs had only recognized what FESTU and its members have decided by replacing Mr Osman as Secretary-General in 2013, without any interference. Furthermore, according to the Government, FESTU held a general assembly on 5–6 April 2016 and elected a new Secretary-General. Consequently, in the Government's view, Mr Osman does not represent NUSOJ or FESTU and in accordance with both Somali trade unions Constitutions and the national provisional Constitution, Mr Osman has no legitimacy to represent these two unions.
- 916.** With regard to allegations of obstruction of the union gatherings, through the National Intelligence and Security Agency, in 2014 and in February 2016, the Government declares that the claims are false. The Government provided a copy of a letter whereby the owner of the venue (Diplomatic Hotel) endorsed that no government officials, police or security forces have interfered or obstructed the gatherings. According to the Government, in light of the dispute over NUSOJ's leadership since 2011, it was members of the union that came to the venue and requested both meetings in 2014 and in 2016 to be halted as they believed that the meetings did not represent their union and therefore are infringing upon their rights. It was the organizer himself that decided to halt the meetings.
- 917.** With regard to the alleged arbitrary interrogations of Mr Osman, the Government indicates that the summoning for interrogation of Mr Osman had been initiated by a request to investigate, due to the suspicion against Mr Osman. The Office of the Attorney-General had produced a preliminary report (copy provided). This investigation was aimed at Mr Osman as an individual and not as the alleged chairman of a trade union. The procedure had been in accordance with the law and Mr Osman's attorney was present during the interrogation ensuring due process. After the conclusion of the investigation, the Attorney-General's office decided not to bring charges against Mr Osman.

- 918.** With regard to allegations of threats against FESTU, the Government regrets that Mr Osman did not report these threats to the police. However, the police began investigations on those claimed threats from Mr Osman as this is standard procedure. Through investigation it was learnt that Mr Osman has created all these threats for his personal gain and to divert the real attention in order to gain international sympathy and support. Consequently, the police investigation concluded that there were no threats against Mr Osman from security forces.
- 919.** Concerning the alleged travel restriction against Mr Osman, the Government refers to the preliminary investigation report by the Attorney-General into this matter which shows that no restrictions have been put on Mr Osman's right to travel, except during a brief period pending investigation into allegations against him. This information is supported by the travel log provided by the Somali Immigration and Naturalization Directorate (IND). Therefore, the allegation that Mr Osman was denied travel on 12 September 2014 is not supported by any evidence.
- 920.** In its communication transmitted to the Committee during its hearing in May–June 2016, the Government questions Mr Osman's reputation and background. The Government provides information on reports and letters, from UN bodies, questioning the position of Mr Osman in NUSOJ as well as his behaviour with journalists and donors, and reporting that his access to the UN premises has been restricted. Additionally, the Government indicates that Mr Osman was detained in Kenya due to a 3.6 million Kenyan shillings (KES) hotel debt, and his passports had been confiscated. He had reportedly been detained in Addis Ababa for a similar case.
- 921.** With regard to the Committee's recommendation on the legal framework, the Government is undertaking an overhaul of the legal system and laws of the country. A significant number of laws date from the semi-communist regime era between 1970 and 1990. The Labour Code is also being reviewed. However, this process will take the necessary time to complete. Nevertheless, although the Labour Code may grant significant authority to the Government, this power is never used and trade unions enjoy many de facto freedoms.

The Committee's conclusions

- 922.** *The Committee recalls that it has been considering this serious case of threats, acts of intimidation and reprisals against union members and leaders on several occasions. In view of the seriousness of the matters raised and the apparent lack of understanding as to their fundamental importance, the Committee decided to have recourse to paragraph 69 of its procedure and invite the Government to come before it to expose the steps taken in relation to the pending matters for which the Government had not been providing adequate responses.*
- 923.** *While regretting that it had to decide to apply a measure of special nature to obtain information from the Government on the present case, the Committee welcomes the renewed engagement of the Government of the Republic of Somalia which has since provided a written communication and made an oral presentation. The Committee recalls the importance for all governments of providing within a reasonable time frame complete replies concerning allegations made against them or in follow-up to the Committee's recommendations.*
- 924.** *The Committee recalls that the present case principally concerns serious allegations of interference in the operations of FESTU and NUSOJ and the unilateral determination of the Government to no longer recognize FESTU and NUSOJ under Mr Osman's leadership. The Committee notes the latest information provided by the complainants to the effect that: (i) by a decision dated 4 February 2016, the Supreme Court of Somalia ruled that the general assembly held on 28–29 May 2011 which removed Mr Osman from office was not legitimate.*

Consequently, the Court invalidated the dismissal of Mr Osman and nullified the election of Mr Mohamed Ibrahim Isak (Pakistan) as Secretary-General of the union. The Court ordered the preparation of the next general assembly under the supervision of the head of the regional appeal court to be held within five months; (ii) NUSOJ obtained permission to hold its general assembly from 13 to 14 February 2016 and informed the Minister of Internal Security about the scheduled general assembly requesting support in relation to the safety of the participants. The Banadir Regional Appeal Court confirmed NUSOJ's right to hold its general assembly must be respected and that the Ministry of Internal Security was obliged to safeguard the safety of the participants. Nonetheless, on 13 February 2016, NISA disrupted the meeting demanding written approval letters from the Ministry of Internal Security and the Ministry of Information. NUSOJ attempted to relocate the meeting to its headquarters in Taleex Street, however the police threatened to arrest the participants if they tried to proceed with the meeting; (iii) the Government has decided to team up with employers of the media sector in order to take over NUSOJ and remove the union from workers' control; (iv) in May 2016, the former Chief Justice who made the landmark ruling for trade union freedom (Decision of 4 February 2016 of the Supreme Court which dismissed the May 2011 Congress of NUSOJ) and the chairperson of the Regional Appeals Court were sacked by presidential decree, although the President has no such power; and (v) in July 2016, the newly appointed Chief Justice wrote a letter supporting an attempt to delegitimize the authentic leadership of NUSOJ and propel individuals who have never been members, tacitly imposed by the Ministry, to lead the union. This action of the Chief Justice clearly compromises judiciary independence.

925. *The Committee notes from the Government's submission that: (i) NUSOJ was split in two wings in 2011, one group accusing Mr Osman of financial misappropriation. A general assembly convened on 28–29 May 2011 removed Mr Osman and elected Mohamed Ibrahim Isak as the new Secretary-General of NUSOJ; (ii) following the Supreme Court ruling of 4 February 2016, NUSOJ held a democratic election on 17 May 2016 and chose a new leader without any kind of interference from the Government; (iii) the Government received written confirmation from FESTU affiliate unions that Mr Osman is not the Secretary-General of FESTU; (iv) FESTU held a general assembly on 5–6 April 2016 and elected a new Secretary-General; and (v) consequently, in the Government's view, Mr Osman does not represent NUSOJ or FESTU and in accordance with both trade unions constitutions, Mr Osman has no legitimacy to represent these two unions.*

926. *In light of the information provided both by the complainants and the Government, the Committee observes that in February 2016 the Supreme Court held that the general assembly having ousted Mr Osman in 2011 was unlawful and called for the preparation of the next general assembly. It notes with deep concern the allegations that while NUSOJ has attempted to organize its general assembly in February 2016, in accordance with the order of the Supreme Court, the meeting was disrupted by security forces. The Committee also notes with concern allegations relating to the persistent attempt from the Ministry of Information to take over NUSOJ by convening media owners and managers to form a parallel executive board. The Committee firmly recalls the general principle that the right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 391]. The Committee expects the Government to abide by the ruling of the Supreme Court concerning the leadership of NUSOJ and it urges the Government to refrain from any further interference in NUSOJ and FESTU internal affairs, and ensure that the elected leaders of these unions – in particular Mr Osman, until otherwise indicated by the union members themselves – are free to exercise*

the mandate given to them by their members in accordance with the unions' by-laws. The Committee trusts that the Government will recognize the leadership of NUSOJ and FESTU under Mr Osman without delay.

927. *The Committee is deeply concerned by the complainants' allegation that the Chief Justice, namely Dr Aidid Abdullahi Ilkahanaf, who handed down the ruling in favour of Mr Osman – and against the Government's position – has since been sacked by presidential decree. Observing that an independent judiciary is essential to ensuring the full respect for the fundamental freedom of association and collective bargaining rights, the Committee urges the Government to ensure full respect for this principle and to ensure that Dr Aidid Abdullahi Ilkahanaf is not subjected to threats for discharging his duties in accordance with the mandate bestowed upon him. The Committee requests the Government to reply in detail to this allegation.*

928. *Furthermore, the Committee is concerned over the recent report on the arrest of Mr Abdi Adan Guled, Vice-President of NUSOJ, at his workplace in Mogadishu by NISA on 15 October 2016. According to the allegations, during the raid, NISA confiscated all the materials for publication of the newspapers, as well as computers, archives and cameras. The Committee urges the Government to provide without delay full explanations on the reasons for the arrest of Mr Abdi Adan Guled.*

929. *With regard to allegations of threats against FESTU, the Committee notes from the Government submission that through police investigation it was found that Mr Osman has made up the threats against FESTU in order to gain international sympathy and support. The Committee however takes note with deep concern of the complainants' serious allegation – uncontested by the Government – on the assassination attempt against Mr Osman on 25 December 2015. The incident took place outside of the NUSOJ headquarters, and one of Mr Osman's bodyguards and two pedestrians were seriously wounded during the attack. The car and the assailants were allegedly apprehended, while no prosecution has yet been reported. The Committee recalls that in the event of assaults on the physical or moral integrity of individuals, an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts [see **Digest**, op. cit., para. 50]. The Committee urges the Government to provide without delay detailed information on any police investigation and judicial inquiry in relation to this very serious incident. More generally, the Committee urges the Government to ensure the protection and guarantee the security of FESTU and NUSOJ leaders and members, and establish a full and independent judicial inquiry in the event of any complaints relating to intimidation and threats affecting them.*

930. *In this regard, the Committee is deeply concerned by the recent report of the assassination of Mr Abdiasis Mohamed Ali, a journalist and member of NUSOJ, who was killed on 27 September 2016 by two men armed with pistols in northern Mogadishu. Noting that the complainants denounce the fact that the law enforcement authorities have not yet conducted any investigation of the murder, the Committee calls on the Government to take all necessary measures to investigate urgently the assassination of Mr Abdiasis Mohamed Ali and to keep it informed of its outcome.*

931. *Furthermore, noting with concern the complainants allegation on retaliatory measures taken against Mr Osman, in particular an investigation by the Attorney-General's Office in April 2016, for having lodged a complaint with the ILO supervisory mechanisms, the Committee firmly recalls that union leaders should not be subject to retaliatory measures, in particular arrest and detention without trial, for exercising their rights which derive from the ratification of ILO instruments on freedom of association or for having lodged a*

complaint with the Committee. The Committee expects the Government to ensure full respect of this principle.

- 932.** *The Committee further notes with concern allegations that the Ministry of Labour and Social Affairs spearheaded the setting up of a trade union for public sector workers by initiating a committee tasked to launch it, led by the Director of the Labour and Human Resources Department of the Ministry. FESTU was informed and protested. The complainants see this as another confirmation of interference by Somali authorities, denying workers their fundamental right to organize themselves freely and independently. The Committee is of the view that the involvement of the authorities in the process of setting up a trade union is in contradiction with the basic principle that employers and workers should have the right to establish organizations of their own choosing without previous authorization, and therefore constitutes a violation of the principles of freedom of association. Consequently, the Committee urges the Government to ensure full respect of this principle and to refrain from any initiative or connection in the setting up of a trade union.*
- 933.** *While the Committee has duly taken into consideration the elements provided by the Government concerning Mr Osman's reputation, it nevertheless considers that this background information is not of a nature as to put into question the serious acts of an anti-union nature by the Government in this case and the recommendations made thereon.*
- 934.** *In conclusion, the Committee wishes to emphasize that 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. A climate of violence, coercion and threats of any type aimed at trade union leaders and their families does not encourage the free exercise and full enjoyment of the rights and freedoms set out in Conventions Nos 87 and 98. Consequently, the Committee urges the Government to endeavour to meet its obligations regarding the respect of these individual rights and freedoms, as well as its obligation to guarantee the right to life of trade unionists. Finally, the Committee recalls to the Government that it may wish to avail itself of the technical assistance of the Office in order to determine the appropriate measures to address effectively its outstanding recommendations.*

The Committee's recommendations

- 935.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee expects the Government to abide by the ruling of the Supreme Court concerning the leadership of NUSOJ and it urges the Government to refrain from any further interference in NUSOJ and FESTU internal affairs, and ensure that the elected leaders of the unions – in particular Mr Osman, until otherwise indicated by the union members themselves – are free to exercise the mandate given to them by their members in accordance with the unions' by-laws. The Committee trusts that the Government will recognize the leadership of NUSOJ and FESTU under Mr Omar Faruk Osman without delay.*
 - (b) The Committee is deeply concerned by the complainants' allegation that the Chief Justice, namely Dr Aidid Abdullahi Ilkahanaf, who handed down the ruling in favour of Mr Osman – and against the Government's position – has since been sacked by presidential decree. Observing that an independent judiciary is essential to ensuring the full respect for the fundamental freedom*

of association and collective bargaining rights, the Committee urges the Government to ensure full respect for this principle and to ensure that Dr Aidid Abdullahi Ilkahanaf is not subjected to threats for discharging his duties in accordance with the mandate bestowed upon him. The Committee requests the Government to reply in detail to this allegation.

- (c) The Committee urges the Government to provide without delay full explanations on the reasons for the arrest on 15 October 2016 of Mr Abdi Adan Guled, Vice-President of NUSOJ.*
- (d) The Committee urges the Government to provide without delay detailed information on any police investigation and judicial inquiry in relation to the assassination attempt against Mr Osman on 25 December 2015. More generally, the Committee urges the Government to ensure the protection and guarantee the security of FESTU and NUSOJ leaders and members, and establish a full and independent judicial inquiry in the event of any complaints relating to intimidation and threats affecting them.*
- (e) The Committee calls on the Government to take all necessary measures to investigate urgently the assassination of Mr Abdiasis Mohamed Ali, a member of NUSOJ, and to keep it informed of its outcome.*
- (f) The Committee urges the Government to ensure full respect of principles related to the right to establish organizations of their own choosing without previous authorization and to refrain from any initiative or connection in the setting up of a trade union.*
- (g) The Committee firmly recalls that union leaders should not be subject to retaliatory measures, in particular, arrest and detention without trial, for exercising their rights which derive from the ratification of ILO instruments on freedom of association or for having lodged a complaint with the Committee. The Committee expects the Government to ensure full respect of this principle.*
- (h) The Committee recalls to the Government that it may wish to avail itself of the technical assistance of the Office in order to determine the appropriate measures to address effectively its outstanding recommendations.*

CASE NO. 3109

DEFINITIVE REPORT

**Complaint against the Government of Switzerland
presented by
the Autonomous Union of Postal Workers (SAP)**

Allegations: The complainant alleges that it has been prevented from participating in the negotiations on a collective agreement with the enterprise, Swiss Post. It further alleges acts of discrimination and intimidation directed against its President and its members

- 936.** The Autonomous Union of Postal Workers (SAP) presented its complaint in communications dated 11 October 2014, 18 February and 30 March 2015, and 2 February 2016.
- 937.** The Government submitted its observations in communications dated 9 March and 30 November 2015, and 6 May 2016.
- 938.** Switzerland has ratified the Freedom of Association and Protection of 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

- 939.** In a communication dated 14 October 2015, SAP states that it is a trade union and was established within Swiss Post in 2005. In pursuit of its goal of improving its members' working conditions, its statutes empower it to negotiate and conclude collective labour agreements. However, it indicates that, since its establishment, it has been demanding that Swiss Post allow it to participate in negotiations with a view to concluding the enterprise's collective labour agreement (CCT) or to engage in negotiations with a view to concluding a convention on behalf of its members. The SAP maintains that the enterprise has refused to allow it to exercise this right to bargain collectively on the basis of criteria for representation which, despite the trade union's repeated requests between 2005 and 2010, the enterprise refused to specify. In November 2010, after a complaint had been lodged with the Federal Administrative Court (FAC), the enterprise agreed to recognize the SAP as a trade union representing its employees and to provide it with some facilities but continued to refuse to bargain collectively with it.
- 940.** Following a change in the status of the Post, which became a public limited company in 2012, and of its staff, which are now governed by the Code of Obligations, the SAP again requested to participate in negotiations on the new CCT, which was under preparation. When the enterprise again refused, including in a communication dated 3 April 2012, stating that the number of SAP members (500) was far from sufficient for it to be considered representative, the trade union lodged a complaint with the Federal Postal Services Commission (Post-Com), which rejected it. The SAP then lodged a complaint with the FAC, which, in a decision issued on 13 December 2013, concluded that Post-Com was not empowered to compel Swiss Post to accept or reject the SAP as a social partner and therefore

set aside its decision. On 23 December 2013, after its appeal to the highest Swiss administrative court had failed, the SAP requested the Federal Conciliation Office to intervene. The conciliation meeting was held nine months later on 8 September 2014. The SAP reports that during the meeting, its rival trade unions (Syndicom and Transfair) attended and participated in the proceedings and, by expressing their opposition to the SAP, were one reason that conciliation was not achieved. The SAP expresses surprise that the established collective dispute resolution system allows rival trade unions to object to its recognition by the employer. The trade union also challenges the number of members claimed by Syndicom and Transfair 15,000 and 6,000, respectively and requests that a notarial certificate attesting to the exact number of employee members be drawn up.

- 941.** The SAP maintains that the enterprise has continued to refuse to specify the criteria for representation that it used and explains that, regardless of the number of the trade union's members, the enterprise was unwilling to recognize it as a social partner and would not do so unless compelled by a court judgment. Such a statement demonstrates the climate of mistrust in which the SAP must operate; its representatives are demonized to the staff by the enterprise's management. In support of its allegations, the SAP provides copies of internal communications between 2005 and 2009, informing management staff that the SAP was not an official partner of the enterprise. It also reports that its President, Mr Olivier Cottagnoud, and Vice-President, Mr Lionel Laurent, were subjected to intimidation and subtle retaliation, including disciplinary measures, simply for carrying out their trade union responsibilities.
- 942.** The SAP considers that the Swiss authorities, through the Post-Com and the FAC, have denied it the right to participate in negotiations on collective agreements although the criteria for representation are neither known nor established. The enterprise in question has even refused to specify the criteria that it used in refusing to allow the SAP to exercise this right before the federal Conciliation Committee. Thus, the SAP is being accused of not being representative without knowing the criteria for representation. The trade union also notes that the many delays in opening discussions with it, the fact that its right to bargain collectively has been denied since 2005 and the refusal to state the criteria for representation are clear proof of the enterprise's lack of good faith, which, in the trade union's view, is nevertheless essential to social welfare.
- 943.** The SAP also notes that although the authorities refer to the FAC's case law on the matter, the Court has not set clear criteria, including an established quantitative minimum. The trade union recalls the ILO monitoring bodies' principle that representative character should be based on objective and pre-established criteria. Therefore, this situation, in which the Government has not established a system whereby the criteria for representation are previously established in a transparent manner, is contrary to the commitments that Switzerland made in ratifying the relevant ILO Conventions on freedom of association and collective bargaining and to the principles recalled by the monitoring bodies, particularly the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations.
- 944.** The SAP requests the Government to take steps to put an end to these violations and to require Swiss Post to finally agree to negotiate the collective labour agreement under preparation or to conclude a collective agreement with the trade union on behalf of its members. It also requests the Government to put an end to the discrimination against and pressure on its leaders and representatives in the enterprise.
- 945.** In its communication of 30 March 2015, the SAP objects to the time limit that the Government has set for its response to the complaint early 2016 and recalls that the Government has been aware of the situation since December 2013, when the appeal was brought before the federal Conciliation Committee. It maintains that setting this time limit is an effort to exclude it from the ongoing collective bargaining with the enterprise, and thus

to undermine it by leading its members to resign out of anger at its failure to sign the CCT, and that many of its members have resigned.

B. The Government's reply

- 946.** In a communication dated 6 May 2016, the Government provided background on the handling of the complaint and made observations on the complainant's allegations.
- 947.** As an introduction, it recalls that Swiss Post employs approximately 55,000 people and is one of Switzerland's largest employers. With a policy mandate set by its largest shareholder, the Confederation, the enterprise has offices throughout the country. In June 2013, it became a public limited company known as Swiss Post Ltd. Its primary markets are exploited by the group's core companies, Post CH Ltd, PostFinance Ltd and PostBus Ltd. Since 26 June 2013, its staff employment relations have been governed by the private labour law contract regime, the Code of Obligations. Under Chapter 1, article 1, of the Swiss Post Organization Act (LOP) of 17 December 2010 (Act No. 783), the modalities for and date of the transfer of Swiss Post employees' employment relations to the private law regime are established in an agreement between the social partners, signed on 25 June 2012. The Act of 17 December 2010, also requires the enterprise to negotiate a CCT with the staff associations (local trade unions). Lastly, the Government recalls that the enterprise employs 55,000 people and that the two trade unions that are parties to its CCT which entered into force on 1 January 2016, represent almost 40 per cent of its staff (of which 15,000 are members of Syndicom and 6,000 of Transfair).
- 948.** The Government states that, according to a notarial certificate issued in July 2014, the SAP reported 600 active members, including retirees and supporters who are not employed by the enterprise. According to the local office, the trade union has failed to expand significantly since its establishment in 2005.
- 949.** With regard to background on the handling of the case, the Government states that on 17 October 2014, the ILO informed the State Secretariat for Economic Affairs (SECO) that the SAP had presented to the CFA complaint against the Government, alleging failure to respect the principles of freedom of association and collective bargaining. The complaint focuses on the refusal of Swiss Post Ltd (hereinafter "the enterprise") to include the SAP as a partner in negotiations on the new CCT following the change in the establishment's status. The Government notes that the SAP presented its complaint to the Committee after bringing several judicial proceedings before the national courts for the same purpose. The primary reason for the enterprise's refusal to include the SAP as a partner in the negotiations on the new CCT is the fact that, in its view, the trade union is not sufficiently representative of the staff, either numerically (600 members out of a total of 55,000 employees) or geographically. As a subsidiary argument, the enterprise alleges unfair conduct by the SAP.
- 950.** The ILO's announcement was discussed informally in Geneva on 17 October 2014 at a meeting of the Tripartite Federal Commission on ILO Affairs. On that occasion, the representatives of national trade unions on the Commission (the Swiss Federation of Trade Unions (USS), Unia and Travail.Suisse) emphasized that the SAP did not meet the criteria for representation in the context of collective bargaining within the enterprise. With regard to the current procedure for presenting the complaint to the CFA, the ILO Director-General might appoint a representative of the Organization whose mandate would be to carry out preliminary contacts with the complainant and the competent authorities of the country in question in order to gather full information on the issues raised in the complaint, ascertain the facts and seek possible solutions on the spot (paragraph 67 of the special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association). To that end, SECO requested the ILO to conduct a preliminary contacts visit in order to gather information from the parties, including the social partners in

the hope that an amicable arrangement could be reached. The CFA agreed to that request and a team from the Office visited Lausanne, Vétroz and Bern on 11 and 12 December 2014. The visit team met with representatives of SECO, the Federal Office of Justice and the various social partners concerned (the SAP, the Swiss Employers' Association, Swiss Post, Syndicom, USS, Unia, Travail.Suisse and Transfair).

- 951.** In its report, the visit team states that collective bargaining in Switzerland is conducted in the absence of pre-established quantitative criteria for trade union representation. It notes, however, that case law, including that of the Federal Court, has developed criteria for recognition of a trade union as a social partner with a view to participating in collective bargaining and concluding or signing a CCT. These criteria are related to the representation and fairness of the trade union, to be assessed by the Court on a case-by-case basis, the goal being to promote effective collective bargaining. The visit team notes that with the exception of the SAP, this pragmatic approach was recognized and welcomed by all of the people with whom it met.
- 952.** The visit team also notes that the enterprise has almost 55,000 employees and that the two trade unions involved with a view to concluding CCTs with management represented, at the time, almost 40 per cent of the staff (Syndicom with 15,000 members and Transfair with 6,000), whereas the SAP, with 600 active members, represented 1 per cent of the staff. The visit team further notes that the SAP's principal request is to be able to participate immediately in the negotiations with management on the CCT. In its conclusions, the visit team stated that there was genuine disagreement as to whether the SAP should be represented during the negotiations on the Swiss Post CCT and that, in light of current practice in Switzerland, this disagreement could be addressed by the competent bodies. Therefore, as the issue had not been settled by amicable arrangement, the Office referred the case to the CFA and in March 2015, it informed SECO that the SAP's complaint had been registered.
- 953.** With regard to the various appeals lodged by the SAP, the Government recalls that as soon as the change in the enterprise's status was announced, the trade union requested to be included in the negotiations with a view to conclusion of a new CCT. Swiss Post refused this request on the grounds that the SAP was not sufficiently representative (1 per cent of the staff) and had acted unfairly (communication dated 3 April 2012). On 29 April 2013, the SAP lodged a complaint with the Federal Postal Services Commission (Post-Com), requesting an official ruling regarding the enterprise's obligation to include it in collective bargaining. On 4 July 2013, Post-Com decided "not to order Swiss Post to conduct negotiations with the SAP". On 22 July 2013, the trade union appealed this decision before the FAC. In a judgment dated 13 December 2013, the FAC held that Post-Com did not have the subject matter competence to order the enterprise to include a trade union in collective bargaining and should have dismissed the SAP's complaint. Consequently, it set aside the Post-Com decision of 4 July 2013 and, in addition, rejected the SAP's appeal. Subsequently, in another attempt to be included as a partner in the negotiations on the enterprise's CCT, the SAP lodged an appeal with the Federal Conciliation Office. On 9 September 2014, the conciliation proceedings proved unsuccessful. The SAP then appealed the decision of the FAC before the Federal Court, which, in a judgment dated 22 March 2015, confirmed the FAC decision and rejected the SAP's appeal. On 26 June 2015, the SAP brought proceedings for failure to recognize its legal personality before the Bern-Mitteland civil court. The conciliation hearing, which took place in October 2015, proved unsuccessful, after which the SAP declined to bring proceedings within the relevant legal time period.
- 954.** The Government explains that the dialogue between the enterprise and the SAP continued during the aforementioned time period. In fact, the enterprise provided the SAP with some facilities with a view to its expansion (2010: information meetings between the representatives of the two parties every three months, permission to make use of the internal

bulletin boards and the provision of new employees' addresses to the SAP; and 2013: permission to meet with new apprentices).

- 955.** With regard to the assessment of representative character under the Swiss system, the Government states at the outset that freedom of association is enshrined in article 28 of the Federal Constitution (Act. No. 101). This provision of the Constitution establishes that employees, employers and their organizations have the right to join together in order to protect their interests, to form associations and to join or not to join such associations. Case law and doctrine make a distinction between individual and collective freedom of association. Individual freedom of association entitles individuals to help to form a trade union, join an existing one or participate in its activities, as well as not to join or to resign from a trade union. Collective freedom of association entitles trade unions to exist and to act accordingly, in other words, to defend the interests of their members. This implies, among other things, the right to participate in collective bargaining and to conclude collective agreements.
- 956.** The Government explains that a trade union is established as an association within the meaning of articles 60 et seq. of the Swiss Civil Code (Act No. 210). However, Switzerland has no procedure for registering or recognizing trade unions in order to determine their representative character, which is assessed on a case-by-case basis under the conditions prescribed in the case law of the Federal Court. In that regard, the case law on representation has been established and confirmed in several of the Court's judgments. The Government refers, in particular, to Federal Court judgment 2C 701/2013 of 26 July 2014 (*Federal Institute of Technology (EPF) Staff Union v. Council of Federal Institutes of Technology (EPF Council)*). This judgment addressed the question of whether an EPF trade union must be recognized as a social partner. Among its criteria for representation, the EPF Council had established requirements for the staff union's members and had concluded that the trade union could not be recognized as a reliable social partner. In its judgment, the Federal Court applied Swiss constitutional law. In this case, the trade union won its appeal in so far as the Federal Court recognized that it met enough of the criteria for representation to participate in collective bargaining within the EPF.
- 957.** In its judgment, the Federal Court recalled several principles: (i) at the outset, the right to exercise collective freedom of association by participating in collective bargaining and concluding or signing collective agreements, is not open to all trade unions without restrictions. Such a situation might result in an excessive number of social partners, which in turn might undermine the quality and effectiveness of social dialogue and the conclusion of collective agreements, which, like the independence of the social partners, is considered a key element of collective labour law in Switzerland. For this reason, only trade unions that are recognized as social partners are entitled to participate in social dialogue under article 28 of the Constitution; (ii) the requirements for recognition of a trade union have been established in the case law of the civil courts: a union must be recognized as a social partner in order to participate in collective bargaining and conclude or sign a collective agreement, even without the consent of the employer or the other social partners, if it is sufficiently representative and acts fairly; to do otherwise would violate its right to legal personality. In particular, a minority trade union may not be excluded if it is sufficiently representative; (iii) doctrine has organized this case law by establishing that a trade union must meet four requirements for recognition as a social partner: (1) be empowered to conclude collective agreements (*Tarifähigkeit*); (2) have geographical and subject matter competence; (3) be sufficiently representative (representative character requirement); and (4) demonstrate that it has acted fairly (fairness requirement); (iv) on the issue of freedom of association, the case law of the Federal Court also establishes that representative character and fair conduct are requirements that a trade union must meet in order to be recognized as a social partner; (v) limiting the status of social partner to trade unions that meet the representative character and fair conduct requirements does not constitute a violation of freedom of association,

which entails the obligation to comply with article 36 of the Constitution (restrictions on fundamental rights). On the contrary, these requirements must be understood as inherent in the notion of “social partner” and must be met by trade unions in order to claim that status; (vi) the representative character and fair conduct requirements are legally undefined notions that must be interpreted through assessment on a case-by-case basis; (vii) with regard to the representative character requirement, such character may be properly assessed if appropriate and reasonable criteria are used. These criteria must be sufficiently broad to include minority trade unions in social dialogue in order to encourage a degree of pluralism in the expression of trade unions’ views without granting every minority trade union social partner status; to do otherwise might undermine the effectiveness of social dialogue. Thus, trade unions must speak on behalf of a minority group rather than comprising isolated members. In that respect, the Federal Court did not set a universal minimum number of members to be used in assessing whether a minority trade union is representative. It did, however, establish in one case that a trade union of which 7 per cent of the enterprise’s employees were members was sufficiently representative and that, despite attempts to exclude it, it must be recognized owing to its obvious influence at the national level. Furthermore, a trade union need not represent a large minority in order to have representative character; moreover, a union that lacks such character in the enterprise in question but is sufficiently representative at the cantonal or federal level must also be recognized as a social partner. A trade union’s representative character must also be considered in light of the particular structure of the enterprise or public institution through which it is requesting to be recognized as a social partner; (viii) employers may establish criteria for representative character in a document of general scope; where the employer is a public authority or a public sector body, these criteria may but need not be established legally, procedurally or substantively; (ix) the fair conduct requirement means that the trade union in question must undertake to meet all obligations arising from the collective labour agreement and, generally speaking, must be a trustworthy social partner. It must demonstrate that it is reliable and acts in good faith. In particular, this is not the case if it unduly obstructs collective bargaining or makes false accusations against the other social partners; (x) the fair conduct requirement concerns the trade union’s dealings with the other social partners; in particular, it may not be called unfair simply for being involved in a dispute with some of its current or former members since such disputes are unrelated to its conduct as a social partner; and (xi) the fairness requirement, which is one aspect of good faith, must be deemed to be presumed. Therefore, if a trade union that is requesting recognition as a social partner undertakes to meet the obligations arising from the collective labour agreement or, more broadly, the obligation to act as a trustworthy social partner, and if it also meets the other requirements for recognition, the employer may not, in principle, refuse to recognize the trade union unless it can demonstrate, based on previous actions that raise serious concerns as to whether it would conduct itself fairly in social dialogue, that the fairness requirement has not been met.

- 958.** The Government states that the SAP is a local minority trade union that represents about 1 per cent of the enterprise’s employees whereas the other trade unions (Syndicom and Transfair) represent about 28 and 11 per cent of the staff, respectively. Clearly, the enterprise is unwilling to include the SAP in the negotiations on the CCT because it is neither numerically nor geographically representative and because it is deemed to have acted unfairly. The enterprise has, however, held intensive consultations with the SAP in order to provide it with some facilities with a view to its expansion (meetings with representatives of management every three months, permission to use the internal bulletin boards, provision of new employees’ addresses to the SAP; and permission to meet with new apprentices). Lastly, the Government recalls that the SAP has had access to all legal safeguards and legal and administrative remedies in order to assert its rights, even before the highest state legal body, the Federal Court.
- 959.** While the criteria for representation in Switzerland are established through the case law of the Federal Court rather than by law, the Government considers that there are objective

criteria for eliminating any risk of bias or abuse. It is neither desirable nor advisable to establish criteria for representation in domestic law. In that regard, the Government recalls that the Federal Court itself has stated that while a legal, procedural or substantive basis may, of course, be envisaged, it is not absolutely essential even where the employer is a public authority or a public sector body.

- 960.** In conclusion, the Government considers that domestic law and practice for assessing the criteria for a trade union's representation are fully consistent with the requirements arising from ILO Conventions on the right to bargain collectively and, in particular, from Conventions Nos 98 and 154, which Switzerland has ratified.

The Committee's conclusions

- 961.** *The Committee notes that in this case, the complainant, SAP alleges that since its establishment in 2005, it has been prevented from participating in the collective bargaining process on the grounds that it is not sufficiently representative but that it has not been informed of the criteria for such an assessment. The SAP also alleges acts of discrimination and intimidation directed against its President and its members.*
- 962.** *The Committee notes that the case concerns Swiss Post Ltd. (hereinafter "the enterprise"), which, according to the Government, employs approximately 55,000 people and is one of Switzerland's largest employers. With a policy mandate set by its largest shareholder, the Confederation, the enterprise has offices throughout the country. In June 2013, it became a public limited company. The Committee also notes that under Chapter 1, article 1, of 17 December 2010 (Act No. 783), the modalities for and date of the transfer of Swiss Post employees' employment relations to the private law regime were established in an initial collective agreement signed on 25 June 2012. The Act also requires the enterprise to negotiate a CCT with the staff associations. Lastly, the Committee notes that, pursuant to the Act, the enterprise has begun collective bargaining with two trade unions that represent about 40 per cent of the staff (Syndicom and Transfair with 15,000 and 6,000 members, respectively) and that these negotiations culminated in the signing by the social partners of a CCT that entered into force on 1 January 2016.*
- 963.** *The Committee notes that the Tripartite Federal Commission on ILO Affairs has discussed the SAP's complaint to the ILO, which was presented in October 2014. According to the Government, on that occasion, the representatives of the national trade unions on the Commission (USS, Unia and Travail.Suisse) emphasized that the SAP did not meet the criteria for representation in the context of collective bargaining within the enterprise in question. Within the framework of the procedures established for that purpose (paragraph. 67 of the special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association), SECO requested the ILO to conduct a preliminary contacts visit in order to gather information from the parties, including the social partners in the hope that an amicable arrangement could be reached. The Committee agreed to that request and a team from the Office visited Lausanne, Vétroz and Bern on 11 and 12 December 2014. The Committee welcomes the efforts and initiatives taken by the Government and by the Tripartite Federal Commission on ILO in this regard.*
- 964.** *The visit team met with representatives of SECO, the Federal Office of Justice and the various social partners concerned (the SAP, the Swiss Employers' Association, Swiss Post, Syndicom, USS, Unia, Travail.Suisse and Transfair). The Committee observes that the visit team states in its report that there is genuine disagreement as to whether the SAP should be represented during the negotiations on the enterprise's CCT. As the issue had not been settled by amicable arrangement, the complaint was registered and referred to the Committee.*

965. *The Committee notes that, according to the complainant, the enterprise has been refusing to allow the SAP to exercise its right to bargain collectively since the trade union's establishment in 2005. The change in the status of the enterprise and the requirements introduced with the Act of 2010 still did not allow it to participate in collective bargaining on behalf of all the employees or of its own members, as it is demanding to do. The SAP maintains that, despite its repeated requests between 2005 and 2010, the enterprise has refused to allow it to exercise this right to bargain collectively on the basis of criteria for representation that the enterprise nevertheless refuses to explain. According to the trade union, the enterprise has even refused to inform the Federal Conciliation Committee of its criteria for representation. Thus, the SAP regrets that it is being accused of not being representative without knowing the criteria for representation.*
966. *The Committee notes that the Government, for its part, maintains that the SAP is a minority trade union that represents about 1 per cent of the enterprise employees whereas the other trade unions (Syndicom and Transfair) represent about 28 and 11 per cent of the staff, respectively. Thus, the enterprise is clearly unwilling to include the SAP in the negotiations on the CCT because it is neither numerically nor geographically representative and because it is deemed to have acted unfairly. The Committee also notes the statement that the enterprise has conducted intensive consultations with the SAP in order to provide it progressively with a number of facilities with a view to its expansion (meetings with representatives of management every three months, permission to use the internal bulletin boards, provision of new employees' addresses to the SAP; and permission to meet with new apprentices).*
967. *The Committee notes that, with regard to trade union representation, Swiss law does not set a minimum threshold for representative character and that, in principle, disputes between the parties during collective bargaining are settled by joint committees and, as a last resort, by the courts. According to the Government, this system is based on the goal of effective, responsible social dialogue. To that end, and in the absence of any official standards for recognition of a trade union, the nature of a trade union organization is assessed for the purpose of participating in collective bargaining with an employer using criteria established in the case law of the Federal Court; according to the Government, this avoids any risk of bias or abuse.*
968. *The Committee notes that according to this case law, as recalled in Federal Court judgment 2C 701/2013 of 26 July 2014 (Federal Institute of Technology (EPF) Staff Union v. Council of Federal Institutes of Technology (EPF Council)), recognition of a social partner is based on four primary criteria; a trade union that wishes to be included in negotiations on a CCT must: (1) be empowered to conclude collective agreements; (2) have geographical and subject matter competence; (3) be sufficiently representative without, a priori, meeting a minimum quantitative criterion; and (4) have acted fairly in the past; it undertakes to meet the obligations arising from the CCT, to be a reliable partner and to act in good faith.*
969. *According to the Government, this legal structure provides objective assessment criteria and, above all, takes a pragmatic approach. It is welcomed by all the social partners and allows for a case-by-case assessment that takes the specific characteristics of enterprises and the structure of the economic sectors in question into account. The judge assesses the situation using clear and pre-established criteria. The Government emphasizes that the value of this approach may be seen from its results; it is welcomed by the trade unions and employers' organizations.*
970. *The Committee would like to recall that, generally speaking, the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association; and trade unions should have the right, through collective bargaining or other*

lawful means, to seek to improve the living and working conditions of those whom the trade unions represent; and that the public authorities should refrain from any intervention which might restrict this right or impede the lawful exercise thereof. Recognizing the possibility of trade union pluralism does not preclude granting certain rights and advantages to the most representative organizations. However, the determination of the most representative organization must be based on objective, pre-established and precise criteria so as to avoid any possibility of bias or abuse, and the distinction should generally be limited to the recognition of certain preferential rights, for example for such purposes as collective bargaining, consultation by the authorities or the designation of delegates to international organizations. The Committee has also recalled on several occasions that Conventions Nos 87 and 98 are compatible with systems which envisage union representation for the exercise of trade union rights based on the degree of actual union membership, as well as those envisaging union representation on the basis of general ballots of workers or officials, or a combination of both systems [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 354 and 349].

971. The Committee observes that while the system under consideration sets no legally established minimum number for representation, it gives joint and judicial appeal mechanisms considerable latitude in resolving disputes concerning collective bargaining or recognition of a trade union as a social partner. The Committee would like to emphasize that the principle that objective, precise and pre-established criteria must be set in order to avoid any risk of bias or abuse in a context in which the most representative trade unions are given certain rights and advantages does not necessarily require establishing a minimum number of members. The Committee notes that under the Swiss system, a judge makes the final assessment based on clear criteria for representation and fairness that have been previously established by the country's highest court and are evaluated by the court on a case-by-case basis. According to the report of the ILO visit team, this approach has been welcomed by all of the country's most representative trade unions and employers' organizations and, in the Committee's opinion, is not contrary to the aforementioned principles.
972. The Committee observes that the ILO visit team stated in its conclusions that, in light of current practice in Switzerland, the issue of SAP representation in negotiations on the CCT could be addressed by the competent bodies. It notes from the background on the appeals lodged by the SAP with a view to participation in collective bargaining that the trade union has had access to all legal safeguards and legal and administrative remedies in order to assert its rights, even before the highest State legal body, the Federal Court. Moreover, it is the Committee's understanding that after the SAP had brought proceedings for failure to recognize its legal personality before the Bern-Mitteland civil court in June 2015 and the October 2015 conciliation hearing had proved unsuccessful, the trade union declined to bring proceedings within the legal time period.
973. In conclusion, the Committee considers that the negotiations with a view to the conclusion of CCTs between the enterprise and the two trade unions that represent about 40 per cent of its staff (Syndicom and Transfair) and the refusal to allow the SAP (which reports that its membership accounts for 1 per cent of the staff) to participate as a minority trade union raise no issues with regard to the principles of freedom of association and collective bargaining.
974. Lastly, the Committee takes note of the complainant's allegations of acts of discrimination (refusal to grant the same arrangements with regard to trade union leave as are granted to the other trade unions), intimidation and retaliation directed against SAP leaders and representatives and, in particular, disciplinary measures imposed on its President, Mr Olivier Cottagnoud, and Vice-President, Mr Lionel Laurent, for having carried out their trade union responsibilities.

975. *With regard to the granting of arrangements, the Committee notes the statement that, since 2010, the SAP has been granted facilities within the enterprise with a view to its expansion (meetings with representatives of management every three month; permission to use the internal bulletin boards; provision of new employees' addresses to the SAP; and permission to meet with new apprentices) and encourages continued dialogue and consultation between the enterprise and the SAP in order to agree on the granting of any additional facilities required by the trade union's representatives, including free time to carry out union activities subject to the effective functioning of the administration or service concerned, as well as access.*

The Committee's recommendation

976. *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. 3164

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

Complaint against the Government of Thailand presented by the IndustriALL Global Union

Allegations: The complainant organization alleges: (i) legislative shortcomings (denial or restriction of the right to organize and bargain collectively to public sector workers, private sector teachers, agricultural workers, workers in the informal sector, migrant workers and temporary, agency or other subcontracted workers; insufficient protection against acts of anti-union discrimination; difficulty to bargain collectively; and denial of the right to strike to public sector workers); and (ii) acts of anti-union discrimination, interference, harassment and other anti-union practices in a number of enterprises and the Government's failure to protect the workers

977. The complaint is contained in a communication from IndustriALL Global Union dated 7 October 2015.

978. The Government sent its observations in a communication dated 14 March 2016.

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

A. The complainant's allegations

980. In its communication dated 7 October 2015, IndustriALL alleges: (i) legislative shortcomings (denial or restriction of the right to organize and bargain collectively to public sector workers, private sector teachers, agricultural workers, migrant workers, workers in the informal sector and temporary, agency or other subcontracted workers; insufficient protection against acts of anti-union discrimination; difficulty to bargain collectively; and denial of the right to strike to public sector workers); and (ii) acts of anti-union discrimination, interference, harassment and other anti-union practices in a number of enterprises and the Government's failure to protect the workers.

Legislative shortcomings

981. The complainant alleges that Thai labour laws and their implementation do not sufficiently protect freedom of association and are not in line with Conventions Nos 87 and 98 as they fail to provide the right to organize and bargain collectively to about 75 per cent of the 39 million workers, nearly half of whom work in the informal economy. Stating that Thailand has the lowest unionization rate – about 1.5 per cent – of any country in South-East Asia, the complainant indicates that labour relations are governed by primarily three laws, all of which fail to protect the right of workers to freely associate, organize, form trade unions and bargain collectively. The relevant laws are:

- Labour Relations Act, 1975 (LRA) which covers employees in the private sector;
- State Enterprise Labour Relations Act, 2000 (SELRA) which covers employees in state-owned enterprises; and
- Civil Service Act, 1992 (CSA) which covers workers in the civil service and public sector.

982. Firstly, the complainant alleges the denial or restriction of the right to organize, form trade unions and bargain collectively to various categories of workers: civil servants and public sector workers, including health-care providers, teachers, police officers, fire fighters and administrative employees at all levels of Government; teachers and professors at private schools and universities (through the passage of the Private University Act, 2003); agricultural workers; and workers in the informal economy sector, including domestic workers and homeworkers. Migrant workers, who make up around 10 per cent of the workforce, also have their rights to organize, bargain collectively and serve on trade union committees severely restricted as in line with section 101 of the LRA, only Thai nationals by birth can organize or serve on a trade union committee or office. Although migrant workers can join already existing trade unions led by Thai born nationals, these are very few, as migrant workers are concentrated in industries where not many Thai born nationals are employed, such as the shrimp and commercial fishing industries. In such industries, the LRA has in effect barred unionization and migrant workers are vulnerable to poverty, wage theft, poor health and safety standards, dangerous working conditions, exploitation, extortion by police and trafficking for forced labour.

983. The complainant states that the labour law also limits the freedom of association and the right to bargain collectively of temporary, agency and other subcontracted workers, who make up around 50 per cent of the workforce in industrial zones specialized in export. Although agency and subcontracted workers have the right to form their own trade unions and bargain with their agency employer or subcontractor employer, such negotiations do not improve their working conditions since these are established by the manufacturing firm, not the employment agency. According to the complainant, in line with sections 88 and 95 of the LRA, trade unions can either represent employees of the same employer or employees

working in the same type of industry. However, when trade unions try to change their statutes to be able to represent agency and subcontracted workers, the Ministry of Labour mostly rejects these initiatives. Furthermore, when temporary workers attempt to establish a trade union or bargain collectively, they are often transferred to another workplace or lose their contracts. The complainant adds that although these workers are considered as temporary, the majority of them work in the same position for several years and perform jobs similar to those performed by permanent employees and that employers frequently increase the use of temporary workers to thwart unionization or weaken an already existing union.

- 984.** Secondly, the complainant alleges that the laws do not sufficiently protect workers from anti-union discrimination. It explains that although an employer may not dismiss or take action against a worker for joining a trade union, submitting a demand, calling a rally, filing a complaint or lawsuit, or for providing evidence to a government official and may not threaten or force a worker to resign from a trade union or to interfere with the operations of a trade union, the courts have interpreted these prohibitions to mean that a labour union must already be in existence and registered. Collective action or activities undertaken with the aim to form a trade union or discuss forming a trade union are thus only protected from the time the trade union is registered, leaving workers unprotected against anti-union discrimination and retaliation during the process of organizing and forming a trade union. According to the complainant, workers are only protected if they sign a demand and propose it to the employer, which is why, in practice, workers organizing a union generally propose a demand to the employer at the same time as they submit a request for registration. However, during the process of establishing trade unions and before submitting a demand, workers remain vulnerable especially considering that the Ministry of Labour usually contacts employers to verify whether the workers who are trying to establish a trade union actually work at the company, thus revealing their names to the employer.
- 985.** The complainant also indicates that even once a trade union is established, trade union leaders and employee committee members are vulnerable to employer retaliation or interference in trade union affairs. Workers report that trade union leaders are often dismissed on the pretence of a lay-off or downsizing, after which they are prevented from entering the workplace and representing trade union members, in line with sections 95 and 101 of the LRA, as they are not full-time employees. Furthermore, Labour Courts and inspectors often side with employers to pressure trade union leaders and members to give up seeking reinstatement; in some cases, courts had dragged reinstatement issues for years, and even when a court order is favourable to the workers, employers often ignore the ruling without impunity. The complainant further states that while the LRA and the SELRA ostensibly protect the right to freedom of speech for trade unionists by providing that they cannot be charged with civil or criminal offences for explaining and publicizing the facts concerning a labour dispute, the provisions allow pursuits in case of criminal offence against the employer's reputation, which can lead to fines and imprisonment and is reported to be abused by employers during union organizing initiatives or in labour disputes.
- 986.** Thirdly, the complainant indicates that although the LRA requires the employer to begin negotiating within three days after the union submits its demands and proposals, it does not oblige the employer to negotiate in good faith. Employers often ignore trade unions and refuse to negotiate after the initial meeting, while not providing any effective avenue by which workers can collectively bargain.
- 987.** Lastly, the complainant alleges that the SELRA prohibits all state enterprise employees from striking or engaging in industrial actions and stipulates penalties both for participating in a strike – up to one year imprisonment or a fine or both – and instigating a strike action – up to two years of imprisonment or a fine or both penalties. It further states that the Committee had previously pronounced itself on the restriction of the right to strike and expressed regret at the general prohibition of strikes in the public sector and the severe penalties imposed.

Anti-union practices and the Government's failure to protect workers

988. The complainant alleges that the Government fails to protect the workers who exercise their freedom of association and collective bargaining and provides the following illustrative cases.

TRW Steering and Suspension (company 1)

989. On 30 March 2012, the employer unilaterally increased wages without negotiating with the union, in response to which the workers protested by refusing overtime and proposed wage increases in line with the industry standard. On 20 April 2012, the company announced a lockout of three trade union leaders, including the president, claiming in writing that they had led the workers to slow down the production, causing damage to the company and violating its rules. Despite many mediation meetings with the provincial labour office and Labour Court, the workers were pressured to accept an offer from the employer to drop their complaint and resign. While the locked out union president accepted the offer and resigned due to financial difficulties, the other two trade union leaders asked for reinstatement and emphasized that the labour authorities did not aim at their reinstatement but pressured them to accept the offer and resign. The case is ongoing.

TechnoPLAS Thailand Factory (company 2)

990. On 25 December 2012, the factory trade union was registered after which the workers, most of whom are female, proposed their demands to the company but negotiations with the employer were unsuccessful. On 23 and 30 January 2013, the employer dismissed 15 trade union leaders, allegedly due to organizational restructuring, who were then pressured by the labour inspectorate to take a payout from the company and resign. On 29 May 2013, the Labour Relations Committee (LRC) called upon the employer to reinstate the remaining workers but in the meantime 14 out of 15 workers took the payout and resigned due to financial difficulties, while the remaining trade union leader is isolated and under constant surveillance.

Nakashima Rubber (Thailand) Co. Ltd. (company 3)

991. On 17 January 2005, the Nakashima Rubber Company dismissed four trade union leaders, including the president, for having allegedly violated company rules pertaining to "union duty leave" and other issues. Immediately following their dismissal, the trade union leaders were prohibited from entering the enterprise and were unable to meet with trade union members. While two trade union leaders took a payout and resigned, the other two filed a complaint to the LRC and the Central Labour Court and, after seven years of proceedings, won their case. In 2012, the Supreme Court had to confirm the reinstatement order on two occasions before the two workers were finally reinstated. However, when the company opened a second factory in Prachinburi Province, the reinstated workers together with other trade union leaders were transferred there, before being dismissed. In November 2013, another 11 members of the employee committee were dismissed. The primary court upheld the dismissals but following the workers' appeal, the case is currently ongoing at the Supreme Court.

Yum Restaurant International (Thailand) Co. Ltd. (company 4)

992. On 9 May 2011, the company dismissed three trade union leaders after they had successfully registered a trade union and proposed their demands to the company. Several trade union members were called to individual or small group meetings with the employer and pressured to resign from the trade union; under financial distress, two trade union leaders accepted the

company's offer while the third one obtained reinstatement at court but was pressured by the judge to be more conciliatory, accept the money and drop the case. When she returned to work, the employer subjected her to various forms of intimidation and discrimination: isolation, lack of work, video surveillance, exclusion from bonuses and company-provided benefits with the aim to pressure her to take a payout and resign. The complainant states that both the LRC and the Labour Court claimed that they did not have the power to consider or make a decision on the specific allegations of anti-union discrimination. The company appealed against the reinstatement order and the case is currently ongoing.

TA Automotive Parts (Thailand) Co. Ltd. (company 5)

993. On 10 February 2014, about 120 workers met, signed and submitted a set of bargaining proposals to the company while being observed and videotaped by police officers called in by the employer to intimidate the workers. Two days later, the workers submitted a request to register their local trade union at the Ministry of Labour. Although the company and the trade union met for three rounds of negotiations, the trade union was asked to withdraw its proposals as the company was unable to meet the workers' demands. Further mediation meetings were held with no progress and on 24 March 2014, the company locked out 116 workers and replaced them with subcontracted workers, including 45 Cambodian migrant workers, before cutting benefits for all trade union members. Frustrated with the lack of progress and support from the labour inspectorate and the Ministry of Labour, the union began to demonstrate in front of the Ministry of Labour and the Thai Labour Solidarity Committee submitted a complaint to the Royal Thai Police for allowing police officers to be used to threaten workers and violate their labour rights.

994. On 23 May 2014, the employer agreed to sign a collective bargaining agreement and to reinstate all locked out workers but in reality only a few workers were allowed to come back and about 38 trade union members were forced to wait in tents set up on company grounds and were monitored by video cameras. They were required to report daily and were paid, but were not given work or allowed to use company bathrooms. Later on, the company dismissed a worker for posting a picture on social media depicting the workers in tents, claiming that the picture defamed the company's image. On 28 June 2014, the employer dismissed seven trade union leaders who were also members of the employee committee, claiming that other workers had gathered enough signatures to remove the seven trade union leaders from the employee committee. On 8 July 2014, the company suspended the 38 trade union members sitting in tents for allegedly refusing to work overtime although they were not even allowed to work for most of the time they were in the tents. The company then held private meetings, without trade union representatives, with the 38 workers and pressured them to take a settlement and resign; 34 workers agreed to the company's demands while the other four workers initially refused but eventually succumbed to the employer's pressure. One of the workers was physically assaulted but the police never apprehended any suspects. On 28 November 2014, the LRC found that the dismissal of seven trade union leaders in June 2014 was illegal and ordered the company to reinstate and compensate them but the company appealed the order.

Alpha Industry (Thailand) Co. Ltd. (company 6)

995. On 10 March 2014, about 260 workers signed a document containing their proposals and submitted it to the company. When the company and the workers' representatives met to negotiate, police officers were brought in to intimidate the workers and the supervisors walked around the factory to force the workers to sign an order to withdraw their proposals; those who refused were threatened with dismissal. According to the complainant, six workers and negotiating committee members refused to sign resignation letters even under pressure; the employer then called in police officers carrying rifles to intimidate them and when they again refused they were dismissed for violating company rules. The six dismissed

workers reported a labour dispute to the Prachinburi Provincial Labour Office. On 21 March 2014, the company dismissed one more trade union leader for violating company rules. The workers then elected seven new trade union committee members but the employer dismissed all of them between 8 and 10 April 2014. The dismissed workers filed a complaint to the Royal Thai Police over the use of police officers to intimidate workers and another complaint to the LTRC, Ministry of Labour, and Japan Council of Metal Workers Unions. As a result, the trade union and the company reached a collective bargaining agreement but under the employer's continued pressure, all trade union leaders eventually resigned from the trade union that has since been dissolved.

HGST Thailand (company 7)

- 996.** On 12 December 2014, about 1,500 workers protested against the company's low bonuses and a decrease in other payments. Although a mediation meeting was held with the Ministry of Labour, the protesting workers became agitated, as the employer did not allow workers inside the factory to leave after their shift, as they feared they would join the protest. Other trade unions and workers from surrounding plants also rallied behind the protesting workers. The following day, an agreement on the disputed issue was reached and an amnesty clause requiring both the employer and the workers not to retaliate against each other or to file legal charges, was agreed upon. However, the company along with local political officials and the police began to pressure the workers who had led the protest and had begun to organize a trade union, to make them resign and terminate the trade union organizing drive. These workers, as well as labour leaders from supportive trade unions, received death threats. At the beginning of 2015, the company informed the workers that they could negotiate a collective bargaining agreement by March but in the meantime, it increased the number of contract workers, held meetings with the military and police to prepare for any future protests and broke off the negotiations. The national trade union federation, fearful of retaliation against the workers, advised not to protest or challenge the actions.

Hutchinson Technology Operations (Thailand) Co. Ltd. (company 8)

- 997.** After failing to reach a collective bargaining agreement in November 2014, the employer proposed to decrease the benefits of trade union members. The local trade union organized a protest and called for a mediation meeting that resulted in a collective bargaining agreement, which included an amnesty clause for protesting workers. However, soon after, the employer dismissed the local trade union president and began to closely monitor the workers who had been involved in the protest with security guards and video surveillance. As the trade union president was a member of the employee committee, she could only be dismissed with a court order and thus challenged her dismissal. Even when the Ayutthaya Labour Welfare and Protection Office informed the employer that the worker was a member of the employee committee, the employer refused to reinstate her. The trade union president then filed a complaint with the Labour Court but while acknowledging that the dismissal was unlawful, the employer did not offer reinstatement but compensation to resign, which the worker accepted due to continued pressure. On 1 May 2015, the company began to separate the trade union leaders from other workers and stopped giving them work while hiring short-term contract employees. The complainant further refers to a gas leak that occurred on 20 January 2015, stating that while the managers, office workers, and foremen were allowed to evacuate the company premises, the workers were held inside the plant by security guards and were told by the health and safety employee that it was safe to work. Fearful of dismissal, the workers returned to work but soon began to pass out or develop other symptoms, including swelling of the face, blackout, sore throat and high blood pressure. According to the workers, several gas leaks have occurred in the past, and workers' health had suffered as a result.

Michelin Siam Company (company 9)

998. On 13 February 2014, the local trade union submitted its collective bargaining proposals to the company but no agreement was reached, after which the trade union organized rallies and demonstrations. When the trade union announced that a strike would commence on 13 March 2014, several gunshots were fired at the demonstration site but no one was injured. Eventually, the strike did not take place and on 29 April 2014, the trade union and the employer reached a collective bargaining agreement. However, the company then proceeded to a lockout of 60 trade union members and although all but two of the workers were later reinstated, they were transferred to the worst positions in the plant and were regularly verbally abused and pressured to resign. The workers filed a complaint to the Labour Welfare and Protection Department but no action was taken to resolve the complaint.

Stanley Works (company 10)

999. On 30 July 2013, the employer dismissed the president of the Stanley Thailand Workers Union (STWU) for allegedly stealing company property – a leave request form, which the trade union president had signed and took to photocopy for his own record. As a dismissed trade union leader, he was not allowed to visit the plant or meet with his members and the trade union elected a new leader. However, the company began to directly support the creation of another trade local union – the Stanley Works Workers Union (SWWU) – led by white-collar employees instead of production workers. On 29 October 2013, the company locked out 44 STWU members, including the local union executive council and four pregnant women, one of whom miscarried during the lockout period, and demanded that the STWU withdraw its collective bargaining agreement and its bargaining proposals. The company and the newly created trade union then signed a new collective agreement containing wage freezes and other concessions. The STWU reported that the company pressured its members to leave the trade union and join the SWWU and presented the locked out workers with an 18 point consent letter they had to sign in order to be reinstated, which requested the workers to perform a religious ceremony to apologize to the company and repent for their actions, prohibited them from complaining about the company and required them to drop all of their complaints and cases in the Labour Court, and even required one of the trade union leaders to apologize to the company on her social media for up to one year on threat of a criminal libel case against her. Since the lockout, the STWU has been in mediation with a labour officer but due to his slowness or unwillingness to protect labour rights, no progress was made. As a result, on 11 November 2013, the STWU filed a petition to the National Human Rights Commission against the lockout but despite additional mediation meetings with the company, most of the STWU members who continue to work at the factory left the trade union to avoid employer's pressure.

1000. In January 2014, the trade union organized demonstrations due to the employer's refusal to negotiate but the company threatened to dismiss any worker that participated in the demonstrations. Although to end the labour dispute, the STWU offered to agree with the employer's collective bargaining demands and requested a mediation meeting with the Chacheongsao Labour Welfare and Protection Office, the employer refused to meet unless the workers signed the 18 point consent letter. The STWU then held meetings with various public institutions and labour organizations and the Deputy Director of the Labour Welfare and Protection Department agreed to mediate between the two parties. As a result, the employer agreed to reinstate 12 out of the 44 locked out trade union members and leaders, while the others accepted a settlement and decided to resign. The employer, however, continued to threaten the reinstated workers, dismissed one of the workers for posting a picture of the management on social media and encouraged the newly created company trade union to stage a walk out against the reinstated workers. As a result, three of the reinstated workers were pressured to voluntarily resign and eight others were dismissed on 13 January 2015. According to the complainant, the company trade union filed criminal libel lawsuits

against four trade union leaders from the Thai Confederation of Electronic, Electrical Appliances, Auto and Metal Workers (TEAM) who provided assistance to the STWU and all four received fines. The company is also planning to file civil lawsuits against additional TEAM leaders and the STWU for alleged damages, including “defaming” the company. On 24 June 2015, the LRC ruled in favour of the eight dismissed former STWU members stating that as the eight workers had agreed to the demands proposed by the employer with the intention to be reinstated to end the conflict, the dismissal was in breach of section 121(1)–(2) of the LRA. However, the LRC did not order reinstatement as it found that the parties could no longer work together peacefully and instead ordered the employer to compensate the workers.

Yano Electronics (Thailand) Ltd. (company 11)

- 1001.** On 9 December 2014, about 1,000 workers protested against the company not announcing bonuses, after which mediation with the Prachinburi Labour Welfare and Protection Office took place in the presence of police officers and the parties agreed on a bonus plan. However, soon after, the company dismissed the leaders of the protest and the workers were pressured and threatened by company-hired thugs. In response to the workers’ complaint, the Labour Welfare and Protection Officer stated that he had no power to remedy the situation.

NTN Manufacturing (Thailand) Co. Ltd. (company 12)

- 1002.** On 10 February 2014, the NTN Workers’ Union of Thailand submitted its proposals to the company, which led to several sessions of negotiations from February to March. When no agreement was reached, about 700 workers took sick leave from 20 to 21 March 2014 and the company retaliated by suspending 34 trade union leaders and demanded that the workers elect new leaders and representatives. Negotiations resumed but no agreement was reached and the trade union requested mediation from the Ministry of Labour. On 3 April 2014, the parties reached an agreement but the company also demanded that the trade union sign an apology letter to which the workers disagreed, as they were afraid that the employer would use the letter to file charges against them. Although several draft letters were exchanged between the employer and the trade union, one party always rejected the other’s proposal. In May 2014, eight trade union leaders and a trade union member were dismissed. In protest, the trade union attempted to organize a demonstration in front of the company but was prevented from doing so by the security officers from the Eastern Seaboard Industrial Park. The employer then dismissed 27 additional trade union members. The trade union president and two other trade union members filed complaints to the Labour Court while the other dismissed workers accepted compensation. In December 2014, the court ordered the reinstatement of the two trade union members but upheld the dismissal of the trade union president.

Summit Laemchabang Auto Body Work Co. Ltd. (company 13)

- 1003.** In 2013, the company dismissed 60 trade union members for incompetency, claiming that 20 trade union duty leave days that trade union leaders were entitled to under the collective bargaining agreement hindered the company’s operations. Although the workers filed a complaint to the Labour Court, the judge stated that the employers had the right to dismiss workers at any time if they were not making profit. On 11 November 2013, the employer suspended 17 members of the local union executive committee, and although later reinstated all but four of them, it filed a court order for permission to dismiss all trade union members and officers of the employee committee, rejected mediation and claimed that the workers had hostile attitudes and were incompetent because they were entitled to 20 days of leave per year for trade union duty, which hurt the company’s operations. The judge stated that the workers took too many union duty days and their actions were cause for dismissal but

nevertheless refused to render a decision and ordered the workers to negotiate with the employer. No progress has been made on this issue.

Mitsubishi Motors (Thailand) Co. Ltd. (company 14)

- 1004.** On 16 September 2013, the company filed for a court order to dismiss the trade union president for allegedly having a hostile attitude, taking unauthorized leave and having unlawfully appointed a worker as a member of the employee committee. On 24 July 2014, the court rejected the first two accusations but upheld the third claim indicating that the trade union president interfered with the justice system as he unlawfully appointed a worker to the employee committee, while the worker was in a separate legal process with the employer. After the dismissal of the president, the trade union has been severely weakened and the company stopped transferring membership fees to it.

Thai Sohbi Kohgei Co. Ltd. (company 15)

- 1005.** In October 2013, the company unilaterally changed working hours without consulting the local trade union or the employee committee. When the trade union filed a complaint to the Labour Court, the company dismissed a trade union committee member in retaliation, accusing him of having a hostile attitude and not following company orders, including an order to memorize the company's code of conduct. Taking up the worker's complaint, the LRC ordered his reinstatement but the company rejected the order and filed a complaint to the Labour Court asking to nullify it. The company continued to apply pressure on the worker and the local trade union; on 29 June 2014, several gunshots were fired near the trade union president and on 1 August 2014, the dismissed worker was physically assaulted. After these incidents, the company's lawyer negotiated with the trade union president to drop the complaint concerning the unilateral change of working hours and to persuade the dismissed worker to resign voluntarily, which he refused to do. On 4 September 2014, the local trade union president was physically assaulted on his way home and the LRC issued another order to the employer to reinstate the dismissed trade union committee member. The complainant indicates that the employer has yet to comply with the reinstatement order and that the assault on the local trade union president and local trade union committee member is still under investigation.

Ricoh Manufacturing (Thailand) Co. Ltd. (company 16)

- 1006.** On 29 November 2011, 274 workers signed a petition in support of better working conditions and increase in bonus pay and a group of 21 workers delivered the petition to the managers, who agreed to negotiate. The workers organized a trade union and developed their proposals but on 6 December 2011, the employer dismissed 41 trade union leaders and members, claiming that the workers created a "dispute between workers and management, thus inciting a rift in the company; created a bad example; defamed the company's reputation; built mistrust among workers; showed aggressive behaviour and had bad attitude; and were unwilling to conform and could no longer be trusted". On 7 December 2011, the company dismissed another four workers for participating in a rally and on the following day, it forced the remaining workers to sign a pledge that they would not participate in any demonstration or rally in support of the dismissed workers. A few days later, the company dismissed nine more workers claiming that they had repeatedly violated the company's warnings.
- 1007.** On 16 December 2011, the local trade union was registered but the employer refused to negotiate with the workers. The trade union filed several complaints, including at the Parliamentary Labour Committee and the Rayong Labour Protection and Welfare Officer but the complaint was dismissed by the former and the latter took no action at all. Although the trade union received considerable international support, the company refused to reinstate the dismissed workers or to negotiate with the trade union. Furthermore, it handed out

bonuses to workers who did not support the trade union and transformed about 400 full-time permanent positions, out of a total of 724, into short-term positions to undermine trade union support. The trade union was dissolved as the workers had to find new jobs to support themselves.

Iida Seimitsu (Thailand) Co. Ltd. (company 17)

- 1008.** In early 2012, the workers registered a trade union and in March 2012 proposed their demands to the company. However, instead of negotiating, the employer suggested to take away many of the benefits the workers already had, an act which they believe was retaliation for organizing a trade union, and on 18 April 2012, the employer demanded that the trade union drop all its demands. Despite mediation meetings with the provincial labour officer, the dispute was not resolved and on 27 April 2012, the employer locked out 112 trade union members and leaders. After several rounds of mediation, the company agreed to reinstate all trade union members but assigned them to cleaning jobs at 75 per cent of their pay. Many of the reinstated workers resigned due to the discrimination and pressure they faced for being trade union members and soon afterward, the trade union ceased to exist. The workers did not file any further complaints for fear of retaliation.

Electrolux (company 18)

- 1009.** On 21 December 2012, the company representatives and the trade union met to discuss wages and short-term contracts but no agreement was reached and a few days later, the company posted the new wage schedules without negotiating with the trade union. On 9 January 2013, the company demanded each “line leader” to refrain from carrying out any trade union activity and to instruct their subordinates to do the same and repeated these instructions a day later. On 10 January 2013, the trade union again requested the management to take their concerns about wage schedule into account when calculating wage increases. The company called a meeting with trade union representatives and informed the workers that it would announce the changes to wages, use of short-term contract workers and bonuses, while also stating that it would not retaliate against trade union members. However, when the workers gathered to hear the announcement, the company director and managers grabbed the local trade union president and physically escorted him outside the meeting where he was dismissed, taken into a company van and driven off the company property.
- 1010.** The workers refused to return to work after the meeting unless their demands were met and the trade union president was reinstated. In response, the company called in additional security guards as well as the police and barricaded about 100 workers outside the workplace. The workers, including pregnant women, were not allowed to have lunch and were detained by the company guards for up to eight hours. When the workers returned to work on 14 January 2013, the company dismissed them and others as well – up to 127 workers. On 28 June 2013, following international pressure and condemnation, the company agreed to reinstate the workers but has so far failed to honour the agreement. The complainant alleges that since its registration in February 2011, the employer ignored the trade union and refused to bargain in good faith with the workers, even though the trade union represented an overwhelming majority of the workforce.
- 1011.** In conclusion, the complainant requests the Government to ratify Conventions Nos 87 and 98, to review the labour laws, in consultation with trade unions, in view of bringing them into compliance with the Conventions and to ensure that in the mentioned cases, employers comply with all orders for remediation and compensation and that workers’ fundamental rights are respected.

B. The Government's reply

1012. In its communication dated 14 March 2016, the Government provides observations on several types of labour organizations; progress made in legislative revision; freedom of association of various categories of workers; measures to promote the right to strike and combat discrimination against migrant workers; as well as on the cases of alleged anti-union practices in numerous enterprises.

Observations on the allegations of legislative shortcomings

1013. The Government contests the complainant's allegation that the vast majority of Thai workers are prohibited from exercising freedom of association and that Thailand has the lowest unionization rate of any country in South-East Asia. It asserts that Thai workers are able to exercise freedom of association by participating in four main forms of labour organizations, each protecting workers' right to organize and bargain collectively based on the LRA, the SELRA, the Thai Constitution, the Interim Constitution and other related laws. The Government refers to the following entities:

- Trade unions: The number of trade unions increased from 1,366 in 2012 to 1,479 in 2015, while the number of trade union members grew from 402,633 in 2012 to 450,725 in 2015. Out of the 348,692 private enterprises in existence in 2015, 1,379 (0.42 per cent) had registered trade unions. The number of trade unions also increased in state enterprises from 45 in 2012 to 47 in 2015, while the number of trade union members expanded from 166,541 in 2012 to 180,681 in 2015. Out of 64 state enterprises in existence in 2015, 47 (73.4 per cent) had registered trade unions. Representatives from labour organizations are also encouraged to nominate themselves for participation in the Tripartite Committee.
- Employees' Committees: In line with the LRA, an Employees' Committee may be established in a business that has 50 or more employees and the employer must arrange for a meeting with the Employees' Committee at least once every three months, or upon the request of more than one-half of the total number of Committee members or the trade union. The Employee's Committee can discuss many topics, including employees' complaints and settlement of disputes and many actions of the employer against a Committee member, including dismissal, can only be taken with permission from the Labour Court.
- Welfare Committees: According to the LRA, a place of business with 50 or more employees shall arrange for the establishment of a Welfare Committee, comprised of at least five elected employee representatives. As of November 2015, there were 14,557 company-level Welfare Committees represented in businesses and Employees' Committees.
- Unregistered labour organizations: Employees in private sector and state enterprises are also able to organize without any registration. There are a number of active, unregistered labour organizations, whose reputations are well recognized among the civil society, namely the Thai Labour Solidarity Committee (TLSC), Women Workers' Unity Group (WWUG), Labour Coordinating Center (LCC), Information and Training Providing for Labour Center and State Enterprises Workers' Relations Confederation (SERC).

1014. The Government also points out that workers not covered by the LRA or the SELRA, benefit from the right to unite and form an association guaranteed by the Constitution and the Interim Constitution. Article 64 of the Constitution states: "A person shall enjoy the liberty to unite

and form an association, a union, a league, a co-operative, a farmers' group, a private organization, a nongovernmental organization, or any other group". Furthermore, in line with section 13 of the LRA, employees can bargain collectively, whether they are trade union members or not; they can submit a demand for an agreement relating to conditions of employment to the employer if the demand includes at least 50 per cent of the total number of the employees in the enterprise and contains their names and signatures.

- 1015.** The Government further indicates that the Ministry of Labour, through the Department of Labour Protection and Welfare (DLPW), made progress in the revision of the LRA and the SELRA, with the purpose of expanding the ability of workers to organize and bargain collectively. Two draft acts were approved by the Office of Council of State and submitted to the Secretariat of the Cabinet for subsequent submission to the Cabinet and the National Legislative Assembly, but while the two drafts were being processed the TLSC submitted a proposal to the Ministry of Labour to halt the process of submission as it felt that the drafted acts needed revision in order to comply with the principles of Conventions Nos 87 and 98. On 24 March 2015, the Ministry of Labour convened a meeting with representatives from various labour organizations and employers' organizations to consider the proposal and it was decided that the draft acts needed to be redrafted. On 10 August 2015, a working group comprised of six representatives from the Government and the employers' and employees' organizations was set up. Its role is, among others, to review the drafts prepared by tripartite actors and, using ILO Conventions as the source, elaborate a second draft of the LRA and the SELRA. The working group convened five times between July and December 2015 and the Government provides minutes of each meeting. Once its work is completed, a public hearing will be conducted to review and propose comments regarding the content of the redrafted acts and stakeholders, including an expert from the ILO, will be invited to participate. The Government states that it will ensure that the principle of freedom of association and collective bargaining, consistent with ILO standards, will be prescribed in the newly drafted LRA and SELRA in order to provide the right to organize to Thai and migrant workers, irrespective of the type of industrial trade union.
- 1016.** With regard to freedom of association and collective bargaining of various categories of workers, the Government states that the existing legislation affords Thai workers freedom of association and collective bargaining. In particular, the Government refers to section 43 of the CSA, which states that: "Civil servants have the liberty to assemble as a group, as provided in the Constitution, provided that such assembly does not affect the efficiency of national administration and continuity of public services, and must not have a political objective". According to the Government, the CSA intends to maintain national peace and order and does not violate the right of civil servants but the Ministry of Labour will inform the principle of freedom of association, right to organize, and collective bargaining, as set forth by the ILO, to the Office of Civil Service Commission in order to protect the rights of civil servants.
- 1017.** Although in line with section 23 of the Private University Act of 2013, professors at private universities are not under the protection of the LRA, their right to freedom of association is protected by the Constitution and the Interim Constitution. In addition, employees of private universities must receive employment protection, benefits and compensation coverage not less than what is prescribed by the LRA and in line with the ministerial regulations. Consequently, teachers and professors at private universities are able to exercise their right to form an association, as prescribed in the Constitution and the Ministry of Labour will propose the principle of freedom of association and right to organize and collective bargaining, as set forth by the ILO, to the Ministry of Education for its consideration.
- 1018.** The Government further states that according to the LRA, an employee defined as a person agreeing to work for an employer in return for wages, is able to enjoy the right to organize. Therefore, employees or workers in the agricultural sector, domestic workers or any kind of

contract employees are able to submit their proposals for the registration of trade unions. Furthermore, workers in the informal sector are allowed to form a trade union for the sake of collective bargaining and such trade unions have played significant and active roles in collective bargaining in various aspects. The Government indicates numerous organizations of this type: the National Informal Labour Coordination Centre (LILC), which provides services to workers in the informal sector in every region in Thailand; the Foundation for Labour and Employment Promotion (Homenet) established for the purpose of promoting the trade union workers in the informal sector and enhancing their capacity; WWUG which conducts activities related to women workers' issues in various aspects; and Women's Movement in Thai Political Reform (WeMove) which prioritizes women's rights and gender equality issues.

1019. With regard to the allegations concerning migrant workers, the Government indicates that throughout 2015, it took a large number of preventative measures to reduce the vulnerabilities of persons at risk of trafficking by implementing new policies that respond to gaps in the system, developing partnerships and enhancing capacity of government officials, the public and migrants. The Government also improved the process of legalization of irregular migrants and proceeded to the registration of 1,010,391 migrant workers and their dependants from Myanmar, Laos and Cambodia to allow them to stay and work within the country. The Government further states that migrant workers are protected by the Labour Protection Act; the Home Workers Protection Act; and the Occupational Safety, Health and Environment Act; that it enacted various regulations to ensure their protection and that the Ministry of Labour has considered revisions of the Labour Protection Act on issues of forced labour and debt bondage in order to combat forced labour and human trafficking. The Government also provides detailed information concerning the Kvw Lin Naing case and the Rohingya trafficking case to demonstrate progress made in combating human trafficking, including that of migrant workers.

1020. Concerning contract workers, the Government points out that section 11(1) of the Labour Protection Act prescribes that:

Where an entrepreneur has entrusted any individual to recruit persons to work, which is not a business of employment services, and such work is any part of manufacturing process or business operation under the entrepreneur's responsibility, and regardless of whether such person is the supervisor or takes the responsibility for paying wages to the persons who perform work, the entrepreneur shall be deemed as an Employer of such workers. The entrepreneur shall provide contract employees, who perform work in the same manner as employees under the employment contract, to enjoy fair benefits and welfare without discrimination.

In response to the allegation that only full-time employees may serve on trade union committees and that if a trade union official loses his or her job, they can no longer be trade union members or elected officials, the Government indicates that former members of trade union committees can only serve as elected trade union officials and advisers if they are allowed and accepted by the trade unions.

1021. Concerning the obligation to bargain in good faith, the Government states that although the LRA does not contain such an obligation, section 5 of the Civil and Commercial Code provides that: "Every person must, in the exercise of his rights, and in the performance of his obligations, act in good faith". In addition, the LRA allows employees to submit a complaint to a labour dispute arbitrator to request negotiation. Furthermore, the newly drafted LRA will prescribe the principle of good faith and training courses on negotiations in good faith will be provided to employers and employees.

1022. The Government further states that, contrary to the complainant's allegations, both the LRA and the SELRA protect the freedom of speech of unionists, especially for libel. Section 99 of the LRA provides:

When a Labour Union, for the benefits of its members, carries out the following activities, not related to politics, the Employees, Labour Union, members of the Committee or Sub-committee and officials of the Labour Union shall not be liable to criminal or civil charges or actions:

- (1) participate in the negotiation for settlement on the demand for rights or benefits to which its members should be entitled with Employers, Employers' Associations, Employees, other Labour Unions, Employers' Federations or Labour Federations;
- (2) cause a Strike or assist, persuade or encourage its members to Strike;
- (3) explain or publicise facts concerning Labour Disputes; or
- (4) arrange for a rally or peaceful gathering for a Strike,

that is, except where the activities constitute criminal offences in the nature of offences endangering the public against life and body, offences against liberty and reputation, offences against property and civil infringements resulting from the commission of the said criminal offences.

The Government further indicates that individuals enjoy the right to file a defamation lawsuit but the abovementioned categories constitute exemptions. Nevertheless, any defamation case will be brought to the criminal court for trial but in line with section 329 of the Criminal Code: "Whoever, in good faith, expresses any opinion or statement: by way of self-justification or defence, or for the protection of a legitimate interest; in the status of being an official in the exercise of his functions; by way of fair comment on any person or thing subjected to public criticism; or by way of fair report of the open proceeding of any Court or meeting, shall not be guilty of defamation".

- 1023.** The Government concludes by stating that it has seriously endeavoured to better protect labourers and eliminate forced labour, in line with international labour standards. In cooperation with the ILO TRIANGLE Project, the Government focused on the promotion of migrant workers' rights, and under the ILO-IPEC, it focused on the prevention and the elimination of forced labour, child labour, and labour trafficking in the shrimp sector. Training courses to enhance the officials' knowledge on labour inspection has resulted in effective law enforcement actions in the sea fishery and fish processing industries.

Observations on allegations of anti-union practices in various enterprises and the Government's inaction to protect workers

- 1024.** With regard to the individual cases of allegations of anti-union practices in various enterprises, the Government provides the following observations.

Company 1

- 1025.** In January 2012, there was a labour dispute between the company and the trade union leader regarding the 300 Thailand baht (THB) minimum wage launched by the Government. Some of the employees requested higher wages, but the demand was not in accordance with the procedures prescribed in the labour law and the agreement on working conditions was still in force, so the employer denied the demand. As a result, some dissatisfied employees refused to complete their work assignments and despite warnings from the employer, the trade union leader continued to persuade the employees to stop working, causing business losses to the company. Eventually, the employer ordered two trade union committee members and one member of the employee committee, to stop coming to work, although they would still receive pay. According to the Government, the company did not lockout the labour leaders but asked permission from the Labour Court to punish the member of the employee committee. During reconciliation by the Labour Court, the worker resigned with compensation. The trade union continues its activities and the two trade union committee

members continue to work at the company at the same wages and retain their role as trade union officials. The Government states that they had not submitted any further demands and the labour dispute was thus settled.

Company 2

1026. In December 2012, the employees submitted a demand to the employer to change working conditions but an agreement could not be reached. The labour dispute was submitted to the Government office in charge and successfully settled on 18 December 2012, with mutual agreement of both sides. On 23 January 2013, the employer announced a scheme of the company reengineering as a result of which 15 employees, including ten trade union committee members, were laid off with compensation, as prescribed in the labour law. On 7 March 2013, the ten committee members submitted a complaint to the LRC, which conducted an investigation and issued reinstatement and a compensation order. The employer submitted an appeal to the Labour Court to revoke this order, but later withdrew the appeal as it reached an agreement with the ten employees, who did not wish to continue working in the company and voluntarily resigned with compensation. The labour dispute was thus settled and the trade union continues to conduct its activities.

Company 3

1027. In 2006, the company requested the Labour Court to stand down the leader of the trade union and another four employees because they participated in trade union activities beyond those, which are stated in the law and without having been granted permission to do so by the employer. The Labour Court provided conciliation and the employees agreed to cease their employment commitment with compensation. In 2012, the company faced high losses from the severe flooding of 2011 and submitted an application to the Labour Court to lay off the leader of the trade union and another 11 employees who were members of the employee committee and the trade union. The Labour Court gave permission to the employer to lay off the employees and pay compensation in accordance with the law. Although the employer obtained the right to unilaterally lay off the employees, they can appeal such a court order. On 27 April 2015, the trade union submitted its demand concerning working conditions to the employer and after two rounds of discussions an agreement was reached and was registered on 28 May 2015 with validity for two years.

Company 4

1028. When the company laid off three trade union members, they submitted a complaint to the LRC, which made an order to rehire the workers but the employer, submitted a legal action aimed at revoking it. The Central Labour Court provided conciliation that resulted in two employees accepting the employer's compensation while the third employee was rehired in a different position but one of equal rank and pay. Moreover, labour officers also supported the labour relations between both sides so as to promote good labour relations and partnerships. As for the allegation of discrimination, the employer indicated that the employee did not receive a bonus payment, as he was not eligible due to his unqualified working performance when compared with other employees of the same rank, while other forms of welfare, such as uniforms and shuttle buses, were already provided to all employees. The Government points out that employees can submit complaints on discrimination and unfair treatment to the Labour Court or to labour officers.

Company 5

1029. On 3 February 2014, a trade union was registered, on 10 February 2014, it submitted its demands to the company and negotiations proceeded from February to March 2014. However, agreement could not be reached and on 21 March 2014, the employer locked out 104 employees who had participated in the demand submission. On 2 April 2014, the

employer submitted its grievance to the Government and on 10 April 2014, it locked out all members of the trade union. On 22 May 2014, the labour dispute between the employer and the trade union was settled at the Ministry of Labour but on 8 July 2014, the employer imposed temporary suspension of employment to 38 trade union members on the basis that they had not done overtime work during the bargaining period and had caused losses to the company. On 14 July 2014, the company invited the 38 employees to discuss the situation, as a result of which 34 employees decided to resign and received compensation to the extent of 30 per cent of their salary, while the other four employees were rehired and continue to work at the company.

- 1030.** In August 2014, the company laid off seven employees who were trade union committee members, claiming that they had not done overtime work during the bargaining period and had caused losses to the company. The employees submitted a grievance to the LRC asking to let them return to work and receive compensation and accusing the employer of persecuting them in contravention of section 121 (1) and (2) and 123 of the LRA because they signed up their names for the grievance and participated as negotiators and trade union members. The company appealed to the Labour Court and sued both the Committee and the trade union. The LRC issued an order to pay damages to the employees but the employer requested the Labour Court to revoke the order. Eventually, both sides reached an agreement at the court and the employees accepted to receive compensation of THB470,000.

Company 6

- 1031.** On 10 March 2014, a total of 261 employees submitted a demand to the company to change working conditions but an agreement could not be reached and the labour dispute was submitted to a labour officer for conciliation. On 13 March 2014, both sides reached an agreement but the company laid off 14 employees who had led the negotiations. The employees submitted their grievance to the LRC asking to be rehired. After conciliation by the LRC, the company agreed to compensate the laid-off employees instead of rehiring them. The Government indicates that the labour dispute did not result in the laying off of the leader of the trade union.

Company 7

- 1032.** On 12 December 2014, 800 employees took part in a strike to demand the company to pay four-month salary bonus and other benefits. Although the labour officers visited the workplace and advised the employees to appoint a leader for labour negotiations, they preferred to negotiate jointly. On 13 December 2014, an agreement was reached and the labour dispute was settled. The employees did not submit any further grievance to the labour officers, the company rehired all employees without any punishment and did not use subcontracted workers to replace the current employees. Concerning trade union establishment, there was no grievance submitted to the labour officers and the police officers were present at the workplace to act as safety guards and not to confront the employees.

Company 8

- 1033.** In September 2014, the company laid off trade union committee members because they had violated company regulations. The employees submitted a grievance to the LRC, which ordered the company to rehire the employees, but the employer appealed to the Labour Court requesting conciliation and both sides eventually agreed to cease the employment relationships with compensation. On 20 November 2014, the trade union submitted a demand to the employer concerning the working conditions and the employer submitted a counter demand to the employees. Despite four bilateral negotiation meetings no agreement was reached and the employees gathered in front of the worksite during the negotiation and verbally assaulted the employer. On 26 November 2014, both sides submitted grievances to

the labour officers requesting conciliation, after which an agreement was reached and was registered on 9 December 2014 with validity for three years. After the labour dispute had been settled, the employer laid off the chairperson of the trade union as the employer found evidence that he had persuaded other employees to stop working during working hours thereby causing losses to the company. After conciliation at the Labour Court, the employment relationship was terminated and the employee received compensation. In July 2015, the company transferred four trade union committee members from one subsection to another within the same manufacturing section, on the basis that there were no jobs in the former subsection available. While one of the trade union committee members agreed to be transferred, the other three are still undergoing the process at the Labour Court. A further four employees agreed to a transfer requested by the employer and three more are undergoing a process at the Labour Court.

- 1034.** Concerning the gas leak incident, the Phranakorn Sri Ayutthaya Labour Protection and Welfare Office assigned an occupational safety and health officer to investigate the workplace, who found fluorine gas leaking at a level that did not exceed that which was prescribed by the law. No employees were injured in the accident and no grievances were submitted to the labour inspectorate regarding the security guards' misconduct resulting from not allowing employees to leave the area of the gas leak. The labour inspector subsequently conducted another inspection and found no evidence of misconduct.

Company 9

- 1035.** On 13 February 2014, the trade union submitted its grievance to the employer but the two sides were unable to reach a final agreement. The trade union then claimed the right to strike and on 13 March 2014, the employer locked out the workplace by erecting a barrier at the front part of the workplace and did not allow any employee to access the area, claiming it was rented for the purpose of car parking. As a result, a total of 1,500 employees gathered and occupied one lane of the road for a strike. After the strike, the employer did not rehire two employees and applied pressure on those who returned to work by assigning some of them to different offices and jobs. As a result, the employees submitted a grievance to the LRC, which ordered the employer to rehire two employees to their former positions. By virtue of the labour officers' efforts in promoting sound labour relations, the employer rehired all employees without laying off any trade union members.

Company 10

- 1036.** The trade union and the employer submitted proposals to change working conditions but could not reach an agreement. From 29 October to 7 November 2014, the employer locked out 44 employees; 33 employees decided to resign, while 11 employees remained locked out. The Labour Court decided against the employees but the labour officer conducted conciliation talks on several occasions. On 8 November 2015, the employer terminated the lockout and reinstated 11 employees to their former positions before dismissing them with the claim that other groups of employees were not satisfied with their behaviours and did not want to work with them. The employees received dismissal benefits as well as special monetary benefit but they filed a complaint to the LRC, which ordered the employer to pay dismissal benefits to the employees as the parties could not continue working together. In relation to the issue of a defamation lawsuit, the employer filed a complaint against a person who used an amplifier microphone to insult him, and the court, having concluded that he had acted in violation of criminal law, fined the worker.

Company 11

- 1037.** On 9 December 2014, a total of 500 employees went on strike and gathered in the company's premises to demand four months of salary as a bonus payment. Although the labour officers

conducted conciliation talks and advised the employees to appoint a representative to negotiate with the employer, the employees did not wish to appoint one and the Welfare Committee thus offered to be their representative in the negotiations to resolve the strike. The labour officers promoted good labour relations between both sides and on 22 December 2014, the employer agreed to pay the four-month salary bonus payment and the labour dispute was settled by mutual agreement. The Government indicates that no grievance has been submitted by the employees regarding the issue of being laid off.

Company 12

1038. On 10 February 2014, the trade union submitted its demand to the company but after negotiations, the demand was withdrawn. However, the employer did not allow the trade union leaders to go back to work unless they provided a written apology letter regarding a work stoppage during negotiations, which had caused losses to the company. Several draft letters were exchanged between the employer and the trade union, one party always rejecting the other's proposal. The employer then gave a written order to lay off the trade union members and committee members and asked for permission from the Labour Court to lay off the trade union committee claiming that it did not pursue the working conditions agreement by refusing to sign the apology letter. On 16 December 2014, the Labour Court stated that the trade union chairperson had acknowledged that sick leave taken by all company employees had caused the company losses and the court permitted the employer to lay off the trade union chairperson without compensation, while the cases of two other trade union members were dismissed. The trade union chairperson appealed against the judgment.

1039. At the beginning of 2015, the trade union submitted its demand to the employer who submitted a counter demand on two issues. In late June 2015, the employer gradually asked for permission of the Labour Court to lay off some of the new trade union leaders, announced long-term overtime work and hired more than 300 temporary workers to support the workforce. The conciliation process is still ongoing as the employer is suing all trade union leaders for having caused company losses.

Company 13

1040. At the end of 2013, the trade union submitted its demand to the company but agreement was reached only once the labour officers provided conciliation. On 11 April 2014, the employer issued a temporary employment suspension for four trade union committee members stating that it was in the process of asking permission from the Labour Court to dismiss the employees owing to their poor working capacity and their acting as opponents of the employer thus causing damage to the company. In May 2014, several sessions of informal negotiations took place at the Labour Court and once the labour officers from the Department of Labour Protection and Welfare provided conciliation, the employer agreed to discontinue the case. Two of the trade union committee members had not been allowed to return to work but still receive wages from the company. In March 2015, a total of 1,800 temporary workers submitted a grievance to the labour inspectorate asking the employer to comply with section 11(1) of the Labour Protection Act in relation to wage and welfare payments without discrimination. The labour inspectorate issued an order to the employer to pay the stipulated benefits to the employees but the employer submitted an appeal to the Governor of Chonburi Province. Although the Governor confirmed the labour inspectorates' order, the employer submitted a grievance to the Labour Court to revoke the order. The Government indicates that both sides consented to labour conciliation talks conducted by the Labour Court.

Company 14

- 1041.** The employer filed a suit against the trade union chairperson claiming that he had seriously infringed the company regulations by abandoning working, rejecting supervisors' commands and appointing an employee committee without having the authority to do so. On 24 July 2014, the Labour Court permitted the company to lay off the employee, who then appealed against the decision, which is now under consideration of the Supreme Court.

Company 15

- 1042.** On 10 October 2013, the company announced a new working time and the trade union called a meeting among members of the employee committee, trade union committee and the employer to find solutions but the employer refused to negotiate and claimed that it had the authority to manage the company. The trade union submitted a grievance to the Labour Court as the working time shift change was unfair to the employees and on 28 May 2014, the LRC issued an order to re-employ the trade union committee members who had been laid off by the employer for violating company regulations. However, the employer refused to comply with it and submitted a grievance to the Labour Court to revoke the order. By virtue of conciliation provided by the Labour Court, the trade union committee received compensation of THB430,000. Concerning the case of intimidation, the labour officer advised the relevant employee to submit a complaint to the inquiry officers.

Company 16

- 1043.** In November 2011, there was a labour dispute about bonus payments equivalent to 2.9 months of salary and the employees blocked the entrance to the workplace, requesting the company to increase the bonus to the equivalent of three months' salary, meaning an extra THB20,000 per person. On 2 December 2011, the employer made an extra payment of THB5,000 per person but the employees were not satisfied with the increase and continued to block the entrance to the company. Since the employees' actions were not in accordance with the law, on 6 December 2011, the employer laid off 41 employees with compensation and notice payments. A further nine employees were laid off because they failed to comply with a warning. Although labour officers tried to provide conciliation, the employer confirmed unwillingness to continue to employ the workers. On 26 January 2012, the employees submitted a complaint to the LRC requesting to be rehired in the same positions with compensation payment for the time they had spent being laid off. The LRC considered that the strike was not in compliance with the labour law and consequently, laying off the employees did not contravene section 121 of the LRA.

Company 17

- 1044.** On 18 April 2012, the company and the employees could not reach an agreement concerning wage increases and bonus payments, as a result of which both sides submitted grievances to the labour officer and requested conciliation talks. However, the employer did not agree with the employees' demand and locked out the employees from 27 April 2012. On 18 May 2012, both sides reached agreement, withdrew their grievances and the labour dispute was settled. The employees were able to return to work, accepted their wage increases and bonus payments and the trade union was able to run its activities as usual. Another labour dispute occurred when the company closed down some parts of its production temporarily because of a slowdown in purchase orders. The action was conducted in accordance with the law, taking measures such as informing competent officers in advance and paying 75 per cent of wages as compensation, which is not considered as a wage deduction or a form of ill-treatment. After proceeding with the investigation, the labour officer decided to close the case and explained the decision to the employees involved.

- 1045.** The Government further provides information on Case No. 3022 relating to State Railway of Thailand which is before the Committee as well as on another situation involving Thai Airways International Public Company that was not invoked by the complainant.

The Committee's conclusions

- 1046.** *The Committee notes that in the present case the complainant alleges: (i) legislative shortcomings (denial or restriction of the right to organize and bargain collectively to civil servants and public sector workers, private sector teachers, agricultural workers, workers in the informal sector, migrant workers and temporary, agency or other subcontracted workers; insufficient protection against acts of anti-union discrimination; difficulty to bargain collectively; and denial of the right to strike to public sector workers); and (ii) acts of anti-union discrimination, interference, harassment and other anti-union practices in a number of enterprises and the Government's failure to protect the workers.*
- 1047.** *The Committee firstly notes the complainant's general allegation that Thai labour law and its implementation do not sufficiently protect freedom of association as around 75 per cent of the workforce do not have the right to organize and bargain collectively and only around 1.5 per cent of the total workforce is unionized. The Committee observes that the Government contests the complainant's allegations and states that national legislation guarantees the right to organize and bargain collectively, that Thai workers are able to exercise their freedom of association by participating in four main forms of labour organizations and that even non-unionized workers can bargain collectively. The Committee welcomes the statistical information provided by the Government and notes with interest that since 2012 the number of unions and unionized workers increased both in private and state enterprises, but observes that only 0.42 per cent of private enterprises have a registered trade union. The Committee further notes with interest the Government's statement that the Ministry of Labour made progress in the revision of the LRA and the SELRA, that the Government set up a tripartite working group to further align the draft texts with Conventions Nos 87 and 98 and that the principle of freedom of association and collective bargaining, consistent with ILO standards, will be prescribed in the newly drafted LRA and SELRA in order to provide the right to organize to Thai and migrant workers, irrespective of the kind of industrial trade union they are part of. While noting the positive developments in the revision process of the LRA and the SELRA, especially the establishment of a tripartite working group and the Government's engagement to align these texts with the relevant international standards, the Committee recalls that it has been examining the conformity of the LRA and the SELRA with the principles of freedom of association in Case No. 1581 for a number of years and had previously expressed concern at the prolonged period of revision of the relevant legislation [see 333rd Report, para. 137]. The Committee, therefore, urges the Government to take concrete measures to speed up the revision process of the LRA and the SELRA in order to align the applicable legislation with the principles of freedom of association and collective bargaining and to ensure that all issues raised by the Committee in this case as well as in Case No. 1581 are properly addressed. The Committee reminds the Government that it can avail itself of ILO technical assistance in this regard and requests the Government to keep it informed of any developments in this respect and to provide it with the text of the amendments to the LRA and the SELRA.*
- 1048.** *Secondly, the Committee observes a divergence of views between the complainant and the Government with regard to freedom of association of various categories of workers. On the one hand, the complainant alleges that either the law or its application deny or restrict the right to organize, form trade unions and bargain collectively to specific categories of workers, on the other hand, the Government asserts that all workers enjoy freedom of association, either through specific labour legislation or by virtue of the Constitution and the Interim Constitution.*

- 1049.** *As regards public sector workers, the Committee notes the complainant's allegation that the CSA does not allow civil servants and public sector workers, including health care providers, teachers, police officers, fire fighters and administrative employees at all levels of the Government, to organize or form trade unions and negotiate collective bargaining agreements, and the Government's statement that the CSA intends to maintain peace and order and that its section 43 allows civil servants to assemble as a group in line with the Constitution. The Committee observes, however, that according to the CSA, such assembly may not affect the efficiency of national administration or the continuity of public services and must not have a political objective. Furthermore, the Committee notes that neither the Constitution nor the CSA contain any provisions giving effect to the right to organize and form trade unions and that the CSA does not provide any guarantees of collective bargaining. In this regard, the Committee wishes to point out that all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing. Public employees (with the sole possible exception of the armed forces and the police, by virtue of Article 9 of Convention No. 87) should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members [see **Digest of decisions and principles of the Freedom of Association Committee**, 5th edition, 2006, paras 216 and 220]. With regard to collective bargaining of civil servants, the Committee recalls that a distinction must be made between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in Government Ministries and other comparable bodies), as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the Government, by public undertakings or by autonomous public institutions. Only the former category can be excluded from the scope of Convention No. 98 [see **Digest**, op. cit., para. 887]. Bearing in mind the complainant's concerns that the applicable legislation does not sufficiently protect the right to organize and bargain collectively of civil servants, the Committee requests the Government to indicate the manner in which civil servants enjoy freedom of association and collective bargaining in practice and to indicate the specific measures taken or envisaged to ensure that all civil servants, including health care providers, teachers, fire fighters and Government employees, with the sole possible exception of the armed forces and the police, can organize and form trade unions to defend their interests, and that only those civil servants who are directly engaged in the administration of the State can be excluded from collective bargaining.*
- 1050.** *The Committee further notes with concern the complainant's allegation that by virtue of section 23 of the Private University Act of 2013, private schools and university teachers are effectively excluded from the scope of the LRA and are thus prevented from organizing, forming trade unions and bargaining collectively. While noting the Government's statement that teachers can exercise their right to form an association as prescribed by the Constitution and the Interim Constitution and must receive employment protection, benefits and compensation coverage not less than what is prescribed by the LRA, the Committee recalls that teachers should have the right to establish and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests [see **Digest**, op. cit., para. 235]. The Committee considers that these rights must be effectively ensured for teachers in both the public and the private sector and requests the Government to take the necessary measures to ensure that, in line with the mentioned principle, teachers can fully enjoy, in law and in practice, the right to organize, form trade unions and bargain collectively.*
- 1051.** *Concerning the complainant's allegation that agricultural employees and workers in the informal sector, including domestic workers and homeworkers, have no guaranteed rights to form unions or bargain collectively, the Committee notes the Government's reply stating that since the LRA gives every employee, defined as a person agreeing to work for an employer in return for wages, the right to organize, employees or workers in the agricultural*

sector, domestic workers and contract employees can submit their proposals to register a trade union. The Committee also notes the Government's indication that workers in the informal sector can organize with the purpose of collective bargaining but observes that the entities enumerated by the Government seem to be non-governmental organizations active in the protection of informal workers, rather than trade unions of workers in the informal sector. In this regard, the Committee considers it useful to point out that workers in the agricultural and informal sectors are often subjected to untraditional employment relationships, work without contracts or are self-employed and requests the Government to take the necessary measures to ensure that despite these circumstances they are effectively afforded the full protection of their rights to organize and bargain collectively under the LRA.

- 1052.** *The Committee also notes the complainant's allegation that the restriction on the right to form a labour trade union based on nationality effectively bars unionization in those industries where migrant workers prevail, such as the shrimp and commercial fishing sectors. The Committee considers that such restriction prevents migrant workers from playing an active role in the defence of their interests, especially in sectors where they are the main source of labour and recalls that Article 2 of Convention No. 87 is designed to give expression to the principle of non-discrimination in trade union matters, and the words "without distinction whatsoever" used in this Article mean that freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality, political opinion, etc., not only to workers in the private sector of the economy, but also to civil servants and public service employees in general [see **Digest**, op. cit., para. 209]. The Committee regrets that the Government does not provide any concrete observations on these specific allegations but notes with interest the Government's indication that the ongoing revision of the labour legislation will ensure the right to organize and serve on a trade union committee to migrant workers. In light of these considerations, the Committee requests the Government to eliminate, without delay, the restrictions placed on the freedom of association rights of migrant workers and trusts that the revised labour legislation will properly address this issue. The Committee requests the Government to inform it of any developments in this regard.*
- 1053.** *The Committee notes that while the complainant indicates that agency and subcontracted workers can only bargain with their employing agency or subcontractor but not with the manufacturing company, the Government states that even where an entrepreneur entrusts another individual to recruit a person to work for him or her, the entrepreneur is considered as the employer of the worker. The Committee understands the Government's indication to mean that subcontracted or agency workers are allowed not only to bargain with their employment agency or subcontractor, but also with the entrepreneur-employer. Bearing in mind the complainant's concerns, the Committee requests the Government to provide further details on the manner in which, in practice, agency and subcontracted workers may bargain with the entrepreneur-employer.*
- 1054.** *Furthermore, noting with concern the complainant's allegation that employers retaliate against temporary workers if they attempt to exercise their trade union rights and repeatedly use short-term contracts over several years to thwart union activity, the Committee regrets that the Government does not provide its observations on this point and recalls that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing [see **Digest**, op. cit., para. 255]. The Committee further wishes to point out that fixed-term contracts should not be used deliberately for anti-union purposes and that, in certain circumstances, the employment of workers through repeated renewals of fixed-term contracts for several years can be an obstacle to the exercise of trade union rights [see for instance 377th Report, Case No. 3064 (Cambodia), para. 213; 375th Report, Cases Nos 3065 and 3066 (Peru), para. 482 and 374th Report, Case No. 2998*

(Peru), para. 723]. In light of these principles and the complainant's concerns, the Committee requests the Government to take the necessary measures to ensure that the repeated use of short-term contracts is not deliberately used to obstruct trade union formation and that temporary workers fully benefit from freedom of association and collective bargaining, and inform the Committee of any developments in this regard.

- 1055.** *The Committee notes the complainant's allegation that since the LRA does not require the employer to negotiate in good faith, as a result of which employers often refuse to negotiate after the initial meeting, the Government fails to provide any effective avenue by which workers can bargain collectively, and observes that this issue was raised in several cases described in detail above. The Committee also notes the Government's statement that although there is no obligation to negotiate in good faith in the LRA, the Civil and Commercial Code provides an obligation to exercise rights and perform obligations in good faith, that this obligation will also be prescribed by the newly drafted labour legislation and that training courses on good faith for negotiations will be provided to employers and employees. Recalling the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations [see **Digest**, op. cit., para. 934], the Committee trusts that the Government will take all necessary measures to encourage and promote negotiations in good faith, and requests the Government to provide a copy of the new labour legislation once it has been drafted.*
- 1056.** *While noting with concern the complainant's allegation that the SELRA prohibits all state enterprise employees from engaging in strike or industrial actions and stipulates harsh penalties both for participating in a strike and instigating it, the Committee observes that the Government does not provide its observations on this point. Recalling that it had previously examined this issue in Case No. 1581 where it had noted with regret that section 33 of the Act imposed a general prohibition of strikes and that penalties for strike action, even when peaceful, were extremely severe: up to one year of imprisonment or a fine, or both for the participation in a strike action; and up to two years of imprisonment or a fine, or both for its instigation [see 327th Report, para. 111], the Committee once again requests the Government to take the necessary measures to amend the SELRA, without further delay, in order to eliminate the general prohibition of strikes in state enterprises and the corresponding penalties and to bring the legislation fully into conformity with the principles of freedom of association on this and other relevant points. The Committee requests the Government to keep it informed of any developments in this respect.*
- 1057.** *Finally, the Committee notes the complainant's allegation that the laws and their implementation do not sufficiently protect workers from anti-union discrimination: (i) the courts interpret the law to mean that protection against anti-union discrimination only starts once a trade union is registered, which makes the workers vulnerable to dismissal during the setting up of trade unions; (ii) even where a trade union is established, workers are vulnerable to interference and employer retaliation, especially dismissals on the pretence of layoff or downsizing, as well as pressure from the courts to accept compensation instead of reinstatement which is coupled with long delays in judicial proceedings; and (iii) despite ostensible protection of freedom of speech, workers often report that employers file civil and criminal charges for libel against trade union leaders for allegedly harming the employer's reputation during trade union organizing initiatives or in labour disputes. The Committee notes that to illustrate its points, the complainant provides detailed information on alleged anti-union practices in a number of companies and denounces the Government's failure to protect the workers. The Committee notes that these allegations can be summarized as follows:*
- *lockout, suspension, transfer, layoff and dismissal of trade union leaders and members; prohibition to enter factory premises and represent trade union members after*

dismissal; regular refusal of employers to comply with reinstatement and compensation orders;

- *intimidation and harassment exerted by employers, police and security officers with the aim of forcing trade union leaders and members to accept compensation and resign or to halt trade union formation; these incidents include verbal abuse, physical assaults, forced resignation letters, filing of criminal and civil lawsuits against trade union leaders, threat of dismissal and death threats; pressure from the labour inspectorate, the Labour Court or the Labour Officer to drop pending cases, resign and accept compensation;*
- *intimidation and discrimination of trade union members and reinstated workers, including through isolation, separation from other workers, lack of work, monitoring by video surveillance, reduction of benefits and increase of bonuses to non-unionized workers, employer's support for the formation of a new trade union and pressure to join the trade union and obstruction of a demonstration by security officers;*
- *replacement of dismissed workers by subcontracted workers; increase in the use of contract workers and transformation of permanent positions into short-term contracts to halt trade union formation;*
- *use of police officers and video surveillance to intimidate workers during collective bargaining and employer's refusal to negotiate; and*
- *inaction of the LRC, the Labour Welfare and Protection Department and the Labour Court on certain complaints of anti-union discrimination; delays in judicial proceedings; inaction of the police on complaints of physical assaults.*

1058. *The Committee takes due note of the Government's detailed observations to the complainant's general and case-specific allegations of anti-union practices. The Committee notes that, with a few exceptions, the Government's factual interpretation of the circumstances of each case broadly conforms to that provided by the complainant. The Committee notes, in particular, that the Government acknowledges the numerous incidents of lockout, suspension, transfer, layoff and dismissal of a large number of trade union leaders and members, often for seemingly anti-union purposes, as well as the employers' regular refusal to implement reinstatement or compensation orders of the labour inspectorate, the Labour Court or the Labour Welfare and Protection Offices. The Committee further notes the Government's indication that while its labour authorities significantly contributed to solving the majority of the described labour disputes through repeated conciliation, mediation and promotion of harmonious labour relations, other cases are still ongoing. The Committee also notes that the Government indicates that, contrary to the complainant's allegations, both the LRA and the SELRA protect freedom of speech of trade unionists and that although all defamation lawsuits are brought to criminal court for consideration, the legislation sufficiently protects trade unionists who express their opinion in good faith against accusations of defamation. Taking due note of these observations, the Committee regrets that the Government does not address a number of other serious allegations, in particular: erroneous judicial interpretation of the beginning of protection against anti-union discrimination; inaction by the police against complaints of physical assaults; use of police and security officers to intimidate workers; delays in judicial proceedings; inaction of labour authorities in some cases of anti-union practices; and pressure on workers from labour authorities to drop their case, resign and accept compensation.*

1059. *With regard to the allegation that Labour Courts interpret the protection against anti-union discrimination to begin only after registration of trade unions, the Committee considers that such interpretation would considerably restrict the scope of protection against anti-union*

discrimination, as it would not afford sufficient protection to workers during the period of establishment of workers' organizations, when workers are especially vulnerable to anti-union practices and employer retaliation. Emphasizing that the establishment of trade unions is a legitimate trade union activity within the scope of protection against anti-union discrimination and recalling that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions [see **Digest**, op. cit., para. 769], the Committee considers that this restrictive interpretation of the scope of protection, as alleged by the complainant, would not be in line with the principles of freedom of association and could have a severe curtailing impact on workers' organizational rights. The Committee, therefore, requests the Government to take the necessary measures to ensure that workers are effectively protected against acts of anti-union discrimination at all times, both in law and in practice, and that this protection covers all legitimate trade union activities, including those relative to the establishment of workers' organizations.

- 1060.** While acknowledging that in expressing their opinions, trade unions should respect the limits of propriety and refrain from the use of insulting language, the Committee expresses its concern at the allegation that employers often file civil and criminal charges against trade union leaders for allegedly harming employers' reputation when such workers try to organize trade unions or during labour disputes. The Committee finds it important to recall 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] and that allegations of criminal conduct should not be used to harass trade unionists by reason of their trade union membership or activities [see **Digest**, op. cit., para. 41]. In light of these principles, the Committee expects the Government, within its review of the existing legislative framework, to ensure that the freedom of expression of trade union leaders and members is effectively protected.
- 1061.** The Committee further notes with concern the numerous incidents of lockout, suspension and dismissal of trade union leaders and members, as described by the complainant and the Government, and the fact that although these allegations were in many cases confirmed by the labour authorities through reinstatement and compensation orders, employers generally refused to comply with them. In this regard, the Committee also notes the allegations that trade union leaders and members were often dismissed for allegedly economic reasons, were replaced with subcontracted workers and that dismissed trade union leaders were not allowed to enter company premises and represent trade union members. The Committee further expresses its concern at the serious allegations of pressure, intimidation, harassment and discrimination of trade union leaders and members, including through verbal abuse, physical assaults, reduction of benefits, threat of dismissal, isolation, death threats and video surveillance, and observes that where the complainant asserts that these incidents were aimed at forcing workers to resign and accept compensation or halt union formation, the Government simply states that the workers decided to resign voluntarily and accept compensation as a result of negotiations, and that the labour disputes were thus successfully resolved. The Committee further notes with concern the allegation that some of this pressure was exerted by the police and the labour authorities. Taking into account these considerations, the Committee considers that the situation raises serious concerns as to the environment for free exercise of trade union rights and recalls that the right of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for the governments to ensure that this principle is respected [see **Digest**, op. cit., para. 44]. In relation to the variety of matters raised, the Committee wishes to draw the Government's attention to the following principles: the requirement of membership of an occupation or establishment as a condition for the eligibility for trade union office are not consistent with the right of workers to elect their representatives in full freedom; no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all

acts of anti-union discrimination in respect of employment; acts of harassment and intimidation carried out against workers by reason of trade union membership or legitimate trade union activities, while not necessarily prejudicing workers in their employment, may discourage them from joining organizations of their own choosing, thereby violating their right to organize; granting bonuses to non-union staff – even if it is not to all non-union workers – and excluding all workers who are trade union members from such bonuses during a period of collective conflict, constitutes an act of anti-union discrimination contrary to Convention No. 98; subcontracting accompanied by dismissals of trade union leaders can constitute a violation of the principle that no one should be prejudiced in his or her employment on the grounds of trade union membership or activities; the application of staff reduction programmes must not be used to carry out acts of anti-union discrimination; the Committee has drawn attention to the Workers' Representatives Convention, 1971 (No. 135) and Recommendation (No. 143), 1971, in which it is expressly established that workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives or on trade union membership, or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements; trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned (see **Digest**, op. cit., paras 407, 771, 786, 787, 790, 796, 800 and 1105)

- 1062.** *In light of the circumstances of this case and the abovementioned principles, the Committee requests the Government to take the necessary measures to: ensure that, in cases where remediation and compensation have been ordered by the courts, employers comply with such orders and decisions without further delay; provide it with the outcome of all ongoing proceedings, as well as the measures taken to ensure their implementation by the employers; ensure that, in the future, staff reduction programmes and economic measures are not used to discriminate against trade union leaders and members; ensure that when dismissed, trade union leaders can continue to serve as union officials and are provided with access to trade union members; and conduct independent inquiries on all pending allegations of intimidation, harassment, pressure and physical assaults against trade union leaders and members in this case, and inform it of the outcome and the measures taken as a result.*
- 1063.** *Further noting with concern the allegations of inaction of labour authorities in relation to some complaints of anti-union practices and the considerable delays in judicial proceedings, the Committee points out 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. 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., paras 817 and 826]. The Committee trusts that the Government will take the necessary measures to ensure that, in the future, complaints of anti-union discrimination against trade union leaders and members are dealt with promptly and efficiently by the competent authorities.*

The Committee's recommendations

- 1064.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee urges the Government to take concrete measures to speed up the revision process of the LRA and the SELRA in order to align the applicable legislation with the principles of freedom of association and collective bargaining and to ensure that all issues raised by the Committee in this case as well as in Case No. 1581 are properly addressed. The Committee reminds the Government that it can avail itself of ILO technical assistance in this regard and requests the Government to keep it informed of any developments in this respect and to provide it with the text of the amendments to the LRA and the SELRA.*
- (b) *With regard to the allegations of insufficient protection against anti-union discrimination and anti-union practices in various enterprises, as well as the Government's failure to protect the workers, the Committee requests the Government to take the necessary measures to ensure that workers are effectively protected against acts of anti-union discrimination at all times, both in law and in practice, and that this protection covers all legitimate trade union activities, including those relative to the establishment of workers' organizations.*

CASE NO. 3059

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

Complaint against the Government of the Bolivarian Republic of Venezuela

presented by

- the National Union of Workers of Venezuela (UNETE)
- the Confederation of Workers of Venezuela (CTV)
- the General Confederation of Workers (CGT)
- the Confederation of Autonomous Trade Unions (CODESA)
- the Independent Trade Union Alliance (ASI)
- the Autonomous Front for the Protection of Employment, Wages and Trade Unions (FADESS)
- the Autonomous Revolutionary United Class Movement (C-CURA) and
- the Grassroots Trade Union Movement (MOSBASE)

Allegations: Exclusion of the General Secretary of the oil industry trade union federation from the oil sector negotiating table; dispersion of a trade union demonstration; and dismissal of a trade union official without respect for due process

- 1065.** The Committee last examined this case at its May–June 2015 meeting, when it presented an interim report to the Governing Body [375th Report, paras 631–665, approved by the Governing Body at its 324th Session (June 2015)].

1066. The Government sent additional observations in communications dated 21 October 2015 and 2 September 2016.

1067. 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

1068. In its previous examination of the case, at its May–June 2015 session, the Committee made the following recommendations on the questions still pending [see 375th Report, para. 665]:

- (a) The Committee requests the Government to ensure that in future there is no recourse to measures restricting freedom or to injunctions ordering periodic appearances before the judiciary, and banning protests where no grounds have been established for bringing criminal charges against trade unionists who are exercising their right to demonstrate.
- (b) The Committee requests the Government: (1) to send a copy of Administrative Decision No. 075-01-2013, whereby the labour inspectorate authorized the dismissal of Mr Iván Freites, and to specify the offences supposedly committed by this trade union official; and (2) to indicate whether this trade union official has filed a judicial appeal against his dismissal and, if so, to send a copy of the corresponding ruling.

B. The Government's reply

1069. In its communications of 21 October 2015, and 2 September 2016, the Government sent its observations with regard to the aforementioned recommendations of the Committee.

1070. Concerning recommendation (a), the Government rejects the allegation that it has banned peaceful protests and demonstrations and has applied judicial measures without clear grounds for doing so. It explains that peaceful protest is a legitimate right enshrined in the country's Constitution and that the State ensures the exercise of this right provided that the protest does not pose a threat to the life or the physical, psychological and emotional safety of the rest of the population or to freedom of movement, public order or national security. The Government recalls that the exercise of civil, political or labour rights cannot be invoked to justify the commission of unlawful acts. It adds that it is the State's responsibility to protect people, property and institutions from unlawful acts committed during violent protests. The Government also states that the police and security forces act in full compliance with the law and that only in the event of unlawful acts against people, offices or property are these forces called upon to fulfil their duty to protect them.

1071. Concerning recommendation (b), the Government reiterates with regard to the dismissal of the trade union official, Mr Iván Freites, that the Labour Inspectorate of Punto Fijo, at the request of the enterprise, Petróleos de Venezuela SA (PDVSA), launched the procedure for establishing misconduct and authorizing his dismissal. The Government again states that the labour inspectorate, in accordance with section 79 of the Basic Act concerning labour and workers, which specifies various valid reasons for dismissal in the following subsections: (a) lack of integrity or immoral conduct in the workplace; ... (c) serious abuse or lack of respect or consideration due to the employer, his/her representatives or household; ... (i) serious failure to meet the obligations arising from the employment relationship after examining the grounds for dismissal and observing the time frames for bringing evidence in support of the allegations in compliance with the right of defence, decided that the request was admissible and that the enterprise could dismiss Mr Freites. In reply to the Committee's requests, the Government indicates that the offences that prompted the request for authorization to dismiss were: (i) making oral and written statements in the press, on the radio and on television that constituted serious offences and accusations against the self-

respect, honour, reputation and decency of the enterprise and its management, thereby impugning their morals, dignity and integrity; and (ii) expressing opinions on technical matters in violation of the enterprise's rules, insulting it and creating turmoil among the people. In that connection, the Government indicates that these acts were verified by the competent bodies and provides the text of Administrative Decision No. 075-01-2013, which authorized the dismissal. The Decision states that Mr Freitas' involvement in accusations against his employer and members of its management "without following the usual and proper channels, offending and defaming them by calling them weak, corrupt, murderers and saboteurs" has been demonstrated; it concludes that Mr Freitas' actions warrant dismissal pursuant to article 79(a), (c) and (i) of the Basic Act concerning labour and workers.

- 1072.** The Government adds that Mr Freitas appealed for annulment of the aforementioned Administrative Decision, which was heard by the Fifth Court of First Instance of the Falcón State Labour Circuit Court, and states that it will send the Committee any additional information on the matter that it obtains.

The Committee's conclusions

- 1073.** *The Committee takes note of the Government's statements with regard to recommendation (a) from its previous examination of the case, in which the Committee had requested the Government to ensure that in future there is no recourse to measures restricting freedom or to periodic appearances before the judiciary, or of banning protests where no grounds have been established for bringing criminal charges against trade unionists who are exercising their right to demonstrate. The Committee firmly expects that the Government will ensure that this recommendation is fully implemented.*
- 1074.** *The Committee recalls that, in recommendation (b) from its previous examination of the case, it requested the Government to send a copy of the Administrative Decision whereby the labour inspectorate authorized the dismissal of Mr Iván Freitas, to specify the offences supposedly committed by this trade union official, and to send information on any judicial appeal against his dismissal and the outcome thereof. The Committee notes that the Government lists the specific offences of which the trade union leader was accused (serious offences and accusations against self-respect, honour, reputation and decency; and expressing insulting opinions on technical matters in violation of the enterprise's rules) and explains that these offences were verified by the competent bodies. The Committee observes that Administrative Decision No. 075-01-2013 authorized the dismissal of Mr Freitas, stating that the trade union leader had been involved in accusations against his employer and members of its management. In that regard, the Committee would like to recall that the full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end, workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 154]. The Committee also takes note of the Government's statement that Mr Freitas has appealed for annulment of the aforementioned Administrative Decision. The Committee requests the Government to send it a copy of the judgment rendered in the appeal.*

The Committee's recommendations

1075. *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 Government will ensure that in future there is no recourse to measures restricting freedom or to injunctions ordering periodic appearances before the judiciary, and banning protests where no grounds have been established for bringing criminal charges against trade unionists who are exercising their right to demonstrate.*
- (b) The Committee requests the Government to send a copy of the judgment rendered in Mr Freitas' appeal for annulment of the Administrative Decision No. 075-01-2013.*

Geneva, 4 November 2016

(Signed) Professor Paul van der Heijden
Chairperson

<i>Points for decision:</i>	Paragraph 98	Paragraph 542
	Paragraph 117	Paragraph 561
	Paragraph 142	Paragraph 589
	Paragraph 162	Paragraph 634
	Paragraph 192	Paragraph 683
	Paragraph 243	Paragraph 696
	Paragraph 274	Paragraph 724
	Paragraph 304	Paragraph 766
	Paragraph 331	Paragraph 795
	Paragraph 348	Paragraph 810
	Paragraph 372	Paragraph 858
	Paragraph 399	Paragraph 897
	Paragraph 408	Paragraph 935
	Paragraph 444	Paragraph 976
	Paragraph 511	Paragraph 1064
	Paragraph 527	Paragraph 1075